Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Nathan Stanley
("Stanley")

- 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.: 2011A/122

DATE OF DECISION: November 3, 2011

DECISION

SUBMISSIONS

Nathan Stanley	on his own behalf
Lorraine Mapleton	on behalf of Kelowna Motors Ltd.
Kathleen Demic	on behalf of the Director of Employment Standards

OVERVIEW

1. An indefinite term employee who is dismissed without just cause or any prior written notice is presumptively entitled to be paid compensation for lengthy of service under section 63 of the *Employment Standards Act* (the "*Act*"). An employer is relieved from this presumptive statutory obligation if the employee voluntarily resigns from their position (see subsection 63(3)(c)). Mr. Nathan Stanley ("Stanley"), the applicant in these proceedings, originally filed a complaint seeking compensation for length of service against his former employer, Kelowna Motors Ltd. ("KML"). KML's position was that Mr. Stanley was not entitled to any compensation for length of service since he voluntarily resigned.

2. A complaint hearing was held on February 16, 2011, before a delegate of the Director of Employment Standards (the "delegate"). The delegate issued a Determination and accompanying "Reasons for the Determination" (the "delegate's reasons") on April 29, 2011, dismissing Mr. Stanley's complaint on the basis that he voluntarily resigned from his employment.

3. Mr. Stanley appealed the Determination to the Tribunal on the grounds that the delegate erred in law, failed to observe the principles of natural justice in making the Determination and on the ground that he had new and relevant evidence (see subsections 112(1)(a), (b) and (c)). In a written decision issued on August 4, 2011, a Tribunal member dismissed all three grounds of appeal and confirmed the Determination (see BC EST # D080/11 – the "Appeal Decision").

4. Mr. Stanley now applies for reconsideration of the Appeal Decision under section 116 of the *Act*. I am adjudicating this application based on the parties' written submissions. In addition, I have also reviewed the entire record that was before the Tribunal member who issued the Appeal Decision.

THE APPLICATION FOR RECONSIDERATION

5. The application for reconsideration consists of the Tribunal's Reconsideration Application Form and various attachments including a 2 ¼ page written submission. The application is predicated on three grounds:

- Mr. Stanley says (and he has consistently maintained this position since he first filed his complaint) that he did not voluntarily quit but, rather, when he first attempted to provide working notice of his intention to resign, KML refused to accept any working notice and summarily terminated his employment;
- Mr. Stanley says that his final pay cheque was "held pending I signed a release or letter of resignation or in my particular case, payment was not mailed until after [KML] received the self-help kit"; and

- KML engaged in acts of bad faith including "extreme conduct of intimidation and later harassment".

6. KML maintains its position (which it has maintained from the outset of this matter) that it did not summarily dismiss Mr. Stanley but, rather, he voluntarily resigned. With respect to the alleged withholding of Mr. Stanley's final pay, KML strongly denies the assertion. Indeed, KML says that Mr. Stanley's final cheque was available for him to pick up shortly after his resignation but he never attended KML's business premises and eventually, and at his request, Mr. Stanley's final pay cheque and a Record of Employment were mailed out to him.

7. The delegate's position is that Mr. Stanley's application does not identify any fundamental legal error and that he is simply attempting to re-argue his case.

FINDINGS AND ANALYSIS

8. The Tribunal evaluates reconsideration applications utilizing the two-stage analytical framework set out in *Director of Employment Standards (Milan Holdings Inc.)*, BC EST # D313/98. At the first stage, the Tribunal considers whether the application is timely, relates to a preliminary ruling, is obviously frivolous, or is simply a clear attempt to have the Tribunal re-weigh issues of fact that have already been determined. If the application can be so characterized, the Tribunal will summarily dismiss it without further consideration of the underlying merits. On the other hand, if the application raises a serious question of law, fact or principle, or suggests that the decision should be reviewed because of its importance to the parties and/or because of its potential implications for future cases, the Tribunal will proceed to the second stage at which point the underlying merits of the application are given full consideration.

9. Rule 22(3) of the Tribunal's *Rules of Practice and Procedure* states that a reconsideration application should be filed within 30 days after the date of the Tribunal decision and, in this case, the application was not filed until September 12, 2011 – the Appeal Decision was issued on August 4, 2011. However, I am not resting my decision on this procedural shortcoming. In my view, the application simply fails to pass the first stage of the *Milan Holdings* test.

10. Fundamentally, this case turned on findings of fact. Although Mr. Stanley acknowledged his intention to resign in order to take up employment with another local automotive dealership, he says that KML summarily dismissed him when he tendered resignation. KML's position was that it did not wish to see Mr. Stanley quit and asked him to reconsider his decision but, ultimately, he decided to resign. KML provided several witness statements at the hearing before the delegate and several of these witnesses also provided their testimony by teleconference. A good portion of KML's evidence was left wholly unchallenged by Mr. Stanley.

11. The delegate considered all of the evidence and was persuaded, on a balance of probabilities, that Mr. Stanley voluntarily resigned. The delegate, relative to the Tribunal, was in the best position to assess the evidence and her careful review of the conflicting evidence is set out at some length in her reasons.

12. The Appeal Decision contains an analysis of the three grounds of appeal that Mr. Stanley advanced. The Tribunal member noted that there did not appear to be any apparent error of law. Mr. Stanley's objection to the delegate's decision primarily focused on whether the delegate came to the correct conclusion given the disputed evidence before her. However, mere disagreement with a finding of fact does not constitute an error of law. A finding of fact cannot be characterized as an error of law unless it can be clearly demonstrated that the findings of fact was not predicated on a proper evidentiary foundation. I share the

Tribunal member's view that the delegate's determination that Mr. Stanley voluntarily resigned appears to have been amply supported by the evidence before the delegate.

13. The Tribunal member also found that there was no factual foundation to the assertion that the delegate failed to observe the principles of natural justice in making the Determination. Mr. Stanley complained that he did not receive copies of KML's witness statements prior to the hearing but, in fact, he had been provided with these statements. Further, at the hearing the delegate offered him an adjournment but he decided to proceed.

14. Mr. Stanley's assertion about the withholding of his final pay cheque is not something that is properly before the Tribunal at this stage of the proceedings. First, Mr. Stanley does not say that he is owed any wages that were earned prior to the end of his employment relationship with KML. Second, KML says that this allegation is simply untrue. The appropriate forum to deal with this contested matter was the complaint hearing before the delegate and not by way of a reconsideration application. Mr. Stanley's "new evidence" consisted of, at most, simply an "amplification" of the evidence he tendered at the complaint hearing and therefore did not satisfy the test for the admission of new evidence set out in *Davies et al.* (*Merilus Technologies Inc.*), BC EST # D171/03.

15. Finally, Mr. Stanley says that KML acted in "bad faith" and seeks some sort of unspecified remedy. First, there is no finding that KML acted in bad faith. Mr. Stanley's assertion in this regard is predicated on his assertion that he was the victim of a retaliatory dismissal. However, Mr. Stanley voluntarily resigned his employment; he was not terminated. Further, employer "bad faith", as the law now stands, may be remedied, upon proper proof of conduct and injury, by way of an action for compensatory damages in the civil courts (see *Honda Canada Inc. v. Keays*, [2008] 2 SCR 362). I do not see how the Tribunal could make a bad faith damages award in circumstances where an employee voluntarily quits his employment and there is no finding of any employer misconduct.

16. In short, Mr. Stanley's application is doomed to fail and thus there is no need to proceed to the second stage of the *Milan Holdings* test.

ORDER

17. The application to reconsider the Appeal Decision is refused.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal