An Application for Reconsideration

- by -

P.C. Bang Pacific Theatre Ltd.
("PCBT")

- 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: Shafik Bhalloo

FILE No.: 2012A/110

DATE OF DECISION: October 26, 2012

DECISION

SUBMISSIONS

Gordon Haddrell — on behalf of P.C. Bang Pacific Theatre Ltd.

OVERVIEW

1. P.C. Bang Pacific Theatre Ltd. ("PCBT") seeks reconsideration under section 116 of the *Employment Standards Act* (the "*Act*") of a decision of a Member of the Tribunal, BC EST # D092/12, made on September 6, 2012, (the "Original Decision").

2. The Original Decision considered an appeal by PCBT of a determination issued by a delegate of the Director of Employment Standards (the "Director") on June 1, 2012, (the "Determination"), wherein the Director determined that PCBT, a former employer of Stephen McLaughlin ("Mr. McLaughlin"), contravened sections 63 and 58 of the *Act* and ordered PCBT to pay Mr. McLaughlin $4,090.69, an amount which included both wages and interest.

3. The Director also imposed administrative penalties on PCBT under section 29(1) of the *Employment Standards Regulation* (the "*Regulation*") in the amount of $1,000.00.

4. PCBT appealed the Determination on the grounds that the Director erred in law and failed to observe the principles of natural justice in making the Determination. The Member, in the Original Decision, dismissed the appeal and confirmed the Determination.

5. In this reconsideration application, PCBT focuses on a much narrower issue than the issues it focused on in the appeal of the Determination. PCBT is challenging the Member's interpretation of section 65(1)(d) of the *Act* and her decision to uphold the delegate's determination that the exemption for termination pay under section 65(1)(d) did not apply in the circumstances presented by PCBT.

6. In the Reconsideration Application Form, PCBT asks this Tribunal to vary or change the Original Decision, although in its written submissions, PCBT asks the Tribunal to cancel the Original Decision and order that the exemption in section 65(1)(d) of the *Act* applies in the circumstances presented by PCBT.

7. PCBT has not requested an oral hearing of its reconsideration application. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings on applications for reconsideration. Having reviewed the materials before me, I find I can decide this application based on the written materials filed by PCBT, without an oral or electronic hearing.

FACTS AND ARGUMENT

8. In the Original Decision, the Member succinctly summarized Mr. McLaughlin's complaint, the delegate's Reasons for the Determination (the "Reasons") and the parties' submissions on appeal of the Determination as follows:

> Mr. McLaughlin worked from home as a software developer for P.C. Bang Ltd. ('Bang'), a company that operated a local area network (LAN) business. Mr. McLaughlin began working for Bang on March 13, 2006, under the direction of Gordon Haddrell, Bang's sole director. Bang ceased retail operations in 2008

and continued as a software developer and trademark holding company under the name P.C. Development Company Ltd., of which Mr. Haddrell was also a director. Mr. McLaughlin worked for P.C. Development Company Ltd. in its retail operations.

PCBT was established in 2010 with Mr. Haddrell and Brendan Pickering as directors. It commenced retail operations in 2011 at which time Mr. McLaughlin was verbally advised that his work with Bang was ending and that he could either vacate the premises immediately or begin working for PCBT under Mr. Haddrell [sic] and Mr. Pickering's direction. Mr. McLaughlin did not receive a written notice of termination from Bang and went to work for PCBT. Mr. Haddrell contended that Mr. McLaughlin voluntarily quit his employment with Bang in July 2011 in order to continue to work with PCBT. Although Mr. McLaughlin was required to work out of an office during set hours and received a salary increase, he worked on the same software development he had worked on for Bang. Mr. McLaughlin advised the delegate that he helped install and configure the servers at the new location, helped install computer networking cable, and assisted in assessing the new location and layout of the new store.

Mr. Haddrell asserted that section 97 of the *Act* did not apply because there were [sic] no sale of assets or transfer of business between Bang and PCBT and because he was the sole director and shareholder of Bang and only one of two directors and shareholders of PCBT. Mr. Haddrell further contended that prior to July 12, 2011, Bang did not have any physical presence and that Mr. McLaughlin was an 'on-site liaison' to ensure the software he developed was working as intended. Mr. Haddrell further asserted that any equipment Bang left in the space occupied by PCBT after July 12, 2011, was only there temporarily.

On January 10, 2012, Mr. Haddrell told Mr. McLaughlin that PCBT's assets were going to be seized, and asked him to back up the servers. The landlord subsequently locked the employees out of the building. Mr. Haddrell asked Mr. McLaughlin to continue working another week from home to produce documentation in support of his software development. On January 16, 2012, Mr. McLaughlin went to Mr. Haddrell's home to collect his paycheque and to inquire into the status of his work. Mr. Haddrell advised him that he did not have a cheque ready and asked him to return the following day. On January 19, 2012, Mr. Haddrell told Mr. McLaughlin that his cheque would be ready the following Monday and that he needed him to work for another week out of his home to complete some documents. Mr. McLaughlin received his final paycheque on January 23, 2012, but refused to work out of his own home because he would have had to use his own equipment and because he felt he had been laid off. Mr. McLaughlin received a final paycheque for 50 hours of work for the pay period ending January 10, 2011 [*sic*], and for 38.5 hours of 'prepaid final work week'. Mr. McLaughlin also received two Records of Employment (ROE's), one from Bang showing a first day worked as March 15, 2006, and the last day July 11, 2011. The ROE indicated 'other' as a reason for issuance, with the following additional comments: 'transfer to indirectly related corporation for same position'. The second ROE was issued by PCBT showing the first date worked as July 12, 2011, and the last day worked January 10, 2012. Both ROE's were signed by Mr. Haddrell.

Mr. Haddrell argued that Mr. McLaughlin quit his position with PCBT when he refused to work an additional week as requested. Mr. Haddrell agreed that PCBT's office closed on January 10, 2012, and that he had a discussion with Mr. McLaughlin about continuing to work for an additional week on January 24, 2012, based on the dates on the ROE's. Mr. Haddrell argued that the written notation 'prepaid final work week' constituted written notice of termination of employment.

Mr. Haddrell provided the delegate with three emails he sent to Mr. McLaughlin in February 2012 asking him about work Mr. McLaughlin was to complete. Mr. Haddrell asserted that these emails demonstrated that Mr. McLaughlin continued to work after receiving his notice of termination.

At issue before the Director's delegate was whether or not Mr. McLaughlin was owed compensation for length of service, and if so, in what amount.

The delegate analyzed whether or not section 97 applied to Mr. McLaughlin's employment on July 11, 2011. She concluded that, whatever the arrangements between Bang and PCBT, Mr. McLaughlin used Bang's software on PCBT's behalf on July 12, 2011, and for some months afterwards. She found the

> term 'dispose' to be broad enough to encompass the transfer of any assets from one company to another by any means and concluded that Bang had 'disposed' of its assets to PCBT.
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> The delegate noted that there was no dispute that Mr. McLaughlin had not been given written notice of termination when the assets were disposed of. She found that, as of July 12, 2011, Mr. McLaughlin worked at the same office, on the same equipment and on the same software development project, as he had been the day before. The delegate determined that Mr. McLaughlin's employment was continuous and uninterrupted through the change from Bang to PCBT. She concluded that section 97 was triggered by the fact that Mr. McLaughlin was an employee of Bang when part of its assets were disposed of to PCBT and that for the purposes of the *Act*, Mr. McLaughlin's employment was deemed to be continuous and uninterrupted by the disposition.
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> Finally, the delegate noted that the parties agree that PCBT was shut down after the company assets were seized and doors locked on January 10, 2012. She found that, despite the parties' differing recollection of the precise date they discussed the possibility of Mr. McLaughlin performing additional work, they did not dispute that there was a break in his employment from at least January 10, 2012, until January 19, 2012. The delegate found that PCBT had not met the requirements for a layoff. She determined that Mr. McLaughlin was not able to work after January 10, 2012, and was not asked to return to work until at least 9 days later, so he was terminated. She concluded that PCBT had not met the requirements of section 63 of the *Act* and had failed to pay termination pay in accordance with the *Act*.

9. As indicated previously, the Member concluded that PCBT failed to demonstrate an error of law or a breach of the principles of natural justice on the part of the Director and, therefore, dismissed the appeal on both grounds.

10. The reconsideration application, as previously indicated, challenges the Member's interpretation of section 65(1)(d) of the *Act* and the correctness of her decision to uphold the Director's Determination that the exemption for termination pay under section 65(1)(d) did not apply in the circumstances presented by PCBT.

11. The penultimate passage in the Original Decision contains the reasons for the Member's decision on the issue in question:

> As I understand Mr. Haddrell's argument, once the Landlord locked the doors, Section 63 of the *Act* did not apply because Mr. McLaughlin was 'employed under an employment contract that became impossible to perform' due to an unforeseeable event or circumstance other than receivership or insolvency (s. 65(1)(d)). As the Tribunal noted in *M.J.M. Conference Communications of Canada Corp.* (BC EST #D182/04) the Tribunal has given a narrow interpretation to the s. 65 exceptions. Specifically, the Tribunal has held that s. 65(1)(d) does not include situations where a contract of employment was unable to be performed because a landlord shut down an employer's business by executing a distress warrant (*MacDonald & Wilson Ltd.* (BC EST #D497/97) or where an employer shut down after being evicted from its premises because 'an eviction caused by a failure to reach an agreement on a lease or a dispute over rent is largely foreseeable'. (*Top Win Café Ltd.* (BC EST #D629/01).

12. In PCBT's reconsideration application, Mr. Haddrell, on behalf of PCBT, attempts to distinguish the cases the Member refers to in the quoted passage above stating that these cases involved situations that were foreseeable because either the employer was insolvent or on the way to insolvency, having defaulted on debts or "overstayed their lease". Mr. Haddrell argues that PCBT's case is very different from those cases. He states PCBT did not suffer "any sort of insolvency". Instead, it was involved in a "rent dispute" with its landlord and "demand[ed] the return of a rent overpayment". He further argues that at the time the landlord executed a distress warrant "no rent was owing" and, therefore, "it could not have been expected or anticipated by a reasonable person that the landlord would execute a seizure under the *Rent Distress Act* claiming…rent arrears". Therefore, he argues, the exemption in section 65(1)(d) applies in the circumstances presented in PCBT's case.

13. Mr. Haddrell also adduces new evidence in his written submissions concerning an alleged legal proceeding by PCBT against its former landlord for wrongful distress. He states that at an examination for discovery in the legal proceeding, the landlord acknowledged, "that the seizure he ordered was done in error" and his "accountant misrepresented the nature of [the parties'] dispute to the landlord" and misinformed the directors that PCBT "had been provided a substantial refund on both past and future rent paid" when, in fact, "the landlord continued to hold the funds pending the conclusion of a compulsory arbitration that was initiated by a third party to which a judgment ordering the return of rent money paid might occur".

14. He concludes by pointing out that PCBT is solvent and did offer additional work to Mr. McLaughlin, and it continues to fund other company expenses, including two (2) court cases in which it has counsel.

ISSUE

15. In an application for reconsideration, the Tribunal must decide whether to exercise its discretion under section 116 of the *Act* to reconsider the Original Decision.

ANALYSIS

16. Section 116 of the *Act* delineates the Tribunal's statutory authority to reconsider any order or decision of the Tribunal:

> **Reconsideration of orders and decisions**
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> 116 (1) On application under subsection (2) or on its own motion, the tribunal may
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> (a) reconsider any order or decision of the tribunal, and
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> (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.
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> (2) The director or a person named in a decision or order of the tribunal may make an application under this section.
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> (3) An application may be made only once with respect to the same order or decision.

17. Reconsideration is not an automatic right of any party who is dissatisfied with an order or a decision of the Tribunal. Reconsideration is within the sole discretion of the Tribunal, and the Tribunal must be very cautious and mindful of the objects of the *Act* in exercising its discretion. (See *Re: Eckman Land Surveying Ltd.*, BC EST # RD413/02).

18. The Tribunal, in *Re: British Columbia (Director of Employment Standards) (sub nom) Milan Holdings Ltd.),* BC EST # D313/98, delineated a two-stage approach for the exercise of its reconsideration power under section 116. In the first stage, the Tribunal must decide whether the matters raised in the application warrant reconsideration. In determining this question, the Tribunal will consider a non-exhaustive list of factors that include: (i) whether the reconsideration application was filed in a timely fashion; (ii) whether the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already provided to the adjudicator; (iii) whether the application arises out of a preliminary ruling made in the course of an appeal; (iv) whether the applicant 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; (v) whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. If the applicant satisfies the requirements in the first stage, then the Tribunal will proceed to the second stage of the inquiry, which focuses on the merits of the original decision.

19. Having delineated the parameters, both statutory and in the Tribunal's own decisions, governing reconsideration applications, I am of the view that this is not a case that warrants the exercise of the Tribunal's discretion to reconsider the Original Decision. PCBT's application fails on the first stage of the two-stage analysis in *Milan Holdings Ltd., supra.* More specifically, I find that Mr. Haddrell, in his written submissions, is largely repeating his previous submissions in the appeal of the Determination on the question of the application of the exemption in section 65(1)(d):

> **65** (1) Sections 63 and 64 do not apply to an employee
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> …
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> (d) employed under an employment contract that is impossible to perform due to an unforeseeable event or circumstance other than receivership, action under section 427 of the *Bank Act* (Canada) or a proceeding under an insolvency Act,

20. Mr. Hadrell is rearguing that it became "impossible" for PCBT to perform its contract with Mr. McLaughlin because it was "unforeseeable to PCBT that its dispute with its landlord over rent overpayment by PCBT, and particularly when no rent was owing to the landlord, would lead to the landlord executing "a seizure under the Rent Distress Act claiming that [PCBT] owed rent arrears." He attempts to distinguish the cases the Member relies upon in the Original decision stating that in those decisions the employer was insolvent and "defaulted on debts including past lease payments due" and therefore "the rent terminations were foreseeable". In this case, the landlord is not insolvent and rent is not owed, he states. He also adduces fresh evidence that PCBT has commenced legal proceedings against the landlord over the latter's distraint and adds that during the examination or deposition in the legal proceeding, the landlord admitted that the seizure or distraint it ordered against PCBT was in error.

21. It is important to note that the Tribunal, in previous decisions, has taken heed that the *Act* is a remedial legislation and that an interpretation that extends its protection to as many employees as possible is favoured over one that does not. Therefore, when considering sections of the *Act* that have the effect of removing a minimum statutory benefit from employees, the Tribunal has taken an approach that involves giving a narrower interpretation to such sections (see *Fraser-Fort George Museum Society*, BC EST # D292/01). In the case of the exception to entitlement to compensation for length of service contained in Section 65(1)(d), the Tribunal has specifically instructed that this exemption should be used cautiously (see *Pro-Tru-Tec Investments Ltd.*, BC EST # D207/00).

22. In *Labyrinth Lumber Ltd.*, BC EST # D407/00, the Tribunal, when considering the meaning of the term "unforeseeable" in section 65(1)(d) of the *Act*, stated that in its ordinary and grammatical sense, "unforeseeable" means incapable of being anticipated.

23. The onus of establishing a sufficient evidentiary basis to invoke the exemption in section 65(1)(d) is on the party relying on the exemption, in this case PCBT. Here, PCBT made bare assertions in the appeal of the Determination and subsequently repeated them in support of its reconsideration application, namely, that it was involved in a "rent dispute" with the landlord and the latter's actions were unlawful because "no rent was owed at the time of the seizure, and there was no longer a lease in effect". If there is a rent dispute between PCBT and its landlord with PCBT alleging overpayment and the landlord taking a different view than PCBT on the matter particularly when there is "no longer a lease in effect" (as admitted by PCBT in its earlier appeal submissions), I am not convinced that the landlord's distraint is "unforeseeable" as defined in *Labyrinth Lumber Ltd., supra.*

24. As for Mr. Haddrell's evidence that PCBT has commenced legal proceedings against the landlord over the latter's distraint this evidence does not necessarily mean that the landlord was in the wrong or acted unlawfully or that the landlord's actions were unforeseeable to PCBT. It may well be that the landlord's alleged actions were unlawful, but that evidence was not before the delegate or the Member beyond PCBT's bare assertions that the landlord acted unlawfully. It would appear from the submissions of Mr. Haddrell that the litigation between PCBT and the landlord is still ongoing and no determination has been made as of yet. While Mr. Haddrell makes a new allegation that the landlord, during a deposition in the legal proceeding, admitted that the seizure or distraint it ordered against PCBT was in error, this is an unsubstantiated or bare assertion on Mr. Haddrell's part without supporting evidence. No transcripts of deposition or examination were included. I also note that Mr. Haddrell's bare assertions would not qualify as new evidence based on the test for allowing new evidence on appeal or in reconsideration applications set out in *Re: Merilus Technologies Inc.*, BC EST. # D171/03. In this case, The Tribunal laid out four conditions that must be met before new evidence will be considered:

- The evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- The evidence must be relevant to a material issue arising from the complaint;
- The evidence must be credible in the sense that it is reasonably capable of belief; and
- The evidence must have high potential probative value, in the sense that, if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

25. The four criteria above are a conjunctive requirement and therefore the party requesting the Tribunal to admit new evidence has the onus to satisfy each of them before the Tribunal will admit any new evidence.

26. In the case at hand, I am not satisfied that PCBT has met the first criterion in the *Merilus* test in relation to this new evidence. There is no evidence when the deposition of the landlord took place and I am also not persuaded that PCBT could not, with the exercise of due diligence, have discovered the said evidence and presented to the Director during the investigation or adjudication of the Complaint and prior to the Determination being made.

27. I find that PCBT, or Mr. Haddrell on its behalf, has not discharged its evidentiary burden to show that section 65(1)(d) of the *Act* applies in the circumstances presented by PCBT and that the Member erred in the Original Decision in upholding the Determination.

ORDER

28. Pursuant to section 116 of the *Act* and Rule 27 of the Tribunal's *Rules of Practice and Procedure*, I order the Original Decision, BC EST # D092/12, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal