

An Application for Reconsideration

- by -

501546 B.C. Ltd. carrying on business as Labour Unlimited Temporary Services
("Labour Unlimited")

- 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.: 2013A/80

DATE OF DECISION: December 11, 2013

DECISION

SUBMISSIONS

Peter Huber

on behalf of 501546 B.C. Ltd. carrying on business as
Labour Unlimited Temporary Services

INTRODUCTION

1. This is an application filed by 501546 B.C. Ltd. carrying on business as Labour Unlimited Temporary Services (“Labour Unlimited”) under section 116 of the *Employment Standards Act* (the “*Act*”) for reconsideration of appeal decision BC EST # D083/13 issued on October 29, 2013. By way of the appeal decision, Tribunal Member Stevenson confirmed a Determination issued on July 19, 2013, pursuant to which Labour Unlimited was ordered to pay \$6,325.40 on account of unpaid vacation pay (section 58), compensation for length of service (section 63) and interest (section 88) owed to its former employee, Devin Crowder (“Crowder”), and two separate \$500 monetary penalties (section 98).
2. Mr. Crowder’s unpaid wage complaint was the subject of a complaint hearing before a delegate of the Director of Employment Standards (the “delegate”) on June 20, 2013. On July 19, 2013, the delegate issued the Determination and her accompanying “Reasons for the Determination” (the “delegate’s reasons”). The delegate addressed four separate matters, namely, whether Mr. Crowder was: i) entitled to unpaid regular wages for the period November 11 to 16, 2012; ii) owed any commissions; iii) entitled to compensation for length of service; and iv) owed any vacation pay. The delegate found in Mr. Crowder’s favour on the latter two matters but dismissed the complaint as it related to his claim for regular wages and commissions. The delegate awarded Mr. Crowder \$3,737.46 on account of vacation pay and \$1,483.67 as compensation for length of service. The total unpaid wage award, including section 88 interest, was \$5,325.40. In addition, as previously noted, the delegate levied two separate \$500 monetary penalties based on Labour Unlimited’s contravention of sections 58 and 63 of the *Act* thus bringing the total amount of the Determination to \$6,325.40.
3. Labour Unlimited appealed the Determination on the grounds that the delegate erred in law, failed to observe the principles of natural justice in making the Determination, and on the ground that it had new evidence that was not available when the Determination was being made (see subsections 112(1)(a), (b) and (c)). Tribunal Member Stevenson dismissed the appeal under subsection 114(1)(f) on the basis that it had no reasonable prospect of success. Labour Unlimited now applies for reconsideration of the appeal decision as it relates to Mr. Crowder’s compensation for length of service award.
4. At this juncture, and in accordance with the Tribunal’s two-stage framework for addressing reconsideration applications (see *Director of Employment Standards (Milan Holdings Inc.)*, BC EST # D313/98), I am addressing the first stage of the *Milan Holdings* test – *i.e.*, whether the application raises a sufficiently important and arguable legal issue or matter of fact, principle or procedure so as justify a fuller examination of the application on its merits. I have before me Labour Unlimited’s reconsideration application and supporting documents and, in addition, I have reviewed all of the material that was before Tribunal Member Stevenson when he issued the appeal decision now under review. If, in my judgment, the application passes the first *Milan Holdings* test, the respondent parties will be asked to provide their submissions regarding the merits of the application.

BACKGROUND FACTS

5. Labour Unlimited is a labour contractor that provides temporary employees primarily in the construction, warehousing and light industry sectors. Labour Unlimited has a number of offices throughout British Columbia and also has offices in Alberta and Ontario. Mr. Crowder was employed as Labour Unlimited's "sales manager" in the Victoria office; his tenure ran from May 8, 2006, to November 16, 2012. In September 2012 Mr. Crowder entered into discussions with Labour Unlimited regarding his relocation to the Vancouver office but these discussions ultimately stalled. On Friday, November 16, 2012, Mr. Crowder submitted a "Letter of Resignation" addressed to Mr. Peter Huber (a Labour Unlimited director and officer) that provided, in part, "Please accept this letter as my two weeks notice. My last day of employment will be Friday, November 30, 2012." In other words, Mr. Crowder delivered what is commonly known as "working notice" and although there is nothing in the *Act* requiring an employee to give their employer notice of resignation (unlike, say, section 58 of the Alberta *Employment Standards Code*), employees working under indefinite contracts of employment *do* have a common law obligation to tender "reasonable notice" of resignation in the absence of an express termination provision in their contract (*RBC Dominion Securities Inc. v. Merrill Lynch Canada Inc.*, [2008] 3 S.C.R. 79).
6. Upon receipt of Mr. Crowder's resignation letter, Labour Unlimited had three options open to it. First, it could have refused the notice tendered and demanded more notice; second, it could have accepted the notice tendered in which case a contract would arise relating to the termination of Mr. Crowder's employment. Under this latter agreement, Mr. Crowder would continue to work, and to be paid, until November 30 and during this time period both parties would continue to be bound by their respective rights and obligations under the employment contract. Third, and this appears to have been the option that Labour Unlimited effectively exercised, it could immediately terminate Mr. Crowder's employment but, in that event, and absent just cause for termination, Labour Unlimited would be obliged to pay compensation for length of service under section 63 of the *Act*.
7. The delegate, at page R13 of her reasons, found that after submitting his resignation, Mr. Crowder "was told to turn in his office keys" (which he did that same day). Labour Unlimited immediately restricted incoming calls on his cellular telephone (incoming calls were automatically forwarded to another line in Labour Unlimited's office). Mr. Huber testified that he did this "to protect the interests of Labour Unlimited". Mr. Huber also conceded that Mr. Crowder was not terminated for cause. Mr. Crowder took the view that he had been summarily terminated and thus did not report for work the following Monday, November 19. Mr. Huber testified that neither he, nor anyone else at his direction, contacted Mr. Crowder to clarify whether he had simply quit as of November 16 or planned to continue working throughout his notice period. Apparently, no one from Labour Unlimited ever contacted Mr. Crowder and demand that he return to work if he expected to be paid until the end of the month (see delegate's reasons, page R13-R14).
8. Section 66 of the *Act* states: "If a condition of employment is substantially altered, the director may determine that the employment of an employee has been terminated." The delegate applied this section and concluded that Mr. Crowder was entitled to the 2 weeks' wages that he would otherwise have received had he been allowed to work out his 2-week notice period. The delegate found, at page R14 of her reasons:

In considering the testimony provided by all parties, the role of sales manager was one of considerable authority in Labour Unlimited's various offices. As a sales manager, Mr. Crowder held managerial status as supervisor and authority within the Victoria office, made decisions and "ran the office" and performed his work with minimal supervision and significant autonomy. He had full access to office, cell phone and email in performing his work and contacting clients and co-workers. Accordingly I find these were fundamental terms and conditions of his employment. In response to the resignation notice provided by Mr. Crowder, Labour Unlimited took away his office keys and phone access. Furthermore, as testified by

Mr. Annala [Mr. Crowder's successor], had Mr. Crowder returned to work on November 19 he "would not have been the sales manager when he returned as he resigned", would not be allowed to work independently as he had and instead would have been required to work closely alongside of Mr. Annala. Accordingly, I find Labour Unlimited significantly and substantially altered the fundamental terms and conditions of Mr. Crowder's employment. Respectively, I am satisfied he would have been within his right to resign in response to these changes as initiated and instituted by Labour Unlimited and I find he is owed 2 weeks' pay in lieu of the notice provided by him.

THE PRESENT APPLICATION – ANALYSIS & FINDINGS

9. As noted above, the present application appears to solely center on the section 63 compensation for length of service award; Labour Unlimited says that the section 63 award "should be varied/and or cancelled" but, for my part, I fail to see how the award could possibly be varied and, at the same time, cancelled. Further, if the award were to be varied, Labour Unlimited has not provided any argument regarding what an appropriate (presumably lesser) amount might be.
10. In the present case, Mr. Crowder limited his section 63 claim to "the amount of the 2 week notice period he provided to Labour Unlimited prior to his termination" (delegate's reasons, page R4). Having found that Mr. Crowder was, as a matter of law (applying section 66), terminated as of the day he submitted his resignation, the delegate simply awarded him wages representing what he would otherwise have earned had he been allowed to work out his 2-week notice period. I cannot fault the delegate for awarding Mr. Crowder the 2 weeks' pay he sought, but, at the same time, I do not wish to be taken as finding, as a matter of statutory interpretation, that he was necessarily only entitled to 2 weeks' wages as compensation for length of service.
11. As I previously noted, Mr. Crowder tendered 2 weeks' notice and, had that been accepted and he continued to work for the 2-week period, he would have been entitled to his wages for that period if Labour Unlimited failed to pay him. However, and this is an important point, the delegate effectively determined that Labour Unlimited refused Mr. Crowder's tender of a 2-week working notice period. Thus, no concluded contract relating to the termination of his employment ever arose. There *was* an offer but a contract does not arise until the offeree (in this case, Labour Unlimited) unconditionally accepts the offer. Since Labour Unlimited did not accept the offer but rather terminated Mr. Crowder's employment (if not expressly, then constructively under section 66), it was then obliged to either offer him written working notice or compensation for length of service based on his period of continuous employment. At the point of discharge, Mr. Crowder had over 5 consecutive years of employment with Labour Unlimited and thus, by reason of subsection 63(2)(b) of the *Act* was entitled to either 5 weeks' written notice or 5 weeks' wages as compensation for length of service (or some combination of notice/pay equal to 5 weeks).
12. Mr. Crowder only ever sought 2 weeks wages, did not appeal the section 63 award, and this issue was not argued on appeal. However, I raise the point because I do not wish to be taken as acknowledging in this case (or in a factually similar future case), that where (as here) an employer refuses an employee's tender of working notice and summarily dismisses the employee without just cause that the employee is always limited to compensation based on the *lesser* of the proffered notice period or their section 63 entitlement.
13. Returning to the case at hand, Labour Unlimited maintains – as it did on appeal – that Mr. Crowder essentially immediately abandoned his employment after having tendered his resignation. Labour Unlimited continues to assert that it should not have to pay anything to Mr. Crowder on account of compensation for length of service when he provided no services to the company. Labour Unlimited asserts that on November 16 Mr. Crowder "volunteered to hand in his keys at the same time he handed in his resignation" and that he "was never denied access, during regular business hours, to his workplace nor to the sales tools mentioned

above, by the actions of LU” (underlining in original text). Two points should be noted with respect to these latter assertions: first, they stand in marked contrast to the delegate’s findings (see her reasons at page R13) which were, in turn, based on her overall assessment of the evidence and were grounded in a proper evidentiary foundation; second, these assertions merely parrot arguments made (and rejected) on appeal – see Member Stevenson’s reasons at paras. 26 – 30.

14. This application amounts to nothing more than a simple statement of disagreement with the delegate’s section 66 finding coupled with a request that, on reconsideration, the Tribunal overturn (without providing any proper legal foundation to do so) the section 63 award. In my view, there was ample evidence to justify the delegate’s conclusion that Mr. Crowder was effectively dismissed, without cause, as of November 16, 2012, and Tribunal Member Stevenson did not fall into error when he confirmed that finding. This application does not pass the first stage of the *Milan Holdings* test and, accordingly, it must be dismissed.

ORDER

15. Labour Unlimited’s section 116 application to vary or cancel BC EST # D083/13 is refused and, pursuant to subsection 116(1)(b) of the *Act*, this decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal