An Application for Reconsideration

- by -

Abbotsford Concrete Products Ltd.
(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/74

DATE OF DECISION: August 3, 2010

DECISION

SUBMISSIONS

Cliff Leach	on behalf of Abbotsford Concrete Products Ltd.
Karpal Singh	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an application filed by Abbotsford Concrete Products Ltd. (the "Applicant") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of BC EST # D045/10 issued on April 27, 2010, under Tribunal File Number 2010A/17. By way of this decision, Tribunal Member Matsuno confirmed a Determination that was issued by a delegate (the "delegate") of the Director of Employment Standards on December 24, 2009, pursuant to which the Applicant was ordered to pay its former employee, Carolyn Simpson ("Simpson"), $1,502.90 representing 2 weeks' wages as compensation for length of service (section 63) together with section 88 interest (the "Determination"). In addition, and also by way of the Determination, the delegate levied a $500 monetary penalty (see section 98) against the Applicant for having contravened section 63 of the *Act*. The Applicant says that Tribunal Member Matsuno's decision should be set aside since Ms. Simpson quit her employment and thus should not have been awarded any compensation for length of service (see section 63(3)(c)).

2. I am adjudicating this application based solely on the parties' written submissions. I have before me the complete record that was before Tribunal Member Matsuno as well as the further submissions filed by the Applicant and the delegate. Although invited to do so, Ms. Simpson did not file a submission in response to the reconsideration application.

3. Reconsideration applications are assessed in light of the two-stage test set out in *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

4. The Applicant manufactures interlocking concrete blocks and Ms. Simpson was employed by the firm as an accounts payable clerk from June 2006 until her employment ended in the spring of 2008. Her last working day was March 3, 2008, at which time she went on medical leave. She never returned to work and the Applicant issued two Records of Employment ("ROE") relating to Ms. Simpson. The first ROE, dated March 6, 2008, stated that it was issued due to Ms. Simpson's "illness or injury" (Code D) and that she was expected to return to work on March 19, 2008 – it would appear that this ROE was issued so that Ms. Simpson could obtain employment insurance benefits. The Applicant issued a second ROE on April 8, 2008, that stated Ms. Simpson had "quit" (Code E) and would not be returning to work.

5. On September 22, 2008, Ms. Simpson filed a complaint with the Employment Standards Branch seeking 2 weeks' wages as compensation for length of service on the basis that she had been terminated without cause.

The delegate conducted a complaint hearing on January 27th, 2009 and issued the Determination and accompanying "Reasons for the Determination" (the "delegate's reasons") on December 24th, 2009. There is no explanation in the material before me for the lengthy delay in issuing reasons and, obviously, no one is well served by lengthy delays in adjudicating matters under the *ESA*.

6. The delegate addressed two main issues. First, he concluded that Ms. Simpson was not "constructively dismissed" (see section 66) on March 25, 2008, when her medical benefits were suspended since that action was taken in accordance with the terms of the group benefits policy then in place (delegate's reasons, pages R11 – R12). Second, he concluded that Ms. Simpson did not "quit" her employment on April 8, 2008, as the Applicant asserted in the ROE issued on the same date and that by issuing the ROE the Applicant effectively terminated her employment thus triggering her entitlement to section 63 compensation for length of service (page R17).

7. The Applicant appealed the Determination asserting that it should be cancelled because: i) the delegate erred in law in issuing it; ii) failed to observe the principles of natural justice; and iii) because it had new evidence that was not previously available. The appeal was unsuccessful and the Applicant now asks the Tribunal to reconsider its earlier decision.

FINDINGS AND ANALYSIS

8. The Applicant's position is that it was plain and obvious that Ms. Simpson quit and that, accordingly, she should not have been awarded any compensation for length of service. The essence of the Applicant's primary argument is captured in the following portions reproduced from its 2-page reconsideration submission:

> …the Tribunal Member misunderstood a significant issue in the appeal, pertaining to the copies of the doctor's notes presented to the Delegate in making the initial Determination. Neither the Tribunal Member, nor the Delegate…considered the importance of the alteration that Ms. Simpson made to the copy of the doctor's notes that she provided to the offices of [the Applicant].
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> While it is true, as stated in Paragraph 21 of the appeal Reasons, that the delegate had the opportunity to review both the original set of doctor's notes and the copy that Ms. Simpson altered to remove the reference to "EI" from them, our position is that neither the Delegate nor the Tribunal Member fully understood the importance of this evidence, which caused both to misstate the relevant facts.
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> At Paragraph 20 of the appeal, the Tribunal Member asserts that the Delegate based his decision on more than simply the doctor's notes. While this is most certainly an accurate statement, we are of the opinion that his misapprehension of this particular evidence led him to overlook the issue as to whether these notes were in fact altered, and therefore did not deal with the issue of what might have prompted this alteration. Indeed, this issue is not discussed in either the Determination or the appeal.
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> Our position is that had the Delegate or the Tribunal Member properly considered and addressed the issue of Ms. Simpson's wilful manipulation of the evidence to support her claim that she had not, in fact, quit, that it is certain that a different conclusion would have been reached…

9. The Applicant's position is that Ms. Simpson quit her employment and then, after she realized this would prejudice her claim for employment insurance benefits and compensation for length of service, attempted to recast her voluntary quit into an involuntary termination. The Applicant says that the discrepancies between medical notes that Ms. Simpson originally submitted in support of her employment insurance claim and those later provided to the Applicant proves her lack of *bona fides*. The Applicant also points to other evidence in the record that it says unequivocally show that she voluntarily quit her employment.

10. I should state, at this point, that I do not consider the so-called "alteration" of the two medical notes to be particularly consequential; in my view, they fall well short of constituting the "smoking gun" that the Applicant suggests they are. The two notes, prepared by Ms. Simpson's treating physician appear to be written on a prescription pad, and are extremely brief. The first note, dated "4/4/08", states: "E.I. Unable to work". The second note, dated "15/4/08", states: "E.I. This pt is unable to work due to OA spine. Pls retrain". The *only* difference between the notes is that in the copies provided to the Applicant, the letters "E.I." appear to have been blocked out when they were photocopied.

11. The Applicant, in its original appeal submission, characterized the significance of the notes as follows: "At this time Ms. Simpson is still claiming per her own statement, that she didn't quit, yet her doctor is asking EI to retrain her. These two facts are inconsistent with each other". Tribunal Member Matsuno, as is conceded by the Applicant, addressed this issue in her reasons for decision. She noted that both sets of notes were before the delegate and that the Applicant was given the opportunity to cross-examine Ms. Simpson about the matter at the complaint hearing but chose not to do so. For my part, I can think of several explanations that Ms. Simpson might have offered that would not have implied an intention to quit, however, since the Applicant chose not to explore the matter when given the opportunity to do so, one can only speculate as to whether the notes evidenced a nefarious or a benign intent.

12. An appeal to the Tribunal is not a hearing *de novo* where are all facts and findings of the delegate are set aside and the Tribunal considers the matter afresh. The same observation applies to a reconsideration application following a Tribunal decision. Undoubtedly, this was not a case where the evidence overwhelmingly supported one party's position over the other. Ms. Simpson claimed that she was "constructively dismissed" and the delegate ultimately concluded that she had not met her burden of proving that was so. The Applicant, not surprisingly, takes no issue with that aspect of the Determination. However, the Applicant then asserted that it was not obliged to pay Ms. Simpson any compensation for length of service (a presumptive entitlement under the *Act*) since she had voluntarily quit her employment. On that issue, that burden of proof rested with the Applicant and the delegate was not persuaded that it had met its burden. The Applicant appealed and Tribunal Member Matsuno was not persuaded that the delegate erred in law in finding that the Applicant had failed to meet its burden of proving that Ms. Simpson quit.

13. The delegate, in his reasons, identified the proper legal test for a voluntary quit, namely, there must be evidence of both a subjective intention to quit and objective evidence that corroborates that subjective intention. In finding that the Applicant had not met its burden of proving a voluntary quit, the delegate noted that Ms. Simpson never submitted to the Applicant a resignation letter or any other written memorandum evidencing her desire to quit her job; that although her medical condition weighed against her immediate return to her old job, her condition did not imply that she would not return to work if her condition improved or it appropriate accommodations could be made; the Applicant never confirmed with Ms. Simpson (although it had ample opportunity to do so) whether she was, in fact, quitting her job; when Ms. Simpson realized that her second ROE stated that she had quit (after apparently having been informed by an Employment Insurance officer), she immediately wrote to the Applicant advising that she had most definitely not quit but was away from work due to her ongoing medical problems – the Applicant chose to simply write her back the next day reiterating its position that she had quit.

14. While, as I noted above, there was some other evidence that could be taken as suggesting she did intend to quit, it is not the function of the Tribunal on appeal (or on reconsideration) to reweigh the evidence with a view to reaching an independent determination. Rather, the Tribunal's task is to ensure that the decision made by the delegate was one that could reasonably have been made on the evidence. In this case, Tribunal Member Matsuno concluded that the delegate's decision did not amount to an error of law and I echo that conclusion. In essence, this application – as was the case with the appeal – is an undisguised request to have

the Tribunal reweigh the evidence and make an independent decision in favour of the Applicant. That being the case, this application fails to pass the first stage of the *Milan Holdings* test.

ORDER

15. Pursuant to section 116, the application to reconsider BC EST # D045/10, issued April 27, 2010, is refused and the decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal