An Application for Reconsideration

- by -

Irma Tumanan
("Ms. Tumanan")

- 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/123

DATE OF DECISION: November 4, 2015

DECISION

SUBMISSIONS

Scott M. MacKenzie — counsel for Irma Tumanan

OVERVIEW

1. Irma Tumanan ("Ms. Tumanan") applies, pursuant to section 116 of the *Employment Standards Act* (the "*Act*"), for reconsideration of BC EST # D093/15 issued by Tribunal Member Stevenson on September 10, 2015 (the "Appeal Decision").

2. By way of the Appeal Decision, Member Stevenson varied a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on March 31, 2015, pursuant to which Shelley Brennan ("Ms. Brennan") was ordered to pay Ms. Tumanan the total sum of $4,485.61 on account of unpaid wages (including regular and overtime wages, vacation pay and compensation for length of service) and section 88 interest. The bulk of the unpaid wage award consisted of vacation pay ($2,369.54) and it is this award that is the focus of the present application. Member Stevenson issued the following order:

> Pursuant to section 115 of the *Act*, I order the Determination dated March 31, 2015, be varied to cancel the annual vacation entitlement found owing to Ms. Tumanan and the matter referred back to the Director. If the delegate who made the determination is unavailable, I would implore the Director to minimize any further delay by having this matter addressed as quickly as possible.

3. Ms. Tumanan, through her legal counsel, says that this order should be cancelled and advances three reasons in support of that position (discussed below). At this juncture, I am considering whether this application passes the first stage of the two-stage *Milan Holdi*ngs test (see *Director of Employment Standar*ds, BC EST # D313/98). At the first stage, the Tribunal must be satisfied:

> …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. 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. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law"… (*Milan Holdings*, page 7).

4. If the application passes the first stage, the respondent parties will be requested to file submissions regarding the merits of the application and I will then issue reasons for decision. On the other hand, if the application fails to pass the first stage, it will be summarily dismissed.

5. The record before me includes Ms. Tumanan's submissions as well the documents that were before Member Stevenson.

PRIOR PROCEEDINGS

6. Ms. Tumanan worked for Ms. Brennan as a live-in caregiver looking after Ms. Brennan's children and undertaking other household tasks. Her employment spanned the period from January 2010 to June 8, 2012. On October 30, 2012, Ms. Tumanan filed an unpaid wage complaint seeking nearly $21,000 in unpaid wages.

This complaint was the subject of an oral complaint hearing held on May 30, 2013, and July 18, 2013, at which both parties attended (Ms. Tumanan with legal counsel). Regrettably, there was an extended delay – attributable, I understand, to the fact that the delegate was away from work on an extended leave following the hearing – until the Determination and accompanying "Reasons for the Determination" (the "delegate's reasons") were both issued on March 31, 2015.

7. Apart from the delay from end of the hearing, the delegate's task was complicated by the fact that neither party had complete records and, perhaps not surprisingly, provided markedly contrasting testimony regarding several of the issues in dispute. Ultimately, the delegate concluded that Ms. Brennan's evidence was the more cogent and dependable and, for the most part, the delegate relied on Ms. Brennan's evidence in making her findings and orders. As noted above, the delegate ultimately awarded Ms. Tumanan nearly $4,500 in unpaid wages over half of which was vacation pay. The delegate also levied five separate $500 monetary penalties (see section 98 of the *Act*) against Ms. Brennan.

8. Ms. Brennan, although conceding some liability to Ms. Tumanan, appealed the Determination and the appeal principally concerned two issues: i) a "savings bank" that the parties established; and ii) Ms. Tumanan's vacation pay award.

9. The so-called "savings bank" was not an overtime bank established in accordance with section 42 of the *Act*. Rather, as recounted in the delegate's reasons, it was an amalgam of regular wages (typically, $100 per pay period), monies earned by Ms. Tumanan for babysitting Ms. Brennan's children on the weekends (when she would normally not otherwise be required to work), and monies reflecting the difference between the actual prevailing minimum wage (which increased on three occasions over the course of the parties' employment relationship) versus the $8 per hour wage she received (see delegate's reasons, pages R3 and R16). Further, and complicating matters: "Neither party kept an accurate record of the 'bank' or 'savings account' maintained by the Employer during the course of Ms. Tumanan's employment" (delegate's reasons, page R3); "Neither party maintained a record of the on-going banking of wages" (delegate's reasons, page R8).

10. Some or all – this is not entirely clear – of Ms. Tumanan's "banked wages" were paid out to her in 2011 and 2012. The evidence relating to this matter is set out at pages R3 – R4 of the delegate's reasons:

> The only evidence the parties were able to produce with respect to amounts accrued in the bank was an email from Ms. Brennan to Ms. Tumanan on June 3, 2011. The parties agreed at that time there was $2,062.00 in the savings account broken down as follows:
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> - $1,600.00 as a result of the $100.00 per pay period deducted as "savings";
> - $375.00 for "extra" hours worked; and
> - $87.00 due to the increase in minimum wage.
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> Ms. Tumanan agreed she received the following funds in addition to the payment of her regular wages:
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> - $375.00 for the "extra" hours she worked on the weekends when babysitting the kids paid sometime in 2011;
> - $1,000.00 in April 2012 from her savings account; and
> - $300.00 on June 8, 2012 from her savings account. [Note, this was Ms. Tumanan's last day of employment]

11. Ms. Brennan's evidence, which does not appear to have been contradicted, is that whatever monies stood to Ms. Tumanan's credit in the "savings account" were fully paid out to her. The delegate made an unpaid wage award (leaving aside vacation pay) in Ms. Tumanan's favour based on Ms. Brennan's wages and even

indicated that these records indicated that Ms. Tumanan was paid more than what she actually earned in some pay periods but did not credit these "excess payments" to Ms. Brennan (see page R18). The delegate also noted that the parties agreed that Ms. Tumanan also received some cash payments, but neither party had any records regarding these payments. So far as I can determine, the delegate appeared not to make any accounting for monies that may have been paid to Ms. Tumanan by way of cash payments. Leaving aside the matter of vacation pay (discussed below), the delegate's award for regular and overtime wages fully compensated Ms. Tumanan for *all* hours worked during the wage recover period.

12. The delegate found that there was "sufficient evidence to determine the wages that were earned by [Ms. Tumanan] during the last six months of her employment [*i.e.*, during the section 80 wage recover period]" but she was "not satisfied there is sufficient evidence to determine what, if any, 'banked' wages were payable to Ms. Tumanan upon termination of her employment" (delegate's reasons, page R16). The delegate ultimately concluded that she was "unable to determine whether any additional wages remain in the time bank" (page R16). Having made that finding, the delegate calculated Ms. Tumanan's unpaid wage entitlement without regard to the "savings bank" and based solely "on the records of hours worked kept by the Employer" which she had found to be credible and the best evidence available (page R17). The delegate calculated this latter amount (apart from vacation pay) to be $951.55 on account of regular hourly wages and overtime pay. The delegate also awarded Ms. Tumanan vacation pay ($2,369.54), two weeks' wages as compensation for length of service ($815.34), and section 88 interest.

13. With respect to vacation pay, the delegate noted that the parties' employment contract called for three weeks' annual paid vacation and while Ms. Tumanan's initial position was that she did not take any vacation days (page R7), on cross-examination she conceded to taking vacation days in 2010, 211 and 2012 (pages R7 – R8). The delegate's findings with respect to vacation pay are set out below (page R19):

> Ms. Brennan contends that she paid Ms. Tumanan eight hours a day for each vacation day taken. Although I accept Ms. Brennans [*sic*] records of the days worked by the Complainant, I cannot find that the Complainant was paid eight hours for each vacation pay [*sic*, day?] taken as submitted by the Employer. The difficulty in reconciling what may have been paid as vacation days is that the Complainant did not receive the payment of her wages at the required minimum wage rate for the hours worked in a pay period. The Complainant also did not receive the wages she earned in each full pay period since some of the wages such as $100.00 from each pay cheque was also put in to [*sic*] the savings account, essentially making it impossible to conclude what monies were for vacation pay and what monies were for other things which were put into the account.

14. The delegate then concluded (at page R20): "Due to the lack of payroll records and evidence regarding vacation pay paid, I find that the Complainant is owed vacation pay on her total gross earnings from the start of her employment until her termination".

15. Ms. Brennan appealed the Determination and Member Stevenson held that the delegate erred in calculating Ms. Tumanan's vacation pay entitlement. The key aspects of Member Stevenson's decision on this point are reproduced, below (paras. 50; 53 – 55):

> In respect of the decision regarding annual vacation pay, I first note that Ms. Tumanan's annual vacation pay claim in her complaint was $2,987.56. That claim was based on Ms. Tumanan's position that she had taken no vacation days during her employment and, consequently, had received no annual vacation pay at all during her employment. However, the evidence provided to the Director, and accepted, was that Ms. Tumanan took 16 days of vacation in each of the years 2010 and 2011. The vacation periods are identified in the Determination. The evidence provided by Ms. Brennan, both orally and in documented form was that Ms. Tumanan was paid wages during those periods. That evidence is consistent with the records provided by Ms. Brennan, which when examined, shows Ms. Tumanan continuing to receive

> wages during the periods accepted by the Director (and acknowledged by Ms. Tumanan) as vacation days. The Director does not explain why this evidence is not accepted. I appreciate the evidence shows some inconsistency in the calculation of the amounts paid in those pay periods where vacation was taken by Ms. Tumanan, but in my view those inconsistencies are minor and insufficient to cast doubt on the evidence that vacation pay was paid in that period.
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> …
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> Finally, there is no evidence that any of the amounts paid to Ms. Tumanan while she was on vacation time off was "for other things". That is pure speculation by the Director, not based on any facts or evidence provided. In the same vein, the Director states "there is no way of reconciling the monies paid to the Complainant and determining for sure that the excess payments made in certain pay periods were possibly for vacation pay". There was no such contention relating to "excess payments". Ms. Brennan's position was, and is, that vacation pay was paid as eight hours for each day Ms. Tumanan took off. There was no lack of evidence that vacation pay was paid; it is in the documents. The Director has ignored that evidence.
>
> I find it perverse and inexplicable that the Director, in the face of the evidence that Ms. Tumanan took 16 annual vacation days in each of 2010 and 2011 for which the records show she was paid eight hours a day, to find it was "impossible to conclude what monies were for vacation pay" and find, as a result, Ms. Tumanan was entitled to an amount of vacation pay totalling nearly $2400.00. The rationale of the Director, when examined against the evidence as a whole, does not bear up under scrutiny and does not support the finding made. It is an unreasonable assessment of the evidence.
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> In sum, I find the Director has committed an error of law in the finding on vacation pay and that part of the Determination is set aside.

16. It is important to note that Member Stevenson did not conclude that Ms. Tumanan was not entitled to *any* vacation pay (see Appeal Decision, para. 56); rather, he merely referred this issue back to the Director to be recalculated based on the findings of fact made by the delegate with respect to vacation pay actually paid to Ms. Tumanan during her tenure. In all other respects, the Determination stands (save for a possible cancellation of the monetary penalty relating to the section 58 (vacation pay) contravention.

THE APPLICATON FOR RECONSIDERATION

17. Ms. Tumanan's legal counsel alleges three grounds in support of his position that the Appeal Decision should cancelled:

i) "The Tribunal Member erred in law by concluding that there is no evidence that Ms. Brennan 'banked overtime' for Ms. Tumanan";

ii) "The Tribunal Member erred in law by overturning the Delegate's finding that Ms. Tumanan was entitled to receive vacation pay"; and

iii) "Ms. Tumanan submits that it is a breach of the principles of Natural Justice for the Tribunal Member to have made the findings he did without submissions from the Delegate" [who issued the Determination].

FINDINGS AND ANALYSIS

18. In my view, none of the above three arguments has any presumptive merit whosoever. I shall briefly address each point.

Banked Overtime

19. Member Stevenson confirmed the delegate's finding that Ms. Tumanan was entitled to $951.55 in unpaid wages, an amount that included both regular wages and overtime pay. Member Stevenson did *not* conclude that the parties' informal "savings bank" did not include some overtime pay. Indeed, he found just the opposite – see Appeal Decision, para. 18, where he stated: "Notwithstanding the variety of terminology used by the Director to describe the agreement, the Director seems to have understood the essence of the agreement, finding in the Determination was that there was an accord between Ms. Brennan and Ms. Tumanan to "bank" $100.00 a month that probably included amounts attributable to regular hours worked, overtime hours and "extra hours" worked by Ms. Tumanan but that, overall, the arrangement did not conform to the requirements of section 42 of the *Act*." (my underlining) (see also para. 47 of the Appeal Decision).

20. Member Stevenson did conclude, however, that the monies informally "banked" to this account were paid out to Ms. Tumanan (para. 48 of the Appeal Decision) and this finding was consistent with the delegate's findings as set out as pages R3 – R4 of her reasons.

Vacation Pay

21. As noted above, Member Stevenson did not find that Ms. Tumanan was not entitled to any vacation pay; he simply (and in view, correctly) concluded that the delegate very obviously fell into err when she found that no vacation pay whatsoever had ever been paid to Ms. Tumanan. This issue has simply been referred back to the Director for further investigation and recalculation. No final order has yet been issued regarding Ms. Tumanan's possible vacation pay entitlement.

22. Ms. Tumanan will, of course, be given the right to make submissions to the Director (as will Ms. Brennan) regarding Ms. Tumanan's vacation pay entitlement. To repeat, all that Member Stevenson has decided at this juncture, is that the delegate's finding that Ms. Tumanan did not receive *any* vacation pay cannot stand given the clear contrasting evidence on this point that was before the delegate.

Natural Justice

23. Counsel's argument on this point is predicted on the fact that the delegate who heard the evidence (and issued the Determination some 20 months after the completion of the hearing) did not file any submission in the appeal proceedings. The Director did file a submission but one prepared by another delegate since the original delegate was not available due to her being on leave (which is, I understand, to extend to at least May 2016). Counsel submits:

> The Delegate heard evidence over 2 days and made detailed notes of the evidence which supported her findings. Without submissions from the Delegate who heard the evidence and made findings with respect to wages banked/withheld and entitlement to vacation pay, Ms. Tumanan has been denied a fair adjudication on the issue of her entitlement to vacation pay.

24. There are several points to be noted regarding this submission.

25. First, as I previously stated, Member Stevenson did not issue a final order with respect to Ms. Tumanan's vacation pay entitlement. He simply referred the matter back to the Director to be reviewed in light of the clear and obvious error on the part of the delegate with respect to her vacation pay calculation. Ms. Tumanan will be given a full and fair opportunity to make submissions to the Director.

26. Second, the adjudication of this matter has already been delayed to a very significant extent. The original complaint was filed on October 30, 2012 – it is now *over three years* later with no final resolution imminent. While this very considerable delay may be attributable to unfortunate circumstances beyond anyone's control – since the delegate was on leave following the complaint hearing and is now on leave again until May 2016 – this matter needs to proceed apace without further delay. I am unable to see how the *Act*'s section 2(d) dictate that matters be fairly and efficiently resolved would have been respected if the appeal proceedings were delayed until some unknown point after May 2016 when the delegate *might* have been able to provide a submission.

27. Third, the Director's submission was wholly in keeping with the Director's limited role in an appeal to the Tribunal (see *British Columbia Securities Commission*, BC EST # D121/07, judicial review refused: *British Columbia Securities Commission v. Burke*, 2008 BCSC 1244) – particularly, when the matter was adjudicated following a complaint hearing rather than an investigation. Even if the original delegate had filed a submission, it must be remembered that findings of fact and conclusions of law must be set out in the reasons for determination. It is inappropriate for a delegate to use the submission process as a tool to supplement their reasons for decision. It would have been improper for the delegate to say anything much beyond that set out in the submission that was filed on behalf of the Director.

28. Fourth, I note that counsel's submission on this point has been raised for the very first time in this reconsideration application. Counsel did not say a word about this issue in his appeal submission filed with the Tribunal. I do not think it appropriate for this issue to have been raised only after the appeal was adjudicated and a decision, potentially adverse to Ms. Tumanan, was issued.

Summary

29. In my view, none of the three points raised by counsel in his application is, even on a *prima facie* basis, meritorious. I am not persuaded that this application passes the first stage of the *Milan Holdings* test.

ORDER

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

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal