An Application for Reconsideration

- by -

Anthony Furtado
("Mr. Furtado")

- 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: David B. Stevenson

FILE No.: 2012A/51

DATE OF DECISION: July 25, 2012

DECISION

SUBMISSIONS

Anthony Furtado	on his own behalf
Pamela A. Murray	counsel for Cold Logic ULC
Karpal Singh	on behalf of the Director of Employment Standards

OVERVIEW

1. Anthony Furtado ("Mr. Furtado") seeks reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision, BC EST # D036/12, made by the Tribunal on May 1, 2012 (the "original decision"). The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on January 12, 2012. The Determination considered a complaint filed by Mr. Furtado, who alleged his former employer, Cold Logic ULC ("Cold Logic"), had contravened requirements of section 8 of the *Act*.

2. The Determination had found section 8 of the *Act* had not been contravened and refused to take any further action on the complaint.

3. Mr. Furtado appealed the Determination on the ground the Director erred in law and failed to observe principles of natural justice in making the decision.

4. The Tribunal Member of the original decision found the grounds of appeal were not established and, as a result, dismissed the appeal and confirmed the Determination.

5. In this application for reconsideration Mr Furtado says he is extremely dissatisfied with the original decision. He says the Tribunal Member making the original decision failed to do justice, ignoring relevant facts and failing to address what Mr. Furtado believes are key aspects of the case.

ISSUE

6. In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case warrants reconsideration, the substantive issue raised in this application is whether the Tribunal should once again scrutinize the evidentiary record and consider whether there was a reviewable error in the original decision.

ARGUMENT

7. The application for reconsideration contains little in the way of argument. In its initial form, the application is quite accurately described as an expression of dissatisfaction with the original decision, particularly as it relates to the Tribunal Member accepting the conclusion in the Determination that the position to which Mr. Furtado was hired did not entail only refrigeration work, that the position was open to a broader scope of work, including tasks related to warehousing and maintenance, and that Mr. Furtado was made aware of this when he was hired.

8. Mr. Furtado's application focuses significantly on his contention that he should not have been assigned electrical work without Cold Logic first obtaining permission from the appropriate regulatory authority, as he was not registered as an apprentice electrician nor did he have trade qualification for electrical work.

9. In response to the application, the Director says Mr. Furtado has not shown the Tribunal should reconsider the Determination and the original decision. The Director submits Mr. Furtado is simply displeased with the result of the original decision and is seeking to re-argue his original claim.

10. Counsel for Cold Logic also says the application does not warrant reconsideration. She says Mr. Furtado has identified no error that would cause the Tribunal to exercise its discretion under section 116 of the *Act*. Alternatively, counsel says even if the Tribunal concludes there are grounds for reconsideration, the substantive issue – which is whether there was a contravention of section 8 – fails on the facts as found in the Determination and accepted in the original decision.

11. In several responses to the submissions made by the Director and on behalf of Cold Logic, Mr. Furtado re-asserts his contention that a contravention of section 8 of the *Act* occurred because he was assigned to do electrical work without having the necessary trade qualifications. He also re-asserts his allegations that this fact – and some other matters relating to his employment – contravene other provincial legislation dealing with trade certification and safety.

ANALYSIS OF THE PRELIMINARY ISSUE

12. Section 116 states:

> *116 (1) On application under subsection (2) or on its own motion, the tribunal may*
>
> *(a) reconsider any order or decision of the tribunal, and*
>
> *(b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.*
>
> *(2) The director or a person named in a decision or order of the tribunal may make an application under this section*
>
> *(3) An application may be made only once with respect to the same order or decision.*

13. As the Tribunal has stated in numerous reconsideration decisions, the authority of the Tribunal under section 116 is discretionary. A principled approach to the exercise of this discretion has been developed. The rationale for this approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is *"to provide fair and efficient procedures for resolving disputes over the interpretation and application"* of its provisions. Another stated purpose, found in subsection 2(b), is to *"promote the fair treatment of employees and employers"*. The approach is fully described in *Milan Holdings Ltd.*, BC EST # D313/98 (Reconsideration of BC EST # D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In *The Director of Employment Standards (Re Giovanno (John) and Carmen Valoroso)*, BC EST # RD046/01, the Tribunal explained the reasons for restraint:

> . . . the Act creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute . . .
>
> There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the "winner" is not deprived of the benefit of an adjudicator's decision without good reason. A third is to avoid the spectre of a tribunal process skewed in

> favor of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

14. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. An assessment is also made of the merits of the original decision. The focus of a reconsideration application is, generally, the correctness of the original decision.

15. The Tribunal has accepted an approach to applications for reconsideration that 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. The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the Tribunal as including:

- failure to comply with the principles of natural justice;
- mistake of law or fact;
- significant new evidence that was not reasonably available to the original panel;
- inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

16. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively re-visit the original decision and come to a different conclusion.

17. If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration.

ANALYSIS

18. Having reviewed the original decision, the material in the appeal file and the submissions of the parties, I am not persuaded this matter warrants reconsideration.

19. The Determination was largely driven by the finding of the Director that:

> . . . Mr. Furtado was fully aware that the position did not entail only refrigeration related tasks. The position was open to a broader scope of work which included tasks related to warehouse and maintenance work.

20. The original decision contains the following finding and statement on the above point:

> . . . the advertisement stated clearly that the Appellant's duties would include "warehouse facility repairs and maintenance . . . . General facility repairs . . . , electrical . . . , preventive maintenance . . . , project work . . . , [and] other duties as assigned. Moreover, the Appellant acknowledged that he and Olsen discussed that the work would involve duties other than refrigeration work. Nowhere does the Appellant assert that Olsen told him that his work would be exclusively refrigeration work.

21. The part of the original decision with which Mr. Furtado has taken issue and on which this application is grounded is the conclusion that whether Cold Logic asked Mr. Furtado to perform work for which he had no trade qualification is a different issue than whether Cold Logic contravened section 8 of the *Act*.

22. On that point, I agree completely with the following statement in the original decision:

> The Appellant argues, however, that he was asked to perform electrical work for which he did not have the requisite qualification. Cold Logic disagrees. I cannot say, on the evidence presented, whether the Appellant is correct in his assertion. **But even if he is, I am not of the view that while it may be an important issue in another regulatory forum, it is not dispositive of the issue before me, which rests solely on a consideration of section 8.** As I have indicated above, since the evidence demonstrates that the Appellant must have known he would be doing other work apart from refrigeration work, including electrical work, at the time he was hired, the fact he was asked to do electrical work when he commenced his employment cannot ground a successful complaint under section 8 of the *Act*. (emphasis added)

23. In the event Mr. Furtado has failed to appreciate what is being said in that sentence, I will try to convey the statement in the context of the facts using different words.

24. When he was interviewed for the job, Mr Furtado was told the job would entail other work and duties besides refrigeration work, including electrical. This was a finding of fact made by the Director and accepted in the original decision There is no basis in the material for concluding this finding by the Director was wrong and the Tribunal Member deciding the original decision made no error by accepting it. Mr. Furtado has never disputed that he was aware the job was not limited only to refrigeration tasks. As such it is not correct for him to suggest that because he was hired as a "Refrigerator Technician" he should not have been asked to do electrical trade work. It does not matter, for the purposes of considering a complaint under section 8, that Mr. Furtado believes the particular electrical work he was being asked to perform required trade qualifications he did not possess. Nothing in any of the material indicates Mr. Furtado was told before he was hired that he would never be asked to perform electrical work **he believed** required a trade qualification. What section 8 of the *Act* is concerned with, and in this case addressed, is a misrepresentation, which is a misleading or inaccurate statement, influencing or persuading a person to accept the employment offered. No such statement was ever found to have been made by Cold Logic. If, while he was working in his job, Mr. Furtado felt he was being asked to perform work that required trade qualifications he did not possess, that situation (even though it might contravene legislation other than the *Act*) does not somehow convert pre-hiring discussions about the content of the job into misrepresentations. Mr. Furtado's claim under the *Act* is defeated by the Director finding – and the Tribunal Member in the original decision accepting – that there was no misrepresentation before he was hired that influenced or persuaded Mr. Furtado to take the job he was offered.

25. I am not satisfied there is any error in the original decision and the application is denied.

ORDER

26. Pursuant to section 116 of the *Act*, the original decision is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal