An application for Reconsideration

- by -

Isle Three Holdings Ltd. carrying on business as Thrifty Foods
("Thrifty Foods")

- 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 L. Roberts, Panel Chair
Shafik Bhalloo
Robert Groves

FILE No.: 2008A/106

DATE OF DECISION: December 18, 2008

DECISION

SUBMISSIONS

Daniel J. Mildenberger	On behalf of Isle Three Holdings Ltd.
Emilio DeRose	On his own behalf
Terry Hughes	On behalf of the Director of Employment Standards

OVERVIEW

1. This is an application by Isle Three Holdings Ltd. carrying on business as Thrifty Foods ("Thrifty Foods") for a reconsideration of Decision BC EST #D084/08 (the "Decision"), issued by the Tribunal on August 26, 2008.

2. In a Determination dated November 23, 2007, a delegate of the Director found that Thrifty Foods had contravened sections 40 and 63 of the *Employment Standards Act* (the "*Act*") in failing to pay Emilio DeRose overtime wages and compensation for length of service. Mr. DeRose asserted, and the delegate found, that the conditions of his employment were substantially altered such that the Director should consider his employment terminated under section 66 of the *Act*:

> I find that all these factors resulted in conditions of employment being substantially altered by the Employer in this case.
>
> The Employer argues there was just cause for the demotion, and this should negate entitlement under section 66. I find there were disagreements between the Employer and Mr. DeRose but certainly nothing significant enough that would result in just cause for a termination of employment, as contemplated by the Act. [reproduced as written]

3. The delegate addressed Thrifty Foods' argument that Mr. DeRose waited too long to quit after the demotion, and therefore section 66 should not apply as follows:

> It is clear Mr. DeRose expressed immediate dissatisfaction to the Employer about the decision to demote him. He wrote a letter on May 18, 2006 and expressed disappointment and asked for further more suitable options including a possible severance package. He worked in the new position as requested, but dealt with Human Resource to try and obtain a better solution. He wrote another letter on July 24, 2006 asking for a formal reply to his request of May 18, 2006. On July 26, 2006, he was told the matter was closed. Three weeks later he resigned.
>
> I find that in these circumstances, the period of time between the demotion and the self termination of employment as not too long, as to negate the effect of section 66. Mr. DeRose asked management to consider other alternatives. He had discussed with Human Recourses in May about the possible option of a severance package. He tried to resolve the problem. Much of the delay prior to his resignation was the time it took for the Employer to tell him they would not provide severance or other options and they considered the matter closed. After he was told this he resigned within 3 weeks. [reproduced as written]

4. The delegate addressed Thrifty Foods' argument that Mr. DeRose had been offered, and refused, reasonable employment pursuant to section 65(1)(f) as follows:

> I find that the Produce Supervisor position was not a reasonable alternative position to the Merchandiser position. As noted previously, the Produce Supervisor position was a lower level of position with lower pay and significantly different hours and duties.

5. Thrifty Foods appealed only the compensation for length of service aspect of the Determination.

6. The Member upheld the delegate's conclusion that Mr. DeRose's conditions of employment were substantially altered:

> In this case the Director determined that because a condition of employment was substantially altered, DeRose's employment was terminated pursuant to section 66. In my opinion, the Delegate was entitled to make that finding which is similar to a finding at common law that the employee has been constructively dismissed. (BC EST #D031/08, para. 10)

7. The Member continued as follows:

> In my view requesting reconsideration and seeking to negotiate something different does not serve to extend the time for considering when the reassignment is unequivocal. Although DeRose wrote a lengthy letter dated May 18, 2006 setting out his concern, Thrifty Foods replied promptly May 23, 2006 confirming the reassignment to Colwood and declining to discuss severance.
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> In circumstance where the employee knows about the employment position to which he is reassigned it is logical that less time should be necessary to evaluate the option, not more. It is not apparent that the Delegate considered this factor. (para 24 and 25)

8. The Member decided that the delegate's analysis on the issue of whether section 65(1)(f) applied was inadequate. He stated that an appropriate analysis "should reference the factors enunciated in *Helliker* [BC EST #D338/97] and other relevant matters" and referred this matter back to the Director. He also referred the issue of whether Mr. DeRose accepted the position of Produce Supervisor through the "effluxion of time" back to the Director.

9. In the May 22, 2008 decision on the referral back, the delegate addressed the factors outlined in *Helliker* and concluded that the Produce Supervisor position was not a reasonable alternative position. With respect to the second issue, the delegate indicated that he was "guided by the Tribunal's comments" in the matter of the length of time Mr. DeRose took to resign, specifically, those comments set out by the Member in paragraph 7 above, and concluded that waiting in excess of eight weeks was too long to resign and that compensation for length of service was not owed. This conflicted with the delegate's earlier determination that the period of time between the demotion and the self termination of employment was not too long.

10. Mr. De Rose did not agree with that conclusion. He said that he did not work in his position from June 28 to August 13, 2006, as he was under the care of a physician and unable to work. He said that he resigned his position immediately upon being given permission to return. Thrifty Foods argued that the Tribunal should not accept the new evidence and argument, and in the alternative, the new argument should not be persuasive given the delegate's findings.

11. A new Member assumed the referral back as the original Member had resigned. He requested submissions on how the period of time Mr. DeRose worked in his new position before his resignation could disentitle him to length of service compensation. He identified the issue to be decided as: *whether the effluxion of time is a relevant factor in deciding under Section 66 of the Act whether an employee has been terminated.* Neither party responded.

12. The Member considered the law of constructive dismissal and the language of section 66. He noted that, although section 66 is similar to the common law notion of constructive dismissal, there is a key difference, which was reflected in the Supreme Court of Canada's decision in *Farber v. Royal Trust Company* [1977] 1 S.C.R. 846*:*

> The foundation of "constructive dismissal" lies in the administration of the contract of employment at common law. In constructive dismissal, the actions of employer, if they amount to "fundamental breach" of contract, result in a termination of the employment relationship by operation of law. At common law, an employee's claim that there has been a "constructive dismissal" can be denied by application of the principle of estoppel and an employee's claim for damages for the "constructive dismissal" is subject to the duty to mitigate.

13. The Member noted that section 66 is a statutory provision, that the *Act* is remedial legislation, and that it is for the Director to determine, guided by the objects and purposes of the *Act*, if employment has been terminated. He noted that, in the language of section 66, a termination did not necessarily follow from a finding of "substantial alteration" of a condition of employment.

14. The Member considered the Tribunal's decision in *B & C List (1982) Ltd.* (BC EST #RD641/01) in which a reconsideration application based on the grounds that the original Member had failed to consider the principle of estoppel and had misapplied the concept of mitigation was dismissed. The Member noted that the reconsideration panel concluded that the principle of estoppel had no application and that mitigation was not a factor that needed to be considered.

15. The Member noted that the delegate had concluded that the conditions of Mr. DeRosa's employment had been substantially altered. The Member found that the question of the effluxion of time

> does not need to be resolved as I do not accept that the "effluxion of time" can be a relevant factor in deciding under section 66 whether an employee has been terminated and, it follows, nor can it be applied to negate the statutory effect of a termination. [as corrected by corrigendum issued November, 13, 2008]

16. The Member relied upon the reconsideration panel's comments in *B & C List*, *supra* relating to the question of estoppel in concluding that estoppel could not operate to impede the application of the *Act*. The Member further noted that many decisions of the Tribunal had confirmed that "the concept of mitigation has no application to the vested statutory right to compensation for length of service."

17. Finally, the Member noted that he sought submissions from the parties on how the period of time Mr. DeRose worked in his new position before his resignation could disentitle him to length of service compensation under s. 63 and that neither provided a response that addresses the question in the context and purposes of the *Act.*

18. The Member dismissed the appeal and confirmed the Determination.

19. Counsel for Thrifty Foods says that the Member made serious errors of law and procedure.

ISSUES

20. There are two issues on reconsideration:

1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?
2. If so, should the decision be cancelled or varied or sent back to the member?

ANALYSIS

21. The *Act* confers an express reconsideration power on the Tribunal. Section 116 provides

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

The Threshold Test

22. 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*."

23. 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.

24. The Tribunal may agree to reconsider a Decision for a number of reasons, including:

- The member fails to comply with the principles of natural justice;
- There is some mistake in stating the facts;
- The Decision is not consistent with other Decisions based on similar facts;
- Some significant and serious new evidence has become available that would have led the member to a different decision;

- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The Decision contains a serious clerical error.

(*Zoltan Kiss* BC EST#D122/96*)*

25. While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The reconsideration process was not meant to allow parties another opportunity to re-argue their case.

26. After weighing these and other factors, the Tribunal may determine that the application is not appropriate for reconsideration. Should the Tribunal determine that one or more of the issues raised in the application is appropriate for reconsideration, the Tribunal will then review the matter and make a decision. The focus of the reconsideration member will in general be with the correctness of the decision being reconsidered.

27. 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…

28. 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.

29. The panel finds that the reconsideration power should be exercised in this instance in light of the apparent inconsistency between the decisions of the two Members and with other Tribunal decisions on the issue of whether common law notions of constructive dismissal are incorporated into section 66 of the *Act*.

30. We are also of the view that the reconsideration power ought to be exercised in this instance as the delegate's conclusion following the referral back conflicted with his earlier findings and appears to have been heavily influenced by the comments of the original Tribunal Member.

31. Section 66 provides that "if a condition of employment is substantially altered, the delegate may determine that the employment of an employee has been terminated."

32. In considering the meaning of section 66, the second Member said as follows:

> The foundation of Section 66 is the administration of a statutory provision found in the *Act*, which, as the Tribunal has repeatedly confirmed, is remedial legislation "that exists, in large part, for the benefit and protection of employees who otherwise have no control over decisions of their employer about the terms and conditions under which they will be employed" *Barry McPhee*, BC EST#D183/97. In reviewing the language of Section 66 of the *Act*, it is apparent that "termination" does not necessarily follow from a finding of substantial alteration" of a condition of employment.

> It is for the Director to determine if the employment has been terminated. If the Director determines that the employment has been terminated, the employee is entitled to compensation for length service pursuant to the *Act*. (sic) However, the Director must be guided in that exercise of discretion by the purposes and object of the *Act*, and in particular to the statutory purposes and object of the provisions relating to the termination of employment.

33. The panel agrees entirely with this passage. Further, in *Helliker*, *supra*, the Tribunal made it clear that when the Director considers the factors that will be relevant to an exercise of the discretion afforded in section 66, the focus of the examination will be the employment relationship in place at the time of the alteration, and not, for example, the response of the employee to offers of alternate employment the employer may make at that time, or thereafter. The *Act* is a remedial statutory scheme (see *Machtinger v. HOJ Industries Ltd.* [1992], 1 S.C.R. 986, (1992), 91 D.L.R. (4th) 491) and *Re Rizzo v. Rizzo Shoes* ([1998], 1 S.C.R. 27). It creates entitlements separate and distinct from those that might be vindicated at common law. The section 66 discretion must, therefore, be exercised having regard to the provisions of the *Act*, and the principles underlying it, and not of necessity what a court might be inclined to consider in a common law action based on an alleged constructive dismissal.

34. Reference has been made to the reconsideration decision of the Tribunal in *B & C List (1982) Ltd.* (BC EST RD#641/01). In that case, the Director determined that an employee's conditions of employment had been substantially altered and that the employer had therefore terminated her employment. The employer argued that because the employee continued to work under the new terms of employment for approximately one and one half weeks, she could not make an application for compensation for length of service. In effect, the employer in that case made the same argument that Thrifty Foods makes here, which is that the Director must consider factors which might preclude an employee from successfully claiming damages at common law for constructive dismissal, for example an employee's "acceptance" of a substantial alteration of a condition of employment, before deciding that a termination under section 66 has occurred at all. Like the second Member in this case, the reconsideration panel in *B & C List* rejected that proposition. The panel said:

> …we conclude that it was not necessary for the adjudicator to have entered into an analysis of the subsequent actions of the employer or the employee as they were not relevant to the analysis as to whether compensation for length of service was available.
>
> …While the adjudicator does not refer specifically to '*estoppel*', such a principle has no application, as the right to compensation for length of service is statutory and was already vested prior to any such agreement.

35. The panel agrees with the decision of the reconsideration panel in *B & C List.* Once the delegate decided that the conditions of Mr. De Rose's employment as Merchandiser were substantially altered and no relevant factors were identified on the basis of which the delegate might exercise his discretion under section 66 otherwise, the delegate had to conclude, as he did in the original Determination, that Mr. DeRose's employment was terminated. It follows that the delegate erred in considering whether Mr. DeRose waited too long before resigning after conditions of his employment were substantially altered. It also follows that it is not repugnant or absurd, as Thrifty Foods argues it is, for Mr. De Rose to be entitled to payment of compensation for length of service under section 63, notwithstanding that he continued to earn income from Thrifty foods for a period of time after his employment as Merchandiser was terminated under section 66. By the time Mr. DeRose started to earn that other income, his entitlement to compensation for length of service had already crystallized.

ORDER

36. Pursuant to section 116(1)(b), the decision of the Tribunal dated August 26, 2008, is confirmed.

Carol L. Roberts	Shafik Bhalloo	Robert Groves
Panel Chair	**Member**	**Member**
Employment Standards Tribunal	**Employment Standards Tribunal**	**Employment Standards Tribunal**