

An application for Reconsideration

- by -

Payam Azad
("Azad")

- 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: Shafik Bhalloo

FILE No.: 2006A/128

DATE OF DECISION: December 27, 2006

DECISION

OVERVIEW

1. This is an application filed by Payam Azad (“Azad”) pursuant to Section 116 of the *Employment Standards Act* (the “Act”) for reconsideration of a Tribunal Member’s decision issued on October 19, 2006 (B.C.E.S.T. Decision No. D107/06) (“Original Decision”). The Tribunal Member confirmed a Determination that was issued by a Delegate of the Director of Employment Standards (“the delegate”) on July 19, 2006 pursuant to which the delegate dismissed Azad’s claims that his employer, Wal-Mart Canada Corp./La Compagnie Wal-Mart du Canada (“Wal-Mart”), contravened: (i) sections 44 and 46 of the *Act* by posting a notice containing information regarding statutory holidays that was in contravention of the *Act* and failed to pay him statutory holiday pay; (ii) Section 83 of the *Act* by sending him home during a scheduled shift because he raised the issue of the posted notice that he considered was in contravention of the *Act*; and (iii) Section 83 of the *Act* for terminating his employment for raising the concerns about the said posted notice and filing a complaint with the Employment Standards Branch.
2. In the written submissions of Azad attached to the Reconsideration Application Form, in response to the query “reasons for reconsideration”, Azad essentially reiterates his grounds for the appeal of the Determination and sets out essentially the same argument he made before the Tribunal Member when appealing the Determination, namely:

the Director has erred in law and has violated the principles of natural justice by failing to apply Sections 77, 83, 79(1)(2), and Part 5 of the Act to the complaint and also by not applying the provisions of the Act to the complaint of September 26, 2005 by failing to conduct a proper and thorough investigation into the complaint of September 26, 2006.
3. This application for reconsideration has been filed in a timely fashion.

ISSUES

4. In all applications for reconsideration there is a preliminary or a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case is appropriate for reconsideration, the substantive issues raised in this reconsideration application are whether the Tribunal Member’s conclusions regarding the scope of Section 77 of the *Act* and whether Azad received meaningful disclosure of Wal-Mart’s allegations, whether the Delegate’s conduct during the investigation of the complaint raised a reasonable apprehension of bias, whether just cause had been established by Wal-Mart in terminating Azad’s employment.

ANALYSIS OF THE PRELIMINARY ISSUE

5. Section 116 of the *Act* confers the Tribunal with authority to reconsider and confirm, cancel or vary its own orders or decisions:

Reconsideration of orders and decisions

- 116 (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.*

(2) *The director or a person named in a decision or order of the tribunal may make an application under this section.*

(3) *An application may be made only once with respect to the same order or decision.*

6. The Tribunal's authority under Section 116 of the *Act* is discretionary in nature as the Tribunal "may" reconsider its own orders or decisions. Furthermore, the Tribunal's discretion in this regard is to be exercised with caution. As indicated by the Tribunal in *Re Eckman Land Surveying Ltd.* BC EST #RD413/02:

Reconsideration is not a right to which a party is automatically entitled, rather it is undertaken at the discretion of the Tribunal. The Tribunal uses its discretion with caution in order to ensure: finality of its decisions; efficiency and fairness of the appeal system and fair treatment of employers and employees.

7. In deciding whether it should exercise its reconsideration power, the Tribunal employs a two-stage process as set out in *Re British Columbia (Director of Employment Standards) (sub nom. Milan Holdings Ltd.)*, BC EST #D313/98. First, the Tribunal must decide whether the matters raised in the application warrant reconsideration. In determining this question, the Tribunal will consider a non-exhaustive list of factors that include such factors as: (i) whether the reconsideration application was filed in a timely fashion; (ii) whether the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already provided to the adjudicator; (iii) whether the application arises out of a preliminary ruling made in the course of an appeal; (iv) 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; (v) whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.
8. If the Tribunal, after weighing the factors in the first stage, concludes that the application is not appropriate for reconsideration then the the Tribunal will reject the application and provide its reason for not reconsidering. However, if the Tribunal finds that one or more issues in the application is appropriate for reconsideration, the Tribunal will proceed to the second stage in the analysis. The second stage in the analysis involves a reconsideration of the merits of the application.
9. In the case at hand, I have very carefully reviewed the Determination; the record that was before the Director at the time the Determination was made; the Original Decision including the written submissions of the parties in the appeal of the Determination; and the written submissions of the parties in the reconsideration application. I have also specifically compared Azad's written submissions in both the appeal and reconsideration proceedings. It is very clear to me that Azad's entire submission in this reconsideration application is nothing short of an attempt to re-argue the matter or obtain a second opinion because he was, understandably, dissatisfied with the Determination and the confirmation of the Determination in the Original Decision. In my opinion, Azad's request for reconsideration cannot succeed, as the reconsideration process in Section 116 of the *Act* is not meant to allow dissatisfied parties a further opportunity to re-argue their cases.
10. Further, while Azad's application fails in the first stage of the two-stage analysis delineated by the Tribunal in *Milan Holdings Ltd.*, *supra*, and, in the circumstances, I am not required to proceed to the second stage of the analysis to review the merits of the application, I have, nevertheless, considered

Azad's reasons for asking reconsideration. I find no merit in those reasons. That is, I do not find that the Tribunal Member (or for that matter the delegate of the Director) failed to comply with the principles of natural justice or made any serious mistake in applying the law.

ORDER

11. Pursuant to Section 116 of the *Act*, I order the original decision, BC EST #D107/06, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal