An Application for Reconsideration

- by -

Whitehall Bureau of Canada Limited
("Whitehall")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2010A/052

DATE OF DECISION: July 12, 2010

DECISION

SUBMISSIONS

Martin O. Jaekel	on behalf of Whitehall Bureau of Canada Limited
Michael Montgomery	on his own behalf
Jim R. Dunne	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an application filed by Whitehall Bureau of Canada Limited ("Whitehall") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of Tribunal Decision No. D026/10 issued by Tribunal Member Stevenson on March 16th, 2010. The Tribunal's reconsideration power is discretionary ("the tribunal *may* reconsider any order or decision of the tribunal…") and the Tribunal has fashioned a two-stage test to guide its deliberations in section 116 applications (see *Director of Employment Standards and Milan Holdings Ltd.*, BC EST # D313/98). At the first stage, the Tribunal will consider whether the application is simply an attempt to re-argue points that have already been fully addressed in which case, as a general rule, the Tribunal will summarily dismiss the application. If the application raises a serious legal issue or other significant matter of principle or procedure then the Tribunal will proceed to the second stage where the merits of the application are more fully addressed. In my view, this application fails to pass the threshold test and, accordingly, must be summarily dismissed.

PRIOR PROCEEDINGS

2. By way of a Determination issued on November 16th, 2009 (along with accompanying "Reasons for the Determination"), a delegate of the Director of Employment Standards (the "delegate") ordered Whitehall to pay its former employee, Michael E. Montgomery ("Montgomery"), the sum of $15,993.29 on account of unpaid wages and section 88 interest (the "Determination"). Further, and also by way of the Determination, the delegate levied five separate $500 monetary penalties against Whitehall flowing from the latter's contraventions of sections 18 (payment of wages after termination), 21 (unlawful payroll deductions), 34 (minimum daily pay) and 45 (statutory holiday pay) of the *Act* and section 46 of the *Employment Standards Regulation* (production of payroll records). Thus, the total amount payable under the Determination was $18,493.29.

3. As recounted in the delegate's reasons, Mr. Montgomery was the principal of a private investigation firm, Eye-Spy Investigations Inc. ("Eye-Spy"). Whitehall acquired Eye-Spy in May 2007 by way of an asset purchase agreement. Mr. Montgomery entered into an employment agreement with Whitehall effective June 1st, 2007 whereby he became Whitehall's "Vice-President, Investigations Western Canada" at an annual salary of $65,000. Mr. Montgomery was employed from June 1st to December 10th, 2007. On March 12th, 2008, Mr. Montgomery filed a timely complaint under the *Act* claiming overtime pay, statutory holiday pay, minimum daily pay and recovery of certain business-related expenses. In addition, Mr. Montgomery filed a separate civil action claiming damages for "wrongful dismissal". The complaint did not address the claims that were raised in the civil action.

4. As noted above, the delegate issued a Determination in favour of Mr. Montgomery although, in some instances, the amounts awarded fell well short of Mr. Montgomery's original claim. The two largest

components of Mr. Montgomery's award were his claims for reimbursement of business expenses ($7,779.82) and overtime pay ($4,670.23). The former expenses included vehicle mileage expenses (at $0.43 per kilometre) and other business-related expenses such as office supplies. Mr. Montgomery submitted 144 separate expense claims and the delegate allowed most of these claims. Whitehall's principal defence with respect to Mr. Montgomery's overtime claim (as well as his claims for statutory holiday pay and minimum daily pay), was that Mr. Montgomery as a "manager" as defined in section 1 of the *Employment Standards Regulation* and thus was not entitled to advance these claims (see *Employment Standards Regulation*, sections 34(f) and 36). The delegate determined that Mr. Montgomery was not a "manager" and further determined that he typically worked nearly 57 hours per week during this employment with Whitehall but was only paid on a "straight time" basis for these hours.

5. Whitehall, through its legal counsel, appealed the Determination arguing that it should be cancelled or referred back to the Director for further consideration on the grounds that the delegate erred in law and failed to observe the principles of natural justice in making the Determination. Whitehall asserted that the delegate should not have awarded any recovery of business expenses because: i) the expenses were not submitted for reimbursement; and ii) the claims were not proven on a balance of probabilities. Further, Whitehall alleged that the delegate did not observe the principles of natural justice since he did not provide adequate reasons with respect to Mr. Montgomery's various employment expense claims. Whitehall asserted that the delegate erred in finding that Mr. Montgomery was not a "manager" and that, accordingly, his claims for overtime pay, statutory holiday pay and minimum daily pay should be cancelled along with the concomitant administrative penalties. Whitehall's attack on this latter point appeared to have two aspects to it. First, Whitehall alleged that the delegate did not apply the ordinary civil burden of proof when he adjudicated the matter and, second, that he did not apply the correct regulatory definition of a "manager" in deciding the issue.

6. Whitehall did not appeal the $1,196.25 vacation pay award.

7. Tribunal Member Stevenson adjudicated the appeal and, in written reasons for decision issued on March 16th, 2010, he dismissed the appeal and confirmed the Determination. With respect to Whitehall's challenge to Mr. Montgomery's expense claims, Member Stevenson rejected Whitehall's submission that it was a precondition to section 21(2) recovery that the expense be submitted to the Employer for reimbursement (see para. 52) and its further submission that the delegate misconceived or misapplied the burden of proof (see para. 55). He also rejected Whitehall's submission that the delegate failed to observe the principles of natural justice (see para. 57):

> 52. I do not accept there is a requirement in section 21 of the *Act*, or in any other provision of the *Act*, requiring Montgomery to show Whitehall was presented with a demand for those costs and refused or neglected to pay them in order to establish the contravention. Once the statutory elements of the provision have been established, as they were in this case, it is open to Whitehall to avoid liability for the contravention by showing Montgomery has been reimbursed for the costs incurred and, as a result, no wages are owed for the contravention. That is an appropriate assigning of the evidentiary burden in such cases, as it is the employer who is statutorily required to keep a record such matters: see sections 27 and 28. To be clear, the contravention of section 21 in this case arose at the moment Montgomery was required to pay Whitehall's business costs, not when he sought reimbursement for those costs…
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> 55. On the arguments relating to the burden of proof, I do not agree that the Director did not place an onus on Montgomery to establish his claim for expenses or failed to explain how Montgomery met the standard of proof on the expense claims. The Determination

> clearly states Montgomery provided sufficiently credible evidence establishing the necessary elements of section 21. That evidence was sufficiently detailed, supported by receipts and by Montgomery's verbal evidence. Whitehall was provided with that evidence and had a reasonable opportunity to challenge it…
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> 57. …I find the Director did provide reasons for accepting Montgomery's expense claims, including those claims which were only generally challenged by Whitehall. The fact those reasons are comprised of no more indicating an acceptance of Montgomery's verbal evidence and the supporting documentary material simply speaks to the fact there was no competing evidence from Whitehall that required analysis. Simple reasons do not equate to no reasons. The reasons provided by the Director are sufficient to give Whitehall the opportunity to appeal the findings by attempting to show the Director's conclusion on the credibility of the evidence supporting those claims is a reviewable error.

8. Member Stevenson concluded that the delegate applied the correct test in determining if Mr. Montgomery was a "manager" and appropriately reviewed all of the relevant evidence in concluding that Mr. Montgomery fell outside the regulatory definition (see para. 86):

> 86. …The analysis in the Determination shows the Director applied the right legal tests to the issue and asked the right questions within the principles established on this issue. The Determination contains an extensive description of Montgomery's duties and responsibilities as well as a complete analysis of the statutory definition of "manager". I am unable to extricate a question of law from the issue Whitehall seeks to have addressed. While Whitehall may not agree with the conclusion, the application of the law, correctly found, to allegedly erroneous findings and conclusions of fact does not convert the issue into an error of law and give the Tribunal the authority to substitute its judgement about the effect of the facts for that of the Director.

9. As noted at the outset of these reasons, Whitehall now applies for reconsideration of Member Stevenson's decision.

THE APPLICATION FOR RECONSIDERATION

10. Whitehall's Application for Reconsideration consists of the Tribunal's reconsideration form (Form 2) to which is attached a 45-page memorandum, dated April 11th, 2010, and further appendices. This material is supplemented by a further written submission dated June 3rd, 2010 that essentially reiterates the points raised in Whitehall's April 11th memorandum.

SHOULD THE TRIBUNAL RECONSIDER MEMBER STEVENSON'S DECISION?

11. The delegate, in his May 11th, 2010 submission, urges the Tribunal to summarily dismiss Whitehall's application because it is, fundamentally, an attempt to re-argue issues that have already been fully argued and decided. Additionally, to the extent that the present application seeks to introduce new evidence, it is misconceived since this evidence should have been presented to the delegate or, at the very latest, to the Tribunal at the initial appeal stage. Mr. Montgomery, in his two submissions dated April 23rd and May 17th, 2010, also says that the reconsideration application should be summarily dismissed and, in addition, he takes issue with many of the "facts" that are set out in Whitehall's initial reconsideration application materials.

12. Mr. Jaekel, on behalf of Whitehall, says that he is "in total disagreement [with Member Stevenson' decision] on virtually every point" and further states that "I do not believe that Natural Justice has been served, nor common business sense, whether the law or not, applied" [sic]. Mr. Jaekel says that "within this Reconsideration, I hope to demonstrate that Natural Justice, nor parts of the Act were taken into considering, thus attributing to Errors in Law" [sic]. He also states that aspects of the decision are "un-constitutional", however, this latter allegation is not particularized.

13. The first 32 pages of Whitehall's April 11th, 2010 submission address the question of whether Mr. Montgomery was a "manager" as defined in section 1 of the *Employment Standards Regulation*. The submission essentially reiterates Whitehall's strong conviction that Mr. Montgomery was a "manager" and thus should not have been awarded any overtime pay, statutory holiday pay or minimum daily pay. This issue has already been fully addressed by the delegate and reviewed a second time by the Tribunal. Mere dissatisfaction with a result is not a proper basis for the Tribunal to exercise its discretionary reconsideration power. As is often the situation in cases such as this, there may be some factors that, when considered in isolation, tend to suggest that a person is, or is not, a "manager". However, the decision-maker must consider the totality of the evidence and this is precisely what both the delegate and Member Stevenson did. This aspect of Whitehall's application is nothing more than an undisguised effort to re-argue the "manager" issue. The Tribunal's reconsideration power is not to be utilized as a springboard for a *de novo* hearing on an issue that has already been fully argued and determined.

14. Whitehall, at pages 32 to 34 of its April 11th, 2010 submission appears to be advancing an entirely new argument – one not raised before the delegate or on appeal. Although not entirely clear, it seems that Whitehall is suggesting that Mr. Montgomery's complaint ought never to have been accepted for adjudication since it was filed in bad faith (see the *Act*, section 76(3)(c)). I might add that throughout its submission Whitehall has advanced several allegations against Mr. Montgomery questioning his competence and integrity and arguing that his entire claim was tainted by "fraud" and was otherwise an abuse of process. This claim is wholly unsupported by any credible objective evidence and, of course, stands in marked contrast to a decision (now affirmed on appeal) that Whitehall contravened the *Act* and that Mr. Montgomery's claim was largely meritorious. This aspect of the application for reconsideration must, therefore, be summarily rejected.

15. Whitehall's submissions at pages 34 to 38 seemingly relate to other aspects of section 76(3) of the *Act* (the delegate's authority to refuse to investigate a complaint). Whitehall notes that Mr. Montgomery commenced a separate proceeding against it in the B.C. Provincial Court (Small Claims Division). This fact was known to the delegate and he limited his investigation to those issues not covered by the civil court action (see delegate's reasons, page R2) and thus Mr. Montgomery's complaint was not barred by section 76(3)(f) of the *Act*. Whitehall's assertion that the complaint ought to have been dismissed under section 76(3)(e) – "there is not enough evidence to prove the complaint" – stands in obvious contrast to that body of evidence that the delegate relied on in finding in Mr. Montgomery's favour. So far as I can determine, Whitehall's main point is not that there was no evidence to prove the complaint but, rather, that the evidence presented did not support the conclusions reached – in other words, Whitehall simply wishes to reargue matters that have been determined against it. Whitehall's submission concerning section 76(3)(i) – "the dispute that caused the complaint is resolved" – is highly problematic. On the one hand, Whitehall says that it *offered* to settle the matter (on two separate occasions) but at the same time acknowledges that Mr. Montgomery *rejected* their two offers. A complaint is not resolved unless *both* parties unequivocally agree to do so. Thus, section 76(3)(i) is wholly inapplicable.

16. Whitehall, at pages 37 and 38 of its submission now says that there was "collusion" between Mr. Montgomery and another individual and proposes to submit this "new evidence" in support of its reconsideration application. The short answer to this submission is that this "evidence" (it does not seem to

be particularly credible, relevant or probative) is not relevant to the issues that were before the delegate and, further, if Whitehall wished to raise this point it should have done so earlier in these proceedings.

17. The final point raised in Whitehall's April 11th submission (at pages 38 to 44) concerns Mr. Montgomery's business expense claims. Whitehall's principal point on this issue is that it was denied natural justice since "we have had no warning whatsoever of the expenses claimed were actually incurred". Whitehall also erroneously asserts that the Mr. Montgomery was obliged to prove his expense claims "beyond a reasonable doubt". This latter evidentiary burden applies to *criminal* not civil cases. Although Whitehall prefers to characterize Mr. Montgomery's behaviour as being criminal in nature, the fact remains that unpaid wage complaints under the *Act* are fundamentally civil in nature. As for the "natural justice" concern, this point was addressed by Member Stevenson in his reasons at paras. 52 to 57 of his reasons (reproduced, in part, above).

18. It follows from the above discussion that I am not persuaded Whitehall's application satisfies the first step of the *Milan Holdings* test and accordingly, must be summarily dismissed.

ORDER

19. The application to reconsider the Tribunal's decision is refused. Pursuant to Section 116(1)(b) of the *Act,* I order Decision BC EST # D026/10, issued March 16th, 2010, be confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal