An application for Reconsideration

- by -

Gordon Cameron

- 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: John Savage

FILE No.: 2006A/91

DATE OF DECISION: September 28, 2006

DECISION

SUBMISSIONS

Gordon Cameron, for himself.

Kyara Kahakauwila, for L.A. Limousines.

Shelly Burchnell, for the Director of Employment Standards.

INTRODUCTION

1. This is an application pursuant to Section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of Tribunal Decision BC EST # D076/06 rendered by Member Stevenson on July 11, 2006.

2. The applicant, Gordon Cameron ("Cameron"), had employment as a limousine driver with L.A. Limousine Inc. ("LAL"). The complaints were that LAL failed to pay Cameron wages for travel and contravened sections 63 and 83 of the *Act* by terminating his employment because he filed a complaint under the *Act*.

3. Cameron also alleged that the Director failed to observe the principles of natural justice in making the Determination, as the Delegate seemed pre-disposed to decide the complaint and did not allow Cameron to fully present his case. The Delegate and LAL denied these allegations and opposed the complaint. The Tribunal dismissed the appeal.

4. The first ground for reconsideration is that the Tribunal Member stated that the applicant had the burden of proving that the employer had contravened section 83 of the *Act* whilst the Employment Standards Branch Guideline says:

> "The employer must prove that the termination of an employee, or a change in a condition of employment without the employee's consent, is not related to an employee filing a complaint under this Act or because they have supplied, or may supply, information to the director".

5. The second ground for reconsideration concerns a finding that the employment relationship was terminated effectively on the mediation date by virtue of the section 83 complaint.

THE ISSUES

6. The issues in this application for reconsideration are:

1) Does the application meet the threshold test allowing the Tribunal to exercise its discretion under section 116 of the *Act* to reconsider the original decision?

2) If the threshold is met, does the original decision reveal an error of law or breach of the principles of natural justice?

THE TEST FOR RECONSIDERATION

7. This Tribunal has considered a two stage process in the analysis of reconsideration applications. The first stage in the analysis considers whether the matters raised in the application in fact warrant reconsideration. If the matter warrants reconsideration, the second stage in the analysis involves a reconsideration of the merits of the application: *Re Annable*, [1998], BC EST #D559/98.

8. The Tribunal has held that it applies its discretion "cautiously" to ensure the finality of its decisions, the efficiency and fairness of the appeal system, and the fair treatment of employers and employees: *Re Ekman Land Surveying Ltd.*, [2002] BC EST #RD413/02.

9. A principled approach to the exercise of this discretion has been developed. 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 application and interpretation" 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, which can be usefully summarized as follows:

- Any party exercising its right to request the Tribunal to reconsider must first pass the threshold of persuading the Tribunal that it is appropriate to enter upon a reconsideration of the member's decision. The obligation to satisfy the Tribunal that it ought to embark on a reconsideration may be seen as roughly analogous to the obligation, in some statutory contexts, to obtain leave to appeal before a Tribunal decision may be appealed to the Courts.
- In recognition of the importance of preserving the finality of member's decisions, the Tribunal will agree to reconsider those decisions only to the extent that it is first satisfied that one or more of the issues raised in the reconsideration application is important in the context of the Act.
- The Tribunal tends not to be favourably disposed to entering upon a reconsideration where the reconsideration application is untimely, where it asks the panel to re-weigh evidence, and where it seeks what is in essence interlocutory relief.
- Where the Tribunal agrees to enter upon a reconsideration of a decision, the Tribunal moves, at the second stage, directly to the merits. The standard of review at this stage is the correctness of the decision.
- Unlike the process for seeking leave to appeal in the Courts, the party requesting the Tribunal to reconsider must address in one submission both the test for reconsideration and the merits of the decision.

10. The second ground of the application concerns the effective date of termination of employment. With respect to the second ground of the application, I am not persuaded that the test for reconsideration has been met.

11. With respect to the first issue, the applicant is arguing that a Branch Guideline is contrary to a Tribunal decision and a determination of the Delegate.

12. As noted above, the obligation to satisfy the Tribunal that it ought to embark on reconsideration may be seen as roughly analogous to the obligation, in some statutory contexts, to obtain leave to appeal. One of the requirements of obtaining leave requires consideration of the merits. Other considerations include the importance to the parties, the importance of the issue generally, whether the matter includes the interpretation of a statute and whether the provision is of general application.

13. While the first issue raised has importance, in my opinion, for the reasons that follow, the application lacks merit as the decision of the Tribunal is correct.

SECTION 83 AND THE LEGAL BURDEN

14. Cameron says that the burden of proof is on an Employer to show that a termination is not motivated by a complaint under the *Act*. I disagree.

15. If a party has the legal burden of proof in a proceeding under the *Act*, then that party has the obligation to prove or disprove the existence or non-existence of a fact or issue to the civil standard, otherwise that party loses on that issue. The substantive law governs whether a party has the legal burden of proof.

16. Under section 126(4)(c) of the *Act*, for example, the legal burden of proof is expressly on the employer to prove that an employee's pregnancy is not the reason for terminating the employment or for changing a condition of the employment without the employee's consent. In general, the legal burden of showing that an exception to a provision applies lies with the party seeking to rely on the exception. This is not the case with section 83 of the *Act* or generally. It would be neither fair nor efficient to require a party generally to prove a negative.

17. In civil proceedings, the legal burden of proof does not play a part in the determination if a determinate conclusion can be made based on the evidence. That is, the legal burden will not have a bearing on the decision unless, after considering all of the evidence, the evidence is so evenly balanced that the tribunal can come to no sure conclusion: *Robins v. National Trust Co.* [1927] A.C. 515 (P.C.). In such case the party having the legal burden will not have satisfied the onus on it: *The Law of Evidence in Canada*, 2nd Ed., Sopinka, Lederman & Bryant, Butterworths, Toronto, 1999.

18. The Tribunal has called this legal burden the "risk of non-persuasion" in *Swede's Towing*, BC EST # D708/01 cited in *Re World Project Management Inc.*, BC EST # D 134/97:

> "Rules about the legal burden, called by Wigmore "the risk of non-persuasion", define who is to lose if at the end of the evidence the tribunal is not persuaded. Various tests have been advanced over the years in various situations but as one writer (E.M. Morgan, "How to Approach the Burden of Proof and Presumptions" (1952-53) 25 Rocky Mountain L.Rev. 34 puts it, "the allocation (of the burden of Rules about the legal burden, called by Wigmore "the risk of non-persuasion", define who is to lose if at the end of the evidence the tribunal is not persuaded. Various tests have been advanced over the years in various situations but as one writer (E.M. Morgan, "How to Approach the Burden of Proof and Presumptions" (1952-53) 25 Rocky Mountain L.Rev. 34 puts it, "the allocation (of the burden of proof) is determined according to considerations of fairness, convenience and policy". In most cases, convenience suggests that the party with the most ready access to the means of proof should have to produce it. One of the goals of proof is the production of reasonably accurate information and therefore there should be an obligation on the party having most access to such information to provide it or bear the risk of non-persuasion. Considerations of fairness suggest also that the party seeking change should bear the risk of non persuasion in that the status quo would otherwise prevail. Of course concerns of convenience and fairness may be affected by particular circumstance and, for example, may depend upon an assessment of the respective resources of the parties. Ultimately the notion of "burden of proof" is only of significance where the tribunal has not been persuaded."

19. Placing the burden of proof on an appellant generally is consistent with the scheme of the *Act*, which contemplates that the procedure under Section 112 of the *Act* is an appeal from a determination already made and otherwise enforceable in law.

20. Thus, for example, absent any other supporting evidence, the fact that an employee is terminated after the filing of an employment standards complaint does not prove that a breach of section 83 has been shown: *Re Performance Development Ltd.*, BC EST # D446/97. In appropriate circumstances, however, where there is other evidence, a breach of section 83 may be the only reasonable inference from the facts: *Re Photogenis Imaging*, BC EST # D534/02.

21. The Tribunal has consistently held that to succeed in establishing that an employer has contravened section 83 an employee must show that the actions of the employer were motivated at least in part by the prohibited ground. There must be "some evidence" that the actions were motivated by the prohibited ground: *Zolton Kiss*, BC EST # D122/96.

22. In this case, for these reasons I agree with the analysis of Member Stevenson, which succinctly summarized the position as follows:

> "Cameron submits the Act does not place the onus on the employee to prove the employer's intent.
>
> Fairly read, however, the delegate's analysis does not impose on Cameron the burden of proving his employer's intent, as he suggests. The focus of the delegate's analysis was whether there was objective evidence to support a finding that LAL had taken action against Cameron for exercising his rights under the Act. I do not read the Determination as saying anything more than that Cameron had the burden, which was not met, of persuading the delegate, through objective evidence and on balance, that LAL had contravened Section 83."

23. To the extent that the Branch Guideline quoted by Cameron contradicts this analysis it is wrong.

ORDER

24. The application for reconsideration is denied. Pursuant to section 116 of the *Act* the decision of the Tribunal in BC EST # D076/06 dated July 11, 2006 is confirmed.

John Savage
Member
Employment Standards Tribunal