An Application for Reconsideration

- by -

New Vision Enterprises Ltd. carrying on business as Quality Hotel

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

TRIBUNAL MEMBER:	Yuki Matsuno
FILE No.:	2009A/054
DATE OF DECISION:	July 9, 2009

DECISION

SUBMISSIONS

Fadia Sorial	for New Vision Enterprises Ltd. carrying on business as Quality Hotel
Andres Barker	for the Director of Employment Standards

OVERVIEW

1. On September 18, 2009, a delegate of the Director of Employment Standards (the "Director") issued a determination (the "Determination") against New Vision Enterprises Ltd. carrying on business as Quality Inn (the "Appellant" or "New Vision"). The Determination concerned various breaches of the *Employment Standards Act* (the "*Act*") in relation to two employees of New Vision, one of them being Mabinty Kanu. New Vision appealed the Determination to the Tribunal, which issued a decision on December 17, 2008, BCEST # D122/08 (the "First Decision"). In the First Decision, the Tribunal member found that the delegate had erred in law with respect to some of her findings regarding Ms. Kanu and referred two matters back to the delegate for review. The delegate in response issued a Report to Tribunal dated January 23, 2009 (the "Report"). The same Tribunal member who issued the First Decision then issued a second decision, BCEST # D030/09 (the "Second Decision") on March 23, 2009 confirming the Report. New Vision now applies for a reconsideration of the First and Second Decisions (collectively, the "Decisions").

The Determination

2. In the Determination, the delegate found that Ms. Kanu was employed with New Vision as a housekeeper at Quality Hotel from November 15, 2005 to December 10, 2007. The delegate found that Ms. Kanu was entitled to: (a) statutory holiday pay for BC Day and Thanksgiving Day 2007; (b) wages for overtime in the amount of $200.75; and (c) compensation for length of service. The delegate calculated the total amount of wages owing to Ms. Kanu, including interest, to be $1,155.18. The delegate also imposed five administrative penalties of $500.00 each on New Vision for various contraventions of the *Act*.

The First Decision

3. New Vision appealed the Determination to the Tribunal. The Tribunal Member who heard the appeal allowed it with respect to Ms. Kanu on two issues. The Tribunal Member found that the delegate erred in law in failing to provide adequate reasons for her determination of the overtime entitlement, and referred the matter back to the delegate to provide a reasoned analysis of the overtime claim. The Tribunal Member also referred back to the delegate the award to Ms. Kanu of statutory holiday pay. The Tribunal Member affirmed the Determination with respect to the finding that Ms. Kanu was entitled to compensation for length of service. She noted that New Visions' response to the complaint on this point was inconsistent, pointing out that under section 63(3)(a) of the *Act*, the employer's liability to pay compensation for length of service is discharged only if the employee is given written notice of termination. With respect to New Visions' appeal of the administrative penalties imposed against it, the Tribunal Member noted that penalty assessments are mandatory under the legislation and that she had no basis to set aside or "waive" the penalties where she has upheld the delegate's conclusion that it contravened the *Act*.

The Report to Tribunal

4. Following the Tribunal's directions in the First Decision, the delegate dealt with the matters referred back to her in the Report. With respect to wages for overtime, the delegate outlined the basis of her calculations and recalculated the amount of wages for overtime owing to Ms. Kanu to be $264.00, along with in vacation pay payable under section 58. She reviewed Ms. Kanu's entitlement to statutory holiday pay, outlining the evidence on which she based her conclusions, and concluded that the statutory holiday pay awarded to Ms. Kanu in the First Determination should stand.

The Second Decision

5. New Vision responded to the Report by letter dated February 10, 2009, containing arguments that can be summarized as follows: (1) the delegate erred in finding that Ms. Kanu was entitled to pay for having worked on August 6, 2009 (BC Day). New Vision asserted that Ms. Kanu was a "no-show" that day as indicated in writing on the back of the housekeeping assignment sheet for that day; (2) the delegate erred in finding that Ms. Kanu had not been paid for October 8, 2007 (Thanksgiving). New Vision surmises that the delegate failed to notice the payment that was disclosed on the payroll documents; and (3) the delegate erred in calculating the overtime due to Ms. Kanu. New Vision requested that the following be considered: it had a "deal" with the housekeeping employees, including Ms. Kanu, that they got paid for a daily lunch break, got paid for 8 hours whether or not they worked the full 8 hours, and received other benefits that were not deducted from their pay. In addition, New Vision continued its objection to the delegate's award to Ms. Kanu of compensation for length of service.

6. In the Second Decision, the Tribunal Member began by briefly outlining the factual background of the matter and the contents of the Report. She noted that New Vision had been unable to comply with the Director's demand for Employee records as a result of a computer malfunction but that it gave the delegate details of the total regular and overtime hours for each relevant pay period for Ms. Kanu, as well as records of work in form of hard copies of her housekeeping assignments. The Tribunal Member pointed out that the delegate made her decision based on these records. The Tribunal member also noted New Vision's submissions regarding compensation for length of service, and stated that it was not an issue that could be addressed by her in the context of a referral back.

7. The Tribunal Member then summarized New Vision's arguments regarding the Report and noted that the Director, through his delegate, submitted that the Report speaks for itself.

8. The Tribunal Member then presented her analysis and conclusion in the case:

> As the Tribunal stated in *Renshaw Travel*, BCEST # RD085/08:
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> > The occasions on which an alleged error of fact amounts to an error of law are few. In order to show that an error of fact amounts to an error of law an appellant must show what the authorities refer to as palpable and overriding error, which involves a finding that the factual conclusions of a delegate, or the inferences drawn from those factual conclusions, are inadequately supported, or are wholly unsupported, by the evidentiary record, with the result that there is no rational basis for the finding, and so it is perverse or inexplicable. Put another way, an appellant will succeed only if it establishes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have come to the determination (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331). This means that it is unnecessary in order for a delegate's decision to be upheld

> that the Tribunal must agree with the delegate's conclusions on the facts. It means that it may not be an error of law that a delegate could have made other findings of fact on the evidence, but did not do so. It also acknowledges that the weight to be ascribed to the evidence is a question of fact, not of law (see *Beamriders Sound & Video* BC EST # D028/06).

I have reviewed the delegate's analysis of Ms. Kanu's overtime and statutory wage entitlement. I am not persuaded that her decision was perverse or inexplicable on the evidence she had before her and I decline to interfere with her conclusion.

The Reconsideration Request

9. New Vision now applies to have both the First and Second Decisions reconsidered by the Tribunal.

ISSUE

10. When considering and application for reconsideration, the Tribunal must answer two questions:

1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?
2. If so, should the decision be cancelled or varied or sent back to the member?

ARGUMENT AND ANALYSIS

Scope of the Reconsideration Power

11. Section 116 of the *Act* provides the Tribunal with the power to reconsider decisions:

> (1) On application under subsection (2) or on its own motion, the tribunal may
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> (a) reconsider any order or decision of the tribunal, and
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> (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

12. The Tribunal reconsiders decisions only in very limited and exceptional circumstances. Reconsideration is not meant to be used as an opportunity for a party to have its case re-heard where it is not satisfied with the outcome of an appeal. In *Milan Holdings Inc.* (BCEST # D313/98, reconsideration of BCEST # D559/97), the Tribunal outlined a two-stage analysis in determining whether a decision should be reconsidered:

> Consistent with the need for a principled and responsible approach to the reconsideration power, the Tribunal has adopted an approach which resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration: *Re British Columbia (Director of Employment Standards)*, BCEST # D122/98. In deciding this question, the Tribunal will consider and weigh a number of factors. For example, the following factors have been held to weigh against a reconsideration:
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> (a) Where the application has not been filed in a timely fashion and there is no valid cause for the delay: *Re British Columbia (Director of Employment Standards)*, BCEST # D122/98. In this context, the Tribunal will consider the prejudice to either party in

proceeding with or refusing the reconsideration: *Re Rescan Environmental Services Ltd.* BC EST # D522/97 (Reconsideration of BCEST # D007/97).

(b) Where the application's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): *Re Image House Inc.*, BCEST # D075/98 (Reconsideration of BCEST # D418/97); *Alexander (c.o.b. Pereguine Consulting)* BCEST # D095/98 (Reconsideration of BCEST # D574/97); *323573 BC Ltd. (c.o.b. Saltair Neighbourhood Pub)*, BCEST # D478/97 (Reconsideration of BCEST # D186/97);

(c) Where the application arises out of a preliminary ruling made in the course of an appeal. "The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid multiplicity of proceedings, confusion or delay": *World Project Management Inc.*, BCEST # D134/97 (Reconsideration of BCEST # D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.

The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": *Zoltan Kiss, supra.* As noted in previous decisions, "The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons": *Khalsa Diwan Society* (BCEST # D199/96, reconsideration of BCEST # D114/96).

After weighing these and other factors relevant to the matter before it, the Panel may determine that the application is not appropriate for reconsideration. If so, it will typically give reasons for its decision not to reconsider the adjudicator's decision. Should the Panel determine that one or more of the issues raised in the application is appropriate for reconsideration, the Panel will then review the matter and make a decision. The focus of the reconsideration panel "on the merits" will in general be with the correctness of the decision being reconsidered.

13. The Tribunal's decision in *Zoltan Kiss*, BC EST # D122/96 noted a number of grounds on which a Tribunal ought to reconsider a decision:

- a failure by the Tribunal member to comply with the principles of natural justice;
- some mistake in stating the facts;
- a failure to be consistent with other decisions which are not distinguishable on the facts;
- some significant and serious new evidence has become available that would have led to the Tribunal member to a different decision;
- some serious mistake in applying the law;
- some misunderstandings of or a failure to deal with a significant issue in the appeal; and
- some clerical error exists in the decision.

14. This is not an exhaustive list of the possible grounds for reconsidering a decision.

15. It is also valuable to note that it is up to the appellant, in this case New Vision, to establish the basis for the reconsideration power to be exercised by the Tribunal.

Summary of Parties' Arguments

16. In its request for reconsideration New Vision argues the following:

- Overtime: regarding Ms. Kanu's entitlement to overtime, New Vision disagrees with the method of calculation employed by the delegate. New Vision says that in fact, Ms. Kanu has been overpaid by $114.00 according to its calculations.

- Statutory Holiday Pay: regarding Ms. Kanu's entitlement to a statutory holiday pay, New Vision disagrees with the delegate's finding of fact that Ms. Kanu worked on August 6, 2007 (BC Day). It asserts that Ms. Kanu did not come to work that day, and points to evidence, a note written on the back of a housekeeping report, in support of its contention. It says that the Tribunal Member was wrong to ignore this evidence. New Vision also says that it paid Ms. Kanu time and a half for October 11, 2007 (Thanksgiving).

- Severance Pay: Regarding Ms. Kanu's entitlement to severance pay, New Vision says that she received verbal notice of layoff one month in advance. It says verbal notice was given because Ms. Kanu was not able to read or write, and also says that written notice thus would not have been effective. New Vision also says a gap in Ms. Kanu's employment meant she only worked for 8 consecutive months, not 12; therefore, she was not entitled to two weeks' notice.

- New Vision also suggests that the Tribunal Member's reasons in the Second Decision were inadequate.

17. In support of its arguments, New Vision attaches or refers to evidence that it had brought forward at previous stages of the case. It argues in its final submission, "In our opinion, intentionally ignoring the evidences and avoiding addressing them during the period of dispute is a clear case of error in law . . . [we] establish[ed] many reasons behind our request for the Reconsideration and supported that request by providing evidences such as records, testimonies and documents and unfortunately none of them has been looked at previously or has been taken into consideration without any given reasons."

18. The Director, through his delegate, says that New Vision's application for reconsideration fails to satisfy the threshold test outlined in *Milan*. The Director says that the Tribunal Member reviewed the findings of the delegate in the decisions and did not find any error in law. The Director also says that New Vision's submissions are an attempt to re-argue their case anew before the Tribunal in order to receive a different outcome.

Analysis

19. Having considered the submissions of the parties, I conclude that the New Vision's application fails to meet the threshold test for reconsideration.

20. The role of a reconsideration panel is to review, at the request of an appellant, a Tribunal decision. A reconsideration panel is not mandated to make a determination on the merits of the case. This work falls to the Director. In this case, a delegate of the Director made determinations regarding Ms. Kanu's complaint, which were expressed in the Determination and the Report. These were both in turn reviewed by the

Tribunal Member, the results being the Decisions. New Vision says the Decisions were in error in as much as they confirmed the delegate's conclusions.

21. As explained above, the main question to be answered in a reconsideration application is whether the application raises "an arguable case of sufficient merit to warrant the reconsideration" touching on "questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases".

22. With respect to the issues of overtime pay, statutory holiday pay, and compensation for length of service, in my view New Vision's submissions do not raise any significant questions that require review in the form of a reconsideration. New Visions' submissions on these matters take issue with the conclusions drawn by the delegate in the Determination and the Report. They suggest the delegate's findings were wrong on these points and that the reconsideration panel should consider these matters anew; further, it requests another hearing into these matters in dispute and submits names of witnesses and the kind of evidence they will bring forward. This is after New Vision has had the opportunity to make these arguments previously; the evidence and information they submit in their application for reconsideration is for the most part information that had been brought forward already in response to the Determination and the Report and considered by the delegate and the Tribunal Member. New Vision, in my view, is attempting to have the reconsideration panel re-weigh the evidence that has already been brought before the Tribunal Member, which approach in *Milan Holdings*, above, is a factor that weighs against reconsideration.

23. New Visions' submissions regarding the delegate's reasons in the Second Decision deserve more analysis. In its submissions, New Vision cites the Tribunal Member's approach regarding the duty to give adequate reasons and then says, "None of the above rules has [sic] been applied in our appeal . . . ."

24. The Tribunal's general duty to provide written reasons is contained in section 51 of the *Administrative Tribunals Act*:

> 51. The tribunal must make its final decision in writing and give reasons for the decision.

25. The applicable law on the duty to give reasons has been addressed recently by various courts, including the Supreme Court of Canada. In British Columbia, in the recent case of *Gibson v. Insurance Corporation of British Columbia*, 2008 BCCA 217 (CanLII), the Court of Appeal referred to several Supreme Court of Canada decisions in its discussion of the issue:

> [30] In ***Hill v. Hamilton-Wentworth Police Services Board***, 2007 SCC 41, 285 D.L.R. (4th) 620, Chief Justice McLachlin, for the majority, extracted these principles from ***Sheppard*** in a civil case considering the adequacy of the trial judge's reasons (at paras. 100-101):
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>> 100 The question is whether the reasons are sufficient to allow for meaningful appellate review and whether the parties' "functional need to know" why the trial judge's decision has been made has been met. The test is a functional one: *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26, at para. 55.
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>> 101 In determining the adequacy of reasons, the reasons should be considered in the context of the record before the court. Where the record discloses all that is required to be known to permit appellate review, less detailed reasons may be acceptable. This means that less detailed reasons may be required in cases with an extensive evidentiary record, such as the current appeal. On the other hand, reasons are particularly important when "a trial judge is called upon to address troublesome issues of unsettled law, or to resolve confused and contradictory evidence on a key issue", as was the case in the decision below: *Sheppard*,

> at para. 55. In assessing the adequacy of reasons, it must be remembered that "[t]he appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself": *Sheppard*, at para. 26.

26. Further, in considering the adequacy of reasons given by a Tribunal Member in a decision, it should also be noted that in terms of function, the decision of a Tribunal Member is akin to a decision of an appeal court, since the Tribunal Member reviews a decision (determination) made by a finder of fact (the delegate), who is akin to a trial judge. There have been several decisions regarding the duty of an appellate body to give adequate reasons. In *R. v. Therrien*, 2008 MBCA 84 (CanLII), the Court of Appeal of Manitoba considered the question of whether the reasons of the summary conviction appeal court judge (in this case, the Manitoba Court of Queen's Bench) were deficient in that, according to the applicant, there was no review or analysis of the issues as mandated by the Supreme Court of Canada in *Sheppard*, above. The Court dismissed the appeal, holding that the reasons for decision of the appeal court judge must be "interpreted in light of the comprehensive judgement by the [trial] judge, and in the context of the issue before her, namely, whether the Crown had proven its case beyond a reasonable doubt and the related issue [of] whether the verdict was unreasonable." The Court went on to cite *R. v. Schalla (K.T.),* 2007 MBCA 104, 220 Man.R. (2d) 69 [in part]: "with reasons that make it clear that the appeal judge has understood and considered all the relevant factual and legal issues, and where the trial judge who has produced extensive reasons is being upheld, the "bottom line" may be brief." The Court also made reference to the British Columbia Court of Appeal's decision in *R.V. McKinney*, 2008 BCCA 211, in which it was concluded that "it was not an error for the summary conviction appeal judge to dismiss an appeal by substantially agreeing with the reasons given by the trial judge."

27. If the questions posed by the authorities above are translated into the context of whether the reasons contained in a Tribunal decision are adequate, they may be expressed thus:

    (1) Are the reasons sufficient for meaningful reconsideration (the Tribunal's equivalent to appellate review)?

    (2) Do the reasons meet the parties' "functional need to know" why the decision was made?

    (3) Do the reasons make it clear that the Tribunal Member has understood and considered all the relevant factual and legal issues that were before her, in light of a Determination and Report that contained extensive reasons?

28. In my view, the reasons expressed in the Second Decision cannot be taken in isolation; they must be considered along with the reasons in the First Decision, because collectively they constitute the reasons for the Tribunal Member's ultimate disposition of the case.

29. The process of appellate review for Decisions, that is, the reconsideration process, is prescribed and circumscribed by Tribunal jurisprudence (as outlined above under *Scope of the Reconsideration Power*). Taken as a whole, my view is that the Decisions collectively provide enough information for the Appellant to submit a reconsideration application that merits thoughtful consideration.

30. With respect to the parties' need to know why the decision was made, again my view is that the Decisions collectively express adequate reasons why the decisions on the various issues were made by the Tribunal Member. With respect to the Second Decision in particular, it can be said that the reasons are compact and do not go into much detail. At the same time, focussing specifically on the Second Decision, it is clear that the Tribunal Member reviewed the submissions of the parties and the Report; that she outlined the pertinent

authorities regarding the circumstances in which an error of fact amounts to an error of law; and that she applied the law to the Report and found that the delegate's Determination was not perverse or inexplicable on the evidence before her – in other words, there was some evidence before the delegate that could lead her to the conclusions to which she ultimately arrived.

31. Finally, the Decisions taken collectively make it clear that the Tribunal Member understood and considered all of the factual and legal issues that were before her, in the context of the Determination and Report, which collectively provide detailed reasons for the delegate's findings. In fact, the Tribunal Member's referral back for more analysis and detail regarding the delegate's findings are further indications that the Tribunal Member was aware of all of the germane issues that needed proper determination.

Conclusion

32. Based on the foregoing, I find that this application is not appropriate for reconsideration. It does not raise "an arguable case of sufficient merit to warrant the reconsideration" touching on a questions of law, fact, principle or procedure which are so significant as to deserve reconsideration. The application is accordingly dismissed.

ORDER

33. Pursuant to Section 116(1)(b) of the *Act*, I order that Tribunal Decisions BCEST # D122/08 dated December 17, 2008, and BCEST # D030/09 dated March 23, 2009, be confirmed. I also order that the Determination dated September 19, 2008, as varied by the Report dated January 23, 2009, be confirmed, together with any interest that has accrued under the *Act*.

Yuki Matsuno
Member
Employment Standards Tribunal