An Application for Reconsideration

- by -

Robbie Gabrysh

- 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: Ian Lawson

FILE No.: 2005A/70

DATE OF DECISION: July 14, 2005

DECISION

SUBMISSIONS

Robbie Gabrysh and Cathy Gabrysh	on behalf of Robbie Gabrysh
Erwin Schultz	on behalf of the Director of Employment Standards
D.G. Fern	on behalf of Geoff Fern and Patricia Fern doing business as Ferndale Ranch

OVERVIEW

1. On December 10, 2004, a Determination was issued against Geoff Fern and Patricia Fern doing business as Ferndale Ranch ("Ferndale") in the amount of $1,020.93, on account of vacation pay owing to former employee Robbie Gabrysh ("Gabrysh"), together with an administrative penalty in the amount of $500.00. Ferndale appealed that Determination to this Tribunal and its appeal was allowed by Tribunal Member John Savage on April 6, 2005 (BC EST #D044/05 – the "Original Decision"). Gabrysh filed a Request for Reconsideration of the Original Decision on April 27, 2005. This Request is now decided on the basis of written submissions and all the material before the Tribunal.

FACTS

2. The Original Decision found there were no facts in dispute between the parties: Gabrysh managed Ferndale's cattle ranch and was paid an annual salary plus benefits. Gabrysh commenced his employment on July 1, 1997 and was terminated on May 15, 2004 when the ranch was sold. The Original Decision found the terms of Gabrysh's employment were set out in a written agreement which, however, had not been signed by the parties. One of the terms of the agreement was that Gabrysh was entitled to a "reasonable amount of paid vacation time" which Gabrysh and his wife Cathy Gabrysh were to schedule "in a manner consistent with their responsibilities." Gabrysh and his wife split the work evenly between them, and some chores were performed as well by their children, but paycheques were issued only to Gabrysh. After his termination, Gabrysh filed a complaint with the Director that he was owed vacation pay.

3. During the last year of his employment, Gabrysh took 10 days off work with pay to attend a funeral, and he took a further 22 days off with pay to work at a sawmill near the end of his employment. He also took 14 paid vacation days in July and November of 2003. The Director's delegate decided that Gabrysh was owed vacation pay, and did not include as vacation time the 10-day bereavement leave and the 22-day sawmill absence. In its appeal from this Determination, Ferndale argued the delegate erred by not counting these 32 days as paid vacation. In allowing Ferndale's appeal, Tribunal Member Savage referred to the vacation clause of the unsigned employment contract and stated:

> This provision is not inconsistent with the employer's obligations under subsection 57(2) of the *Employment Standards Act*. In the circumstances of this contractual provision, in my opinion the voluntary intentional absence of the employee from work at Ferndale Ranch while being paid to work there but actually working at other employment falls within the ordinary meaning of the term

> "vacation". While not recorded as vacation it qualifies as vacation within the ordinary meaning of that term….
>
> With respect to the time taken off work for bereavement, the contract of employment does not provide for bereavement leave. There is no evidence of a practice of allowing bereavement leave. As there is no contract or practice allowing for bereavement leave, and the employee was paid during this period, this time take [*sic*] off work would also qualify as vacation within the ordinary meaning of that term.

4. In his Request for Reconsideration, Gabrysh submits there were errors of law in the Original Decision. Among the points Gabrysh raises are: the Tribunal erred in accepting an unsigned document as evidence of a legal contract; the Tribunal ignored the plain language of section 57 which creates vacation entitlement for employees; and the Tribunal ignored how the *Act* defines "manager." Gabrysh's submission ends with the following remarks:

> In conclusion it is very disheartening that the Tribunal would disallow a man and his family, that put their whole heart and a lot of blood, sweat, and tears into a business, the same rights that every other employee across the nation receives. Hopefully the Tribunal decision on this case wasn't influenced by their fear of having to wear Darth Vader suits. Please review all the evidence that was put forth and come to a more realistic decision in this case. This decision if left the way it is will most certainly cause turmoil in the Labour Force. 1) Allowing an unsigned, undated, not agreeable document to stand as a contract. 2) Not allowing a person to have two jobs at the same time. Are [*sic*] both very serious issues that we are dealing with.

ISSUE

5. In any request for reconsideration there is a threshold issue whether the Tribunal will exercise its discretion under section 116 of the *Act* to reconsider the original decision.

ANALYSIS OF THE THRESHOLD ISSUE

6. The Tribunal's power to reconsider its decisions is discretionary. 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 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, 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 Tribunal 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 Tribunal Members' 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.

7. While Gabrysh's request was certainly made in a timely fashion, I am not satisfied that any of the issues he raises are important in the context of the *Act*. Instead, I find his request to have been made in the faint hope I might re-weigh the evidence and argument put before Tribunal Member Savage and come to a different conclusion. The reconsideration power must be used sparingly and only where important issues are raised (see *Re Valoroso*, BC EST #RD046/01). If it were otherwise, the appeal process would be undermined and every unsuccessful party at the appeal stage would make a request for reconsideration. The reconsideration power is designed to be used only where an important issue has arisen which the Tribunal accepts ought to be subjected to careful reconsideration.

8. I do not accept that the vacation pay issue arising in this case has any unusual importance in the context of the *Act*. In my review of the Determination and the Original Decision, I see the delegate also accepted the unsigned contract as accurately setting out the terms of Gabrysh's employment. An unsigned contract can be evidence of the bargain struck by the parties, just as much as oral testimony about the parties' discussions when Gabrysh was hired. I see no merit to any of the points Gabrysh raises in order to persuade me to undertake a reconsideration of the Original Decision. Indeed, the Original Decision strikes me as entirely correct, as an employee who receives 32 days off work with pay could only have received those days off as paid vacation, in the absence of any other contractual provision for paid leave. It is not my place, however, to express such an opinion as to the correctness of the Original Decision, unless I am persuaded that the reconsideration power ought to be exercised in this case. Having not been so persuaded, I must refuse Gabrysh's request.

ORDER

9. Pursuant to section 116 of the Act, the request for reconsideration is denied.

Ian Lawson
Member
Employment Standards Tribunal