An Application for Reconsideration

- by -

Sol Station Body Bar Inc.
("Sol Station")
- and -
Cal-Terra Developments Ltd.
("Cal-Terra")

- 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.: 2015A/110

DATE OF DECISION: November 2, 2015

DECISION

SUBMISSIONS

Terry Magnus	on behalf of Sol Station Body Bar Inc. and Cal-Terra Developments Ltd.

OVERVIEW

1. This is an application filed by Sol Station Body Bar Inc. ("Sol Station") and Cal-Terra Developments Ltd. ("Cal-Terra") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of a decision issued by the Tribunal on July 15, 2015 (BC EST # D072/15; the "Appeal Decision"). I shall jointly refer to Sol Station and Cal-Terra as the "Applicants".

2. I am adjudicating this application based solely on the written submissions filed on behalf of the Applicants and, at this juncture, am considering whether the application passes the first stage of the *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98). If the application passes the first stage of the *Milan Holdings* test, the respondent parties will be asked to provide submissions relating to the merits of the application and the matter will then be finally adjudicated. On the other hand, if the application does not pass the first stage, it will be summarily dismissed and the Appeal Decision will be confirmed.

3. In adjudicating this matter, and in addition to the Applicants' submissions, I have also reviewed the complete record that was before the Tribunal Member who issued the Appeal Decision.

PRIOR PROCEEDINGS

4. On January 6, 2014, Pilar Hunter ("Ms. Hunter") filed an unpaid wage complaint against Sol Station in which she claimed an estimated $15,340 in unpaid wages. This complaint was the subject of an oral complaint hearing held before a delegate of the Director of Employment Standards (the "delegate") on November 21, 2014. On April 8, 2015, the delegate issued a Determination against both Applicants in a total amount, including five $500 monetary penalties (see section 98 of the *Act*) and interest (see section 88 of the *Act*), of $13,852.85. The delegate also issued "Reasons for the Determination" (the "delegate's reasons") setting out the parties' evidence and argument, his findings of fact and final orders, concurrently with the Determination.

5. There was a great deal of conflicting evidence before the delegate and, in addition, a dearth of evidence on certain important aspects of the dispute. By way of a brief summary, the delegate made the following findings:

- Ms. Hunter was a Sol Station employee for purposes of the *Act*;
- Ms. Hunter was not, as she alleged, hired on a $3,000 per month wage agreement but, rather, was to be paid on a commission arrangement based on the gross monthly revenues of the salon business. However, since there was inadequate evidence before the delegate regarding the salon's monthly revenues during her 8.5-month tenure, he awarded her wages based on the regulatory minimum wage, less wages previously paid to her;
- Ms. Hunter was not paid 4% vacation pay as mandated by section 58 of the *Act*;

- Ms. Hunter was terminated without just cause and thus entitled to one week's wages as compensation for length of service under section 63 of the *Act*; and
- Sol Station and Cal-Terra were "associated corporations" as defined in section 95 of the *Act* and, as such, were "jointly and separately liable for payment of the amount stated in a determination"

6. The Applicants filed a joint appeal of the Determination alleging all three statutory grounds, namely, that the delegate erred in law, failed to observe the principles of natural justice and that it had new evidence (see subsections 112(1)(a), (b) and (c) of the *Act*). More specifically, the Applicants alleged that Ms. Hunter was the "owner" of the salon business rather than being hired to manage the business; the delegate's calculations did not properly account for all monies paid to Ms. Hunter during her tenure; Ms. Hunter should not have been awarded compensation for length of service due to her "fraud and embezzlement"; and that the Applicants should not have been the subject of a section 95 declaration.

7. The Applicants' appeal was summarily dismissed under subsection 114 of the *Act*.

THE APPLICATION FOR RECONSIDERATION

8. Mr. Terry Magnus, who is the sole officer and director of the two Applicants – and who has represented both firms throughout these proceedings – strongly disagrees with the delegate's findings, as confirmed by the Appeal Decision. He continues to assert that the two corporations should not have been declared to be one employer under section 95 of the *Act*. He says that the Determination does not properly account for all monies paid by Sol Station to Ms. Hunter. He says that Ms. Hunter was not a Sol Station employee, at least not after May 22, 2013 (her tenure spanned April 1 to December 15, 2013).

9. Mr. Magnus has also provided some documentation that was not before the delegate or contained in the submissions filed on appeal. These documents – which have, in my view, rather limited, if any, probative value – are not properly before me in this application. In particular, he submitted a 1-page "affidavit" from an individual who says she worked at the salon. This document is riddled with hearsay statements and contains several statements that are pure conjecture wholly outside this individual's apparent personal knowledge. In light of the strict test for admissibility set out in *Davies et al.*, BC EST # D171/03, this document would not have been admissible had it been filed as part of the Applicants' appeal submissions and it most certainly is not now properly before the Tribunal.

FINDINGS AND ANALYSIS

10. The Tribunal's statutory reconsideration power is discretionary. The Tribunal, as enunciated in the *Milan Holdings* decision, will not automatically conduct a full review into the merits of a section 116 application. Before the Tribunal will fully consider the application on its merits, the applicant must first demonstrate that it:

> …has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. (*Milan Holdings*, page 7)

11. A simple statement of disagreement with the appeal decision no matter how strongly voiced (and Mr. Magnus undoubtedly has the very strongest belief in the righteousness of his cause), without cogent and probative evidence that the decision was wrongly decided, will not take the applicant past the first stage:

> …the following factors have been held to weigh against a reconsideration: …
>
> Where the application's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence). (*Milan Holdings*, page 7)

12. In the instant case, there was a good deal of disputed evidence before the delegate. Indeed, the parties' positions on some central questions (such as whether Ms. Hunter was an employee) were diametrically opposed. The delegate was called on to make findings of fact in the face of conflicting evidence. I wholly endorse the view expressed in the Appeal Decision that none of the delegate's findings was made without a proper evidentiary foundation and, accordingly, none of those findings constitutes a legal error by the delegate.

13. More fundamentally, this application is nothing more than a second attempt (the first being the appeal itself) to have the Tribunal revisit findings of fact and substitute its decision for that of the delegate. However, each and every one of the challenges now raised on reconsideration was fully – and in my view, correctly – addressed by the delegate and in the Appeal Decision. By way of summary, I should note that whether or not Ms. Hunter was an "employee" was addressed at pages R14 – R15 of the delegate's reasons and at paras. 28 – 31 of the Appeal Decision. The section 95 declaration was addressed at page R18 of the delegate's reasons and at para. 37 of the Appeal Decision. Ms. Hunter's alleged defalcations were addressed at paras. 32 – 34 of the Appeal Decision. I endorse the reasoning set out in both the delegate's reasons and the Appeal Decision regarding these matters.

14. Mr. Magnus does not now contest the delegate's finding that Sol Station did not have just cause to dismiss Ms. Hunter – he says that "I was not able to fire her as she was not an employee". Nevertheless, I am in total agreement with the delegate's and the Member's decision on appeal that Sol Station did not prove it had just cause for dismissal.

15. Simply put, and in summary, the arguments advanced in this application have already been fully, and in my judgment correctly, considered and adjudicated. Accordingly, there is no reason to proceed to the second stage of the *Milan Holdings* test.

ORDER

16. Pursuant to subsection 116(1)(b) of the *Act*, this application for reconsideration is refused and the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal