Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Stewart, Aulinger & Company
("the law firm")

- 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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2004A/15

DATE OF DECISION: May 18, 2004

DECISION

APPEARANCES:

Mark R. Braeder and Reinhart J. Aulinger	on behalf of Stewart, Aulinger & Company
Renata Sheppard	on her own behalf
Adele Adamic	on behalf of the Director

OVERVIEW

Stewart, Aulinger & Company ("the law firm") seek reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision made by an Adjudicator of the Tribunal, BC EST #D006/04 dated January 19, 2004 (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 October 28, 2003. The Determination had found the law firm had contravened Part 8, Section 63 in respect of the termination of employment of Renata Sheppard ("Sheppard") and ordered the law firm to pay an amount of $3,071.55. The original decision confirmed the Determination.

The law firm says the Adjudicator of the original decision committed a serious error in law by concluding Sheppard's employment was, for the purposes of the *Act*, "consecutive" from March 1997 through October 2002.

ISSUE

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 is appropriate for reconsideration, the substantive issue raised in this application is whether the Adjudicator of the original decision erred in concluding Sheppard's employment was, in the circumstances, "consecutive" from March 1997 to October 2002.

ANALYSIS OF THE PRELIMINARY ISSUE

The legislature has conferred an express reconsideration power on the Tribunal in Section 116 which provides:

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.

(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.

Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's 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 general approach to reconsideration is set out 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 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. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the Adjudicator (as distinct from tendering new evidence or demonstrating an important finding of fact made without a basis in the evidence) and come to a different conclusion. An assessment is also made of the merits of the Adjudicator's decision.

Consistent with the above considerations, 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.

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.

After reviewing the original decision, the material on file and the arguments of the parties to this application, I have decided this is a case that does not warrant reconsideration.

THE FACTS AND ANALYSIS

Sheppard was terminated by the law firm, without written notice or compensation in lieu of notice, effective October 31, 2002. She filed a complaint with the Director claiming entitlement to length of service compensation for a period from March 25, 1997 to October 31, 2002. The law firm did not dispute her entitlement to length of service compensation, but took the position her entitlement applied only for a period from April 28, 2002 to October 31, 2002.

The position of the law firm was based on their assertion that Sheppard had been dismissed for just cause on April 28, 2002 and that act, notwithstanding she was immediately rehired to another position in a different department of the law firm, created a circmstance where her employment subsequent to April 28, 2002 could not be considered "consecutive" with her employment at the law firm prior to April 28, 2002.

The Director rejected the position of the law firm and found Sheppard's entire period of employment with the law firm to have been "consecutive" for the purposes of Section 63 of the *Act*. The Determination included the following:

> Regardless of whether the employer has just cause or gives notice of termination an employer cannot terminate from employment their employees on one day and advise them they are starting employment the very next day with the same employer at the same location with a new start date. If this were the case an employer could tell his/her employee every three months they are terminated and are starting a new period of employment and avoid accrued liability under section 63(1)(2) of the Act.

The law firm appealed.

The Adjudicator of the original decision, while expressing some regret that the Director had not addressed the question of "just cause" head on, agreed with the Director that, for the purposes of Section 63 of the *Act*, Sheppard's employment with the law firm was "consecutive" from March 1997 to October 2002. The Adjudicator considered the remedial nature of the *Act* and its basic purpose to be relevant factors in interpretting and applying the applicable legislative provisions. The Adjudicator concluded:

> . . . even if the employee was dismissed and immediately re-hired by the same employer on the same day her employment with her employer continued uninterrupted and that each day, week or year of her employment with the employer was "consecutive". In my opinion, this interpretation is consistent with the intent of the legislature to increase the level of compensation based on length of service.

The law firm continues to disagree and seeks reconsideration. Their reasons for seeking reconsideration are expressed in the following argument:

> Both the delegate and the Adjudicator fail to appreciate the evidence and the importance of "just cause" in the case at hand. Both deny the relevance of "just cause" (the delegate by not addressing the issue, the Adjudicator by simply assuming that there was just cause without considering the "just cause") because to them, <u>continuing</u> employment, regardless of whether a "just cause" termination intervened and regardless of the reasons behind the offer to "rehire", is consistent with the intent of the legislation to increase the level of compensation based on length of service.

Essentially, the position of the law firm can be summarized in the following proposition: a purported dismissal for cause which does not actually result in the termination of employment should, notwithstanding, have the effect of discharging any liability for length of service compensation which had accrued up to the date of the purported dismissal for just cause.

Like the delegate and the Adjudicator, I do not accept the position of the law firm. With respect, theat position ignores, and consequently fails to address in any meaningful way, two key aspects of the circumstances of this case that were recognized and given effect by the delegate and the Adjudicator of the original decision. The first is how the perspective of the law firm fits with the objectives and purposes of Part 8 of the *Act*, generally, and with the wording of Section 63 in particular; the second is the decision of the law firm to continue the employment of the employee.

On the first aspect, the statutory framework under which entitlement to length of service comepnsation arises is briefly described in the original decision:

> Section 63 of the Act provides that an employer is liable to pay an employee compensation for length of service in certain circumastances.

I note that the provision which discharges an employer from liability to pay length of service compensation is a deeming provision. I also note that length of service compensation is, from the employee's perspective, a minimum statutory benefit. The original decision refers to the remedial character of the *Act*. In this respect, the original decision correctly noted the effect of the comments in *Machtinger v HOJ Industries Ltd.*, [1992] 1 S.C.R. 986, on the interpretation and application of the *Act*:

> . . . an interpretation of the Act which encourages employers to comply with minimum requirements of the Act, and so extends its protection to as many employees as possible, is favoured over one that does not.

I can find no language in Section 63, or in any other provision, of the *Act* that would support the position taken by the law firm, and none has been identified in any submission made by the law firm. Since the effect of the position taken by the law firm is to disentitle Sheppard to a statutory benefit, clear language is required. Not only is there no such language, there are provisions in the *Act* which suggest that a continuation of employment past the point at which one might otherwise find a termination had occurred, either through the actions of the employer or by operation of law, is not to be given effect and consequently does not interrupt the continuous employment of the employee, see Section 97 and paragraph 67(1)(b). The latter reference is particularly telling, as it is found in Part 8 of the *Act* and applies to notices given under Section 63. It states:

67 (1) A notice given to an employee under this Part has no effect if . . .

(b) the employment continues after the notice period ends.

It is arguable this case is caught by the above provision, but even if it is not, the above provision does suggest the decision of the Adjudicator to give no effect to the purported dismissal for just cause is consistent with the effect which the legislature has said should be given to termination notices where employment continues past the termination date.

In sum, there is no valid employment standards reason, and none has been suggested by the law firm in this application, for accepting that an employer can disentitle an employee to benefits provided by the *Act* through the pretense of dismissing an employee for cause and immediately continuing the employment of that employee, with no change in the identity of the employer and little, if any, change in terms and conditions of employment.

In my view, this interpretation and application of Section 63 that was applied by the Adjudicator of the original decision serves to protect employees, serves the purposes of the *Act*, in particular Sections 2(a) and (b), and fits logically within the scheme of the *Act* as a whole.

ORDER

Pursuant to Section 116 of the *Act*, I order the original decisions be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal