An Application for Reconsideration

- by -

Christi Irlam
(the "Applicant")

- 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/76

DATE OF DECISION: August 3, 2010

DECISION

SUBMISSIONS

Christi Irlam	on her own behalf
Michelle J. Alman	Counsel for the Director of Employment Standards

OVERVIEW

1. This is an application filed by Christi Irlam (the "Applicant") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of BC EST # D044/10 issued on April 27, 2010, under Tribunal File Number 2010A/31. By way of this decision, the Tribunal refused to extend the statutory time limit for filing an appeal and, accordingly, the Applicant's appeal was summarily dismissed.

2. I am adjudicating this application based solely on the parties' written submissions and, in that regard, I only have before me submissions filed by the Applicant and legal counsel on behalf of the Director of Employment Standards. The respondent employer, although invited to so, did not file any material with respect to this application.

3. After considering the parties' submissions, and the governing legal principles, I am of the view that this application must be refused. Although this application arguably raises an important issue for reconsideration and thus meets the first step of the *Milan Holdings* test (see *Director of Employment Standards and Milan Holdings Ltd.*, BC EST # D313/98), I ultimately do not consider this application to be meritorious. My reasons for reaching this conclusion are set out in greater detail, below.

PRIOR PROCEEDINGS

4. The Applicant was employed as the "Lodge Manager" of the Elkin Creek Guest Ranch (southwest of Williams Lake) operated by Adventure West Resorts Ltd. (the "Employer") for less than 2 months during the spring of 2008. The Applicant filed an unpaid wage complaint on November 18, 2008, in which she sought about $7,000 in overtime pay (the bulk of her claim), vacation pay, statutory holiday pay and reimbursement for certain special clothing. A delegate of the Director of Employment Standards conducted an oral hearing on February 26 and April 29, 2009, and issued a Determination (the "Determination") and accompanying "Reasons for the Determination" on July 28, 2009. The delegate concluded that the Applicant was not a "manager" as defined in section 1 of the *Employment Standards Regulation* and that she had worked overtime hours for which she had not been fully compensated. The delegate also made awards in favour of the Applicant on account of statutory holiday pay, vacation pay and section 18 interest. The total unpaid wage award was $3,140.80 of which $2,001.16 was overtime pay. The delegate also issued two $500 monetary penalties against the Employer (see *Act*, section 98) and thus the total amount payable under the Determination was $4,140.80.

5. One of the key contentious points at the hearing concerned the Applicant's final wage statement. It contained the following notation: "Extra days paid in lie [sic, "lieu"?] of notice/OT = 15". Given the Applicant's short tenure with the Employer, the Applicant would not appear to have had a claim for section 63 compensation for length of service (which is triggered after 3 months of employment). Further, on her complaint form she indicated that she had been "fired" from her employment, a fact that would have also disentitled her to any section 63 compensation if the Employer had just cause for termination (see *Act*,

section 63(3)(c)). In the "Details of Complaint" appended to her complaint form the Applicant indicated that she "was terminated without cause"; however, the Applicant did not advance a claim for compensation for length of service in her original complaint form. The Record of Employment prepared by the Employer and issued to the Applicant indicated that she had been "laid off" and was not expected to be recalled. In any event, the delegate's reasons, at page R2, indicate that the Applicant "withdrew" her complaint for compensation for length of service and, I might also add simply for the sake of completeness, the delegate did not deal with the special clothing claim and it is not mentioned anywhere in the delegate's reasons.

6. The delegate's reasons, at pages R18 – R19, address the "extra wages" that were paid to the Applicant on her final paycheque:

> There is one final issue to be dealt with and that is the final wages received by the complainant [the Applicant]. The wages paid were for more hours that the complainant worked. The complainant believes the "extra" wages were for pay in lieu of notice. The employer's evidence was the pay was for extra hours and the notation on the pay statement was an error as an old template was use [sic] to show what the wages were for. I accept the position of the employer that the "extra" pay was for "extra" hours worked and not for pay in lieu of notice. I do so for the following reasons, the employer has terminated employees in the past and was aware of their obligation to pay or not to pay wages in lieu of notice. Also, it was the past practice of the employer to pay employee [sic] for extra hours at the end of their employment. Finally, other than the words written on the pay statement the complainant has not given any supporting evidence that the hours were for pay in lieu of notice and not for "extra" hours worked.

7. In light of the above finding, the delegate credited the Employer with the "extra" hours paid against the overtime pay, statutory holiday pay and vacation pay that he determined to be owing to the Applicant.

8. The Determination includes a text box at the bottom of page D2 that gave the parties information regarding their appeal rights and it also advised that an appeal to the Tribunal must be filed by no later than 4:30 PM on September 4, 2009. The appeal deadline was calculated in accordance with section 122 of the *Act*. The Applicant did not appeal the Determination until March 1, 2010 (the Tribunal's decision incorrectly noted the date as March 10, 2010), approximately six months after the appeal deadline expired. The Applicant purported to appeal the Determination under section 112(1)(c) of the *Act* ("evidence has become available that was not available at the time the determination was being made").

9. The Applicant filed a separate claim against the Employer in the B.C. Provincial Court (Small Claims Court) for "breach of contract" and I understand that she was largely successful in that claim. I take it that her claim was based, at least in part, on the fact that she was terminated without cause before the end of her fixed term agreement. Her original written agreement provided for a fixed term of employment from April 15 to September 30, 2008 (with a possible extension to Thanksgiving 2008). The Applicant's "new evidence" was the Employer's principal's testimony in the Small Claims Court action given on January 27, 2010. The essence of the Applicant's appeal is reflected in the following comments from the memorandum that was appended to her Appeal Form:

> …David Milne [the Employer's principal] testified, again under oath that when I was terminated, I was paid "in lieu of notice" and <u>not</u> 53 hours of overtime [<u>underlining</u> in original]. During my cross-examination of David Milne in Small Claims Court, I clarified this and asked multiple times whether it was in fact "in lieu of notice" and not 53 hours of extra time and multiple times he agreed. Because of this contradictory statement the Small Claims judge deducted the same amount from the total judgment awarded to me, effectively reversing the 53 hours of extra time the ESB delegate has determined I was paid for. Because of David Milne telling two different stories to two different jurisdictions he was able to use the one amount on my final pay cheque twice and subsequently save money, while getting away with not paying me for 53 hours of overtime I had worked.

> I believe Mr. Milne has lied under oath in order to protect his "assets" and that this lie occurred under your jurisdiction of Employment Standards. During the ESB hearing, I testified that I had been told it was "pay in lieu of notice" not for extra hours worked but as [the Employer] had 3 testimonies going against my statement, I was unable to convince the delegate. I have other documents supporting that I was paid "in lieu of notice", some of which were provided to the ESB, and therefore encourage you to allow an extension so the truth can be heard through an appeal.

10. Since the appeal was filed nearly six months after the statutory appeal period expired, the proceedings before the Tribunal took the form of an application under section 109(1)(b) of the *Act* for an extension of the appeal period. In refusing to extend the appeal period, the Tribunal Member noted that the delay was considerable, that the Applicant did not have an ongoing intention to appeal the Determination, and that she appeared to have accepted the delegate's decision prior to January 27, 2010, when Mr. Milne apparently gave conflicting testimony in the Small Claims Court (paras. 13 and 14). Further, while Mr. Milne's testimony could be characterized as "new evidence", it was far from clear that this evidence clearly and credibly suggested that the appeal would be successful (see para. 16) – it must be remembered that the threshold for admission of "new evidence" is a high one (see *Davies et al. and Merilus Technologies Inc.*, BC EST # D171/03). Accordingly, the application was dismissed and the Determination confirmed. The Applicant now asks the Tribunal to reconsider the Tribunal's decision refusing to extend the appeal period.

FINDINGS AND ANALYSIS

11. I shall address two issues in turn, namely, the "new evidence" upon which the Applicant based her appeal and a separate matter concerning section 86 of the *Act* (the Director's reconsideration power).

12. At the outset, I wish to clarify what I conceive to be the actual basis for the Tribunal Member's refusal to extend the appeal period. The Tribunal Member simply (and entirely correctly, in my judgment) applied the well-recognized criteria set out decisions such as *Niemisto* (BC EST # D099/96) and *Wright* (BC EST # D132/97) and determined that a case for an extension had not been made out. Having reached that conclusion, the Tribunal Member then noted that perhaps the Director could revisit the matter using section 86 of the *Act* as a springboard (see paras. 18 and 19). This latter observation lies at the heart of the Applicant's application and is the sole basis for the Director's submission that the reconsideration application be granted. For what it may be worth, I agree that the Tribunal Member probably misstated the nature of the Director's powers under section 86 but, in my view, that error does not change the fundamental point that the application for an extension of the appeal period was correctly refused.

The "New Evidence"

13. The delegate clearly had conflicting evidence before him regarding the nature of the "extra days" that were included in the Applicant's last paycheque. The Applicant says that this payment was for "pay in lieu of notice" whereas the Employer's position was that the payment was for extra hours worked paid on a "straight time" basis. The documentary evidence did not unequivocally point in favour of either party. The wage statement itself stated that the "extra days" were for "pay in lie [sic] of notice/OT" which could mean a payment in lieu of notice, a payment for overtime worked or a payment that reflected both severance pay and overtime.

14. It must be remembered that the Applicant did not pursue a claim for compensation for length of service under section 63 of the *Act* and, as noted above, had she done so, this claim would likely have failed since she did not work for the qualifying 3-month period. The Director does not have the legal authority to award "severance pay in lieu of notice", however, such a claim may be advanced in the civil courts. In this case, however, the Applicant would not appear to be legally entitled to advance such a claim in the civil courts

since the parties agree – and this is confirmed by a written employment agreement – that the Applicant was employed under a fixed-term contract from April 15 to September 30, 2008 (with the possibility of an extension through Thanksgiving 2008).

15. A common law claim for "severance pay in lieu of notice" flows from the implied term in an indefinite contract of employment that each party give the other "reasonable notice" of termination. Thus, in the case of summary dismissal without cause, the former employee can advance a claim for damages based on being denied the opportunity to work out the notice period (*Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986). The "reasonable notice" doctrine has no application to a fixed-term contract (and an employee employed under a fixed-term contract does not have a claim for compensation for length of service under the *Act* if they are dismissed at the end of the fixed term – see section 65(1)(b)). In the case of a fixed-term contract, the contract may be terminated in accordance with any lawful termination provision in it, however, absent such a provision, an employee terminated without cause has a damages claim reflecting the loss of income and other employment benefits to the end of the contract term (see *Chambly (City) v. Gagnon*, [1999] 1 S.C.R. 8; *Ceccol v. Ontario Gymnastic Federation*, 2001 CanLII 8589 (Ont. C.A.); *Rossmo v. Vancouver Police Board*, 2003 BCCA 677).

16. Thus, the Applicant did not have a lawful claim for "severance pay in lieu of notice" under the common law. The Employer's position before the delegate was that it had no intention of paying her any "pay in lieu of notice". The Applicant herself conceded in her original complaint that she understood "extra hours are banked at regular time and paid out at the end of the season" based on policy handbook that was given to her at the outset of her employment and, in addition, this was confirmed to her verbally: "…my employer verbally stated that they pay out all accrued overtime at straight time at the end of the season (the employment contract period)". That being the case, the Employer's position before the delegate (namely, that the "extra days" were paid for overtime worked rather than for severance pay in lieu of notice) was consistent with the parties' mutual understanding about how extra hours or days worked would be addressed. The delegate was aware that the Employer was arguably taking a position that was inconsistent with its position in the Small Claims Court action since the Applicant placed before the delegate the Employer's "Reply" in that action which states that the Applicant was terminated for "unsatisfactory performance" but nevertheless given "15 days [sic] pay in lieu of notice".

17. Notwithstanding the Applicant's evidence and the allegations set out in the Employer's Small Claims Court "Reply", the delegate determined that the "extra days" reflected overtime hours worked rather than "pay in lieu of notice". In reaching this conclusion the delegate was aware that: i) the Employer was taking the position it had just cause for dismissal (in which case no severance pay would be owing), ii) in previous cases the Employer had paid out severance pay to dismissed employees where cause was not alleged, iii) the parties' mutual understanding was that overtime hours would be paid out at the end of the contract on a "straight time" basis, and iv) the wage statement could be taken as supporting either party's position regarding the nature of the "extra days paid" since it referred to both "paid in lie [sic] of notice" and "O/T" [overtime].

18. In light of all the evidence, I cannot say that the delegate's decision to treat the extra payment as representing reimbursement for "extra hours" worked was unreasonable – indeed, it appears to be the most reasonable conclusion to be drawn from the evidence.

19. The Applicant's position on appeal, and also on reconsideration, is that the Employer took mutually inconsistent positions before the delegate and the Small Claims Court and that, in effect, the Employer is attempting, as the phrase goes, to "play both ends against the middle". The Applicant says that Mr. Milne, for the Employer, gave unequivocally untrue sworn testimony in the Small Claims Court action and that this

"new evidence" would result in the Tribunal issuing an order varying the Determination in her favour. There are, it seems to me, at least four fundamental problems with the Applicant's position.

20. First, is this evidence truly "new"? Although Mr. Milne's testimony occurred after the date of the ESB complaint hearing, the Applicant had the Employer's Reply document in hand (and tendered it to the delegate) in which it asserted that the "extra days" payment represented "pay in lieu of notice". The Applicant had the opportunity to put this contradiction to Mr. Milne at the complaint hearing (and apparently did so) and thus the *substance* of the Employer's apparently conflicting positions *was* put before the delegate.

21. Second, I have carefully reviewed the partial transcript of Mr. Milne's testimony in the Small Claims Court action submitted by the Applicant as part of her appeal submissions. In my view, Mr. Milne's testimony falls well short of constituting an unequivocal admission that the payment represented severance pay in lieu of notice. At page 9 of the transcript Mr. Milne states: "Well, you weren't given notice. You were paid severance pay". However, at a later point in his cross-examination by the Applicant, Mr. Milne also testified as follows (at page 13): "Q. So you're testifying today that I was paid in lieu of notice, correct? A. Yes. You also – you also got paid overtime." Further, at an earlier point in the transcript (at page 12), and in response to a question from the court about the parties' agreement regarding payment for extra hours worked, Mr. Milne testified as follows: "She wasn't entitled to overtime, but she was entitled for extra hours. So if she worked over 40 hours a week, she was entitled to straight time or time off for those – for that time." The Court: Or could be paid or could be taken in lieu of overtime? A. That's right." Mr. Milne is not a lawyer and I am not sure if he fully understood the difference between a payment in lieu of overtime and a payment in lieu of notice. In any event, I am not satisfied that Mr. Milne necessarily "lied" (in the sense of making a deliberately false statement) in his testimony before the Small Claims Court.

22. Third, even if it could be said that Mr. Milne did "lie", I fail to appreciate why one should immediately conclude that the lie occurred in the ESB complaint hearing. Given the weight of the evidence, and as I have already observed, the more logical explanation for the "extra days paid" is that it reflected payment for extra hours worked rather than severance pay in lieu of notice.

23. Fourth, the Applicant, in her appeal submission, stated that the Small Claims Court deducted the "extra days paid" in the final judgment that was awarded thereby "reversing the 53 hours of extra time the ESB delegate had determined I was paid for". I do not have the Small Claims Court's reasons for judgment before me and thus cannot say whether that actually occurred. I am of the view that the delegate's Determination regarding the nature of the "extra days paid" was a matter that the Small Claims Court was not entitled to revisit under the principle of issue estoppel (see *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460). The very same issue (namely, the nature of the payment) had previously been finally decided in a tribunal of competent jurisdiction following a hearing involving the identical parties. If, in fact, the Small Claims Court *did* revisit the matter, or the Applicant otherwise wishes to challenge the Small Claims Court's decision, the proper avenue for review is by way of an appeal of that decision rather than a very late appeal to the Tribunal.

24. It follows from the foregoing comments that I fully endorse the Tribunal Member's decision refusing to extend the appeal period. In the circumstances, and in my opinion, it was the only proper order to be made.

The Director's Power to Vary

25. Both the Applicant and the Director assert that the Tribunal Member based his decision on an erroneous view regarding the Director's reconsideration power. As I indicated earlier in these reasons, I do not agree that the application to extend the appeal period was refused on the basis that the Applicant's concerns should be addressed by the Director through a section 86 application to vary the Determination. However, the

Tribunal Member's reasons could be read as suggesting that the Director does have a power to vary the Determination if he so desired and, in my judgment, any such suggestion is incorrect. I am of the opinion that the Director does not have any ongoing jurisdiction to vary the Determination; it stands as a final order having now been confirmed by the Tribunal.

26. When the current employment standards regime was first established in 1995, the Director's reconsideration power was, at least on its face, open-ended. Section 86 simply stated: "The director may vary or cancel a determination". In *Devonshire Cream Ltd.* (BC EST # D122/97) the Tribunal held that the Director could not vary a determination after an appeal of that determination was filed with the Tribunal. If there was no temporal limit on the Director's power to vary, the Tribunal's exclusive statutory powers to consider and decide the issues raised by an appeal could be undermined. The Tribunal has consistently followed the *Devonshire Cream* principle.

27. In *Wally's Auto Body Ltd.* (BC EST # D519/01) – the decision quoted by the Tribunal Member in his reasons for decision and the source of the Applicant's and Director's concerns about the true nature of the Director's reconsideration power – the Tribunal refused to extend the appeal period even though the appeal was filed only about 1 week after the appeal deadline expired. The application to extend the appeal period was refused because, among other things, the applicant employer had steadfastly refused to participate in the delegate's investigation, could not show that it had an ongoing intention to appeal, essentially misstated material facts and provided no credible explanation for having filed a late appeal. The applicant intended to base its appeal on an allegation that the respondent employee provided false and misleading information to the delegate during his investigation of the employee's unpaid wage complaint. After having refused the time extension, the Tribunal Member's reasons concluded with the observation that is set out in para. 18 of the reasons that are now before me in this application:

> I would add the following. The Director has the authority, under Section 86 of the *Act*, to vary a Determination. While I do not speak for the Director, the opportunity may still exist for further discussion concerning the merits of the complaint. If it is obvious that the investigating officer has been misled by the complainant, it is likely he would wish to know that.

28. In *Wally's Auto Body*, the Tribunal Member couched his words carefully. He indicated that the Director "may" be willing to entertain "further discussion" about the merits of the complaint. I do not disagree that if a person possibly provided perjured evidence during an investigation or complaint hearing, the Director might wish to be informed (perhaps because the person gave false evidence under oath of affirmation – see sections 84 and 85(1)(e) – and the Director might decide to invoke perjury proceedings). However, in light of the Tribunal's earlier line of authorities commencing with *Devonshire Cream*, I do not believe that the Director would have had, in 2001 (when *Wally's Auto Body* was decided) or currently, the legal authority to vary the determination without the Tribunal's consent (see, *e.g.*, *Cunliffe*, BC EST # D431/00, and *New Shuttle Inc.*, BC EST # D542/00).

29. In late 2003, section 86 of the *Act* was amended. Section 86 now states:

> **Power to reconsider**
>
> **86** (1) Subject to subsection (2), the director may vary or cancel a determination.
>
> (2) If a person appeals a determination that the director intends to vary or cancel under subsection (1), the director must vary or cancel the determination within 30 days of the date that a copy of the appeal request was received by the director.

30. The Director says "that once an appeal request has been received by [the Director], it is clear that section 86(2) limits the Director's power to vary or cancel a determination to a 30-day window. If the Director fails to exercise his section 86 power to reconsider within that 30-day window, the Director understands that the *Devonshire Cream* analysis continues to apply to bar him from exercising his section 86 power". I agree with the Director's submission regarding the scope of his section 86 reconsideration power.

31. Unlike *Devonshire Cream*, the Tribunal Member's *obiter* comments regarding the ambit of the Director's section 86 reconsideration power set out in *Wally's Auto Body* stand alone. Indeed, they were specifically rejected in *Mission Bingo Association operating as Mission & District Bingo Association* (BC EST # D592/01) where the Director purported to vary a determination, confirmed by the Tribunal, by essentially adding a new party to the Determination by way of a variance. The Tribunal cancelled the "varied" determination.

32. I do not accept that the Tribunal Member refused to extend the appeal period in this case because the matter could be addressed by way of a section 86 variance. In my judgment, the application to extend the appeal period was correctly refused based on a straightforward (and entirely correct) application of the well-established principles governing section 109(1)(b) applications. Nevertheless, I also acknowledge that paras. 18 and 19 of the Tribunal Member's reasons for decision could be read as suggesting the Director had a continuing discretion to vary the Determination if he thought it proper to do so. As noted above, I do not believe that the Director has any such power and, accordingly, I think the best approach to this matter is to simply order that these two paragraphs be excised from the Tribunal Member's reasons for decision and that the balance of the decision be confirmed as issued.

ORDER

33. Pursuant to section 116(1)(b) of the *Act*, I order that BC EST # D044/10, issued on April 27, 2010, be varied by deleting paragraph numbers 18 and 19. In all other respects, the decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal