An application for Reconsideration

- by -

Sorensen's Loans 'til Payday Inc.

- 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: Robert Groves

FILE No.: 2006A/101

DATE OF DECISION: November 27, 2006

DECISION

INTRODUCTION

1. This is an application brought by Sorensen's Loans 'til Payday Inc. ("Sorensen's") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") seeking reconsideration of a decision of Member Lawson of the Tribunal rendered under number D043/06 and dated April 3, 2006 (the "April 3, 2006 Decision").

2. The matter originated with a complaint filed by one Deborah Simpson ("Ms. Simpson") under section 74 of the *Act* alleging that Sorensen's had contravened the *Act* by failing to pay her regular wages, overtime wages, compensation for length of service and vacation pay.

3. After a hearing conducted by teleconference on February 9, 2005, Alan Phillips, a Delegate of the Director of Employment Standards, issued a Determination dated February 24, 2005 in which he concluded that Ms. Simpson's complaint should be dismissed (the "February 24, 2005 Determination").

4. Ms. Simpson appealed, and by decision of Tribunal Member Lawson under number D087/05 dated June 24, 2005 (the "June 24, 2005 Decision"), the February 24, 2005 Determination was cancelled on procedural grounds and the matter referred back to the Director for further investigation on the issues of compensation for length of service and overtime only, as the Member concluded that Ms. Simpson had abandoned her claim in respect of regular wages. The Member made no comment concerning the claim for payment of holiday pay.

5. Following an investigation anew of the issues referred, J. Ross Gould, another Delegate of the Director, issued a Report dated November 18, 2005, revised on December 15, 2005 (the "Report"). The Report determined that Sorensen's should pay Ms. Simpson compensation for length of service in the amount of $1,320.00 plus accrued interest, in accordance with section 88 of the *Act*.

6. In a submission to the Tribunal dated December 7, 2005, Sorensen's challenged the conclusion in the Report. Ms. Simpson delivered a submission in reply dated January 16, 2005 (2006, really), in which she expressed her support for the conclusion drawn by Delegate Gould in the Report concerning payment of compensation for length of service. She also requested payment of holiday pay.

7. The matter again came before Member Lawson for decision on the issues that had been referred back, as determined anew by Delegate Gould in his Report. In the April 3, 2006 Decision he subsequently issued, Member Lawson confirmed Delegate Gould's conclusions in the Report, and ordered Sorensen's to pay Ms. Simpson compensation for length of service in the amount of $1,320.00 plus interest pursuant to section 88 of the *Act*.

8. Sorensen's now seeks a reconsideration of Member Lawson's April 3, 2006 Decision. In addition to the material which was before Member Lawson, I have the benefit of submissions from Sorensen's dated August 30, 2006 and October 6, 2006, and a submission from Ms. Simpson dated September 26, 2006. The Tribunal has determined that this application will decided on the basis of the submissions received, and without an oral hearing.

FACTS

9. Sorensen's engages in the business of providing loans on a short term basis, preparing income tax returns, sending and receiving funds by wire, and selling telephone cards. Its head office is located in Port Alberni.

10. Ms. Simpson worked as the accounts manager at Sorensen's premises in Williams Lake. On July 16, 2004 Ms. Simpson received a letter from her employer advising her that she was being demoted to part-time employment. While Ms. Simpson stated that she did not accept the demotion, she worked part-time until the end of August, 2004, at which time she took a leave of absence on the direction of her physician, due to stress.

11. In his report, Delegate Gould determined that sometime near the end of October, 2004, Ms. Simpson made Sorensen's head office aware that she was available to return to work on or about October 29, 2004. Sorensen's did not respond to this communication. A few weeks later, Ms. Simpson prepared her complaint.

12. At the teleconference hearing conducted by Delegate Phillips on February 9, 2005, the representatives of Sorensen's offered to bring Ms. Simpson back to work on a more generous basis in terms of hours than she had worked following the July 16, 2004 communication, but not full-time. Ms. Simpson declined the offer.

ISSUES

13. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:

- Does the request meet the threshold established by the Tribunal for reconsidering a decision?

- If so, should the decision be cancelled or varied or sent back to the original panel, or another panel of the Tribunal?

ANALYSIS

14. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116, the relevant portion of which reads as follows:

> 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, cancel or vary the order or decision or refer the matter back to the original panel or another panel.

15. Previous decisions of the Tribunal, taking their lead from *Milan Holdings* BCEST #D313/98, have consistently held that the reconsideration power is discretionary, and must be exercised with great restraint. This attitude is in part derived in part from section 2 of the *Act*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and

efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is also derived from a legitimate desire to preserve the integrity of the appeal process described in section 112 of the *Act*. A losing party should not easily have available to it an avenue for avoiding the consequences of a Tribunal decision which arises from that process. Nor should it be entitled to an opportunity to re-argue a case that failed to persuade the Tribunal at first instance. Conversely, the winning party should not be subjected to further proceedings by way of reconsideration, and the possibility of a delay in the enjoyment of the fruits of the original decision, as a matter of course. Having regard to these principles, the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent very exceptional circumstances, the existence of which must be clearly established by the party seeking to have the Tribunal's original decision overturned.

16. In order to determine whether an applicant has overcome this significant burden, the Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal asks whether the matters raised in the application warrant reconsideration at all. In order for the answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the original decision which are so important that they demand intervention by way of reconsideration. If the applicant satisfies this requirement the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the original decision. When considering the original decision at this stage, the standard applied is one of correctness: *Zone Construction Inc.* BCEST #RD053/06.

17. In my opinion, Sorensen's application for reconsideration fails at the first stage of the inquiry. The points raised by Sorensen's in its submissions are either inapt, or re-state positions on questions of fact, or the inferences which should be drawn from them, which were argued on earlier occasions in these proceedings. With respect to the latter, even if this application had resulted from a process which one might say had followed the normal course, involving one investigation, followed by one determination, and one previous decision of the Tribunal, I would be reluctant to disturb such findings. It is important to remember, however, that Ms. Simpson's complaint was investigated not once, but twice. Moreover, the first investigation involved a hearing conducted by telephone. Sorensen's makes no submission on this application that it was denied an opportunity to know the substance of Ms. Simpson's case, or to make full answer in reply. Indeed, it had repeated opportunities to make the points raised on this application, and took full advantage of them.

18. It is true that the manner in which this case has made its way through the February 24, 2005 Determination, the June 24, 2005 Decision of Member Lawson, the further investigation of Delegate Gould, his conclusion in his Report which reversed the February 24, 2005 Determination and decided that Ms. Simpson was entitled to compensation for length of service, and Member Lawson's April 3, 2006 Decision which appears to have disagreed with some of the conclusions drawn by Delegate Gould in his Report, but confirmed the decision that Ms. Simpson was entitled to compensation, was calculated to have caused some confusion. The parties in this case are lay persons, and are not represented by legal counsel. Nevertheless, I see no argument of substance in the submissions delivered on behalf of Sorensen's on this application which challenge in any compelling way the conclusion that the actions of Sorensen's in its dealings with Ms. Simpson resulted in law in her being terminated from her position of employment with the company.

19. There were, in the April 3, 2006 Decision of Member Lawson, several different alternative bases articulated by him supporting the conclusion that Sorensen's had terminated Ms. Simpson's employment, any one of which was sufficient to uphold Delegate Gould's determination that Ms. Simpson was entitled to compensation for length of service. One of these bases was described in this way by Delegate Gould:

> I accept the probability that Ms. Ms. (sic) Bennett and Ms. Folk weren't aware of Ms. Simpson's return to work date (October 29 2004), but I also accept Ms. Simpson's statement that Sorensen's head office did receive this information. Again it seems most probable that Sorensen's head office did nothing to alert Ms. Bennett or Ms. Folk of Ms. Simpson's imminent return to work. By not contacting her at all, the employer neglected their obligation to establish exactly what Ms. Simpson's status and intentions were. They also missed an opportunity to communicate to Ms. Simpson, what ever reasonable terms of employment they wanted to impose. Further, by Ms. Bennett's admission, she didn't return Ms. Simpson's email message on the grounds she felt Ms. Simpson had already received adequate explanation about her performance issues. Ms. Bennett missed another opportunity to negotiate Ms. Simpson's return to work on the employer's terms and instead, she hoped the problem would just go away.
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> To summarize, the onus was on Sorensen's to seek out Ms. Simpson to discuss the terms and conditions of employment under which she would return. Sorensen's did nothing to establish contact with Ms. Simpson any time after she commenced her medical leave in August 2004 and at no point in time did they ever meet their responsibility to provide written notice or compensation for termination and therefore I find Ms. Simpson's employment was terminated by Sorensen's and as a result they have contravened Section 63 of the Employment Standards Act.

20. This passage was one part of the Report Member Lawson approved in his April 3, 2006 Decision, when he said:

> The delegate reported to me his conclusion that Sorensen's had terminated Simpson by failing to communicate with her regarding the terms of her return to work following medical leave...
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> I find, in particular, Sorensen's disregard of Simpson's email shortly before her scheduled return to work in October, 2004 to be significant. The absence of any reply by Sorensen's to a key issue in the dispute between them, communicated to Simpson that Sorensen's was not interested in continuing her employment. Simpson's brief contact with other employees at her workplace that month also led her reasonably to believe the employer was not interested in making any arrangements for her return to work. These facts support the delegate's conclusion in that regard.

21. The effect on the employment relationship generated by Sorensen's failure to respond to Ms. Simpson's communications relating to her return to work was nowhere addressed in Sorensen's submissions on its application for reconsideration. It is axiomatic that conduct which demonstrates, objectively, an intention on the part of an employer that it no longer wishes to employ an employee, may constitute termination. For her part, Sorensen's failure to respond to her communications convinced Ms. Simpson that the company had decided that her employment was at an end. In the absence of argument challenging Member Lawson's conclusion that Sorensen's conduct amounted, in law, to a termination of her employment, I am not persuaded that Sorensen's has raised a question of fact, law, principle or procedure on this aspect of Member Lawson's April 3, 2006 Decision which is so important that it demands that the application for reconsideration proceed to stage two.

22. In my view, this is sufficient to warrant dismissal of the application for reconsideration.

ORDER

23. I order pursuant to section 116(1)(b) of the *Act* that the April 3, 2006 Decision of Member Lawson be confirmed.

Robert Groves
Member
Employment Standards Tribunal