Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Super Save Disposal Inc. and Accton Transport Ltd.
(collectively, “the Applicants”)

- 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: Carol Roberts, Panel Chair
Alison Narod
David Stevenson

FILE No.: 2005A/104

DATE OF DECISION: August 15, 2005

BRITISH COLUMBIA

DECISION

SUMBISSIONS

1. Michael J. Weiler — Counsel for the Applicants

2. J. Edward Gouge and Gareth Morley — Counsel for the Director of Employment Standards

OVERVIEW

3. This is an application by Super Save Disposal Inc. and Accton Transport Ltd. (collectively, "the Applicants") under Section 116 (2) of the *Employment Standards Act* (the "*Act*") for a reconsideration of Decision BC EST # D025/05 (the "Original Decision"), issued by the Tribunal on June 15, 2005.

4. Section 116 of the *Act* provides:

> (1) On application under subsection (2) or on its own motion, the tribunal may
>
> (a) reconsider any order or decision of the tribunal, and
>
> (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

5. The Applicants applied to the Tribunal for an order staying an investigation by a delegate of the Director of Employment Standards into complaints filed against them under the *Act*. The Vice- Chair of the Tribunal concluded that the Tribunal did not have jurisdiction to make the order, and dismissed the application.

ISSUE

6. There are two issues on reconsideration.

7. 1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?

8. 2. If so, should the decision be cancelled or varied or sent back to the Vice-Chair?

FACTS

9. Three individuals filed complaints against the Applicants with the Employment Standards Branch. The Applicants have outstanding appeals before the Tribunal of four Determinations issued in respect of four other complainants, contending, among other things, that the delegate has no jurisdiction to investigate the complaints. The Applicants take the same position with the three new complaints as they did with the original four complaints, and asked the delegate investigating the new complaints to stay his investigation pending a "full and final" determination by the Tribunal of the Applicants' appeal of the four earlier Determinations. In a letter dated June 1, 2005, the delegate declined to do so.

10. The Applicants contended that the delegate's June 1, 2005 letter constituted a "determination" under the *Act*, and sought a stay order under section 113 of the *Act* and section 37 of the *Administrative Tribunals Act* (the "*ATA*").

11. In the Original Decision, the Tribunal's Vice-Chair determined that s. 37 of the *ATA* could not be relied on as a source of jurisdiction to stay the Director's investigation, since s. 37 applied only to "applications" before the Tribunal. The Vice-Chair concluded that the Director's decision was not an application before the Tribunal. The Applicants do not seek reconsideration of this aspect of the Original Decision.

12. The Vice-Chair also decided that the Director's decision to proceed with an investigation is not a decision under ss. 76(3), based on the definition of "determination" under section 1(1) of the *Act*:

> The Director's jurisdiction to investigate complaints is set out in s. 76; however, by no means all decisions made under s. 76 are "determinations" subject to appeal. The definition of "determination" is very specific: it only refers to decisions made under ss. 76(3). Subsection 76(3) gives the Director a discretion to refuse to investigate a complaint or to stop or postpone an investigation in certain specified circumstances. By necessary implication, the legislative intent is that decisions made under s. 76 other than those made under ss. 76(3) are not "determinations" within the meaning of the Act and therefore are not subject to s. 112 appeal.
>
> …
>
> Decisions under s. 79 that a person has contravened a requirement of the Act or the Employment Standards Regulation are "determinations" that can be appealed. But a decision to proceed with an investigation, and not to stay a decision under .s. 76(3), is not a decision under s. 79. As the Tribunal has noted recently in R.J. Somers Enterprises Ltd., (Re) [2004] B.C.E.S.T.D. No. 50, s. 79 decisions are all decisions that would be made following the completion of an investigation, hearing or some other process. I agree with the observation of Member Falzon in that decision that "it would be contrary to the plain language of the word 'determination' to expand it to include any preliminary process decision that the director makes along the way to making a decision listed in section 79" (para, 28). I also agree with and adopt the observations of Member Falzon at paragraphs 29-31 of that decision.

ARGUMENTS AND ANALYSIS

The Threshold Test

13. The Tribunal reconsiders a Decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *Act* detailed in Section 2 "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act."

14. In Milan Holdings (BCEST # D313/98) the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. The primary factor weighing in favour of reconsideration is 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. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

15. In Zoltan Kiss BC EST # D122/96, the Tribunal set out a number of reasons a decision would be reconsidered, including a mistake in stating the facts and serious mistake in applying the law. The Tribunal emphasised that it would use the reconsideration power only in very exceptional circumstances, and that it was not meant to allow parties another opportunity to re-argue their case. The focus of the reconsideration panel will in general be with the correctness of the decision being reconsidered.

16. In Voloroso (BC EST #RD046/01), the Tribunal emphasized that restraint is necessary in the exercise of the reconsideration power:

> .. the Act creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute…
>
> There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the "winner" is not deprived of the benefit of an adjudicator's decision without good reason. A third is to avoid the spectre of a tribunal process skewed in favor of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

17. The Applicants contend that this case involves "a fundamental interpretation of an important feature of the Act as well as a finding going to the jurisdiction of the Tribunal under section 112." The Applicants also argue that the case also involves the rights of the parties to be treated fairly. The Applicants say that the Tribunal's interpretation of the definition of determination is not only in error, but contrary to "basic, natural justice".

18. While the Applicants acknowledge that the Legislature decided to narrowly define what decisions of the Director could be appealed under s. 112 by defining "determinations" very specifically, it contends that the Tribunal ought to give a broad interpretation of what constitutes "any decision".

19. Counsel for the Director submits that the Tribunal's Vice Chair did not err in law in interpreting the legislation. It says the statutory language is plain; that it did not intend to give the Tribunal jurisdiction to consider appeals of decisions to investigate. Counsel also submits that the Tribunal jurisprudence, like that of courts, is to use reconsideration powers reluctantly, particularly with interlocutory or preliminary decisions, because to do so contributes to a multiplicity of proceedings, confusion and delay (World Project Management Inc. BC EST # D134/97).

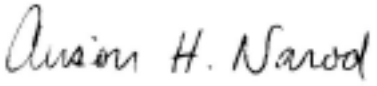
20. In our view, the Applicants have failed to demonstrate that this is an appropriate case for exercise of the Tribunal's reconsideration powers. We are not persuaded, in reviewing the delegate's June 1, 2005 letter, the arguments made to the Vice Chair, the Tribunal's Original Decision, and the submissions on the application for reconsideration, that the Applicants have raised significant questions of law that should be reviewed because of their importance to the parties and/or their implications for future cases.

21. Alternatively, to the extent that these questions of law that the Applicants have raised could be considered significant, we are not persuaded that the Vice-Chair erred in answering these questions.

ORDER

22. Pursuant to Section 116 of the *Act*, the application for reconsideration is denied.

Carol Roberts
Panel Chair
Employment Standards Tribunal



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