An Application for Reconsideration

- by -

United Specialty Products Ltd.
("United Specialty")

- 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.: 2012A/117

DATE OF DECISION: November 23, 2012

DECISION

SUBMISSIONS

Roger Repay on behalf of United Specialty Products Ltd.

INTRODUCTION

1. This is an application filed by United Specialty Products Ltd. ("United Specialty") under section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of Tribunal appeal decision BC EST # D075/12 issued by Tribunal Member Bhalloo on July 26, 2012.

2. Section 116 of the *Act* gives the Tribunal a *discretionary* authority to reconsider an appeal decision. In *Director of Employment Standards Milan Holdings Inc. et al.*, BC EST # D313/98, the Tribunal established a two-stage process for addressing reconsideration applications. 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.

3. At this juncture, I am dealing with only the first stage of the *Milan Holdings* test. If I am satisfied that the application passes the first stage, the Tribunal will advise the respondents and seek their submissions regarding the issues raised by the application. On the other hand, if United Specialty's application fails to pass the first stage, it will be summarily dismissed.

4. I am adjudicating this matter based on United Specialty's written submissions filed in support of its reconsideration application. I have also reviewed the original section 112(5) record that was before the delegate, the delegate's "Reasons for the Determination" (the "delegate's reasons"), as well as the material that was before Tribunal Member Bhalloo when he was adjudicating the appeal.

PRIOR PROCEEDINGS

5. United Specialty is the British Columbia distributor for a line of cleaning products. On February 7, 2011, Ms. Diana Douglas ("Douglas"), who worked in a sales and marketing capacity for United Specialty from March 1 to November 17, 2010, filed an unpaid wage complaint under section 74 of the *Act* in which she claimed unpaid wages and compensation for length of service. The Director of Employment Standard's delegate (the "delegate") held a complaint hearing on June 30 and October 20, 2011. Subsequently, on March 26, 2011, the delegate issued a Determination and accompanying "Reasons for the Determination" (the "delegate's reasons") ordering United Specialty to pay Ms. Douglas $1,991.71 and, in addition, levying two separate $500 monetary penalties against United Specialty (see *Act*, section 98). Thus, the total amount payable under the Determination was $2,991.71.

6. United Specialty appealed the Determination to the Tribunal asserting that the Determination should be cancelled since the delegate erred in law and failed to observe the principles of natural justice in making the Determination (see *Act*, subsections 112(1)(a) and (b)). More particularly, United Specialty argued that the

delegate erred in law in finding that: i) there was an employment, rather than an independent contractor, relationship between the parties, ii) United Specialty did not have just cause for dismissal; iii) Ms. Douglas should be awarded unpaid wages (including vacation pay) based on the entire period of the parties' relationship even though the delegate concluded that, at least initially, the parties were not in an employment relationship, and iv) Ms. Douglas' weekly $500 wage was not an advance against future commission earnings.

7. As for the alleged natural justice breaches, United Specialty claimed that: i) the delegate wrongly refused to receive "lie detector" evidence (*i.e.*, a polygraph test; it should be noted that calling a polygraph test a "lie detector" is a true misnomer since the test is not concerned with lies, *per se*, but rather physiological responses such as heart and respiration rates); ii) would not accept evidence concerning Ms. Douglas' employment with another firm, iii) that the delegate and/or the entire hearing process was biased against it.

8. United Specialty also applied for a section 113 suspension order. On June 13, 2012, Tribunal Member Roberts ordered that the Determination be suspended provided United Specialty deposited Ms. Douglas' unpaid wages, as determined by the delegate, with the Director by no later than June 18, 2012, (see BC EST # D060/12). There was also one other interim decision issued by the Tribunal in this matter. United Specialty applied for an oral appeal hearing and for an order for the production of the delegate's notes from the complaint hearing. On June 12, 2012, Tribunal Member Bhalloo issued reasons for decision denying the application for an oral appeal hearing and for the production of the delegate's hearing notes (see BC EST # D057/12).

9. Tribunal Member Bhalloo also issued reasons for decision concerning the merits of the appeal (BC EST # D075) and this decision is now before me by way of United Specialty's reconsideration application. Tribunal Member Bhalloo concluded that the delegate did not err in finding that there was an employment relationship between the parties and that there was no just cause for Ms. Douglas' dismissal. He also rejected United Specialty's position that Ms. Douglas' unpaid wage claim should be "prorated" based on the unproven assertion that, at some early point in their relationship, Ms. Douglas was an independent contractor rather than an employee. Tribunal Member Bhalloo rejected all of United Specialty's "natural justice" grounds of appeal. However, Tribunal Member Bhalloo concluded that the delegate erred in finding that Ms. Douglas' weekly $500 payment was not an advance against future commissions. The relevant portions of his decision on this latter point are set out, below (at paras. 53, 54 and 56):

> …I find that the delegate, in concluding that the $500 weekly payment was salary, acted on a view of the facts which could not reasonably be entertained and thus erred in law.
>
> Having said this, Section 16 of the *Act* entitles commissioned salespeople to earn at least the equivalent of minimum wage…
>
> In the case of Ms. Douglas, the delegate calculated her entitlement for two weeks [sic] wages based on her conclusion that Ms. Douglas earned a weekly salary of $500. The delegate also calculated the compensation for length of service pay pursuant to section 63 based on the same premise. Having found that the delegate erred in concluding that Ms. Douglas' [sic] was receiving a weekly salary of $500, the calculations for both outstanding wages for the period November 3 to 17, 2010, and compensation for length of service require to be calculated based on Ms. Douglas' minimum wage entitlement for hours worked on a weekly basis. In the Reasons, the delegate states that there was no disagreement between the parties that Ms. Hours [sic, Douglas] worked 40 hours per week on average. In the circumstances, I would, pursuant to Section 115(1)(b) refer the matter back to the Director, with express instructions to calculate outstanding wages as well as compensation for length of service of Ms. Douglas and also vacation pay based on the minimum wage entitlement under the *Act*. Of course this would also entail a recalculation of interest pursuant to Section 88 of the *Act*.

Tribunal Member Bhalloo confirmed the Determination in all other respects.

10. In accordance with Tribunal Member Bhalloo's order, the delegate recalculated Ms. Douglas' unpaid wage entitlement and this resulted in a reduction of her unpaid wage claim from $1,991.71 to $1,433.16 including section 88 interest. This report was provided to the parties and they both filed submissions with the Tribunal concerning the report. In reasons for decision issued on October 3, 2012, Tribunal Member Bhalloo considered the parties submissions and ultimately confirmed the delegate's calculations (see BC EST # 102/12). Accordingly, Ms. Douglas' unpaid wage claim was fixed at $1,433.16 and the Director indicated that it would be refunding the excess held in his trust account (the full amount of Ms. Douglas' originally determined claim was deposited with the Director pursuant to Tribunal Member Roberts' suspension order).

11. As previously noted, the matter now before me is United Specialty's application to reconsider Tribunal Member Bhalloo's decision issued on July 26, 2012 (BC EST # D075/12). However, on October 4, 2012, United Specialty also applied for reconsideration of Tribunal Member Bhalloo's October 3, 2012, decision (see Tribunal File No. 2012A/109) and I will address the latter application in separate reasons for decision. For ease of reference, I shall refer to Tribunal Member Bhalloo's July 26, 2012, decision (BC EST # D075/12) as the "Referral Back Decision" and his October 3, 2012, decision (BC EST # D102/12) as the "Wage Confirmation Decision". To reiterate, the Referral Back Decision is now before me on this reconsideration application.

THE APPLICATION TO RECONSIDER THE REFERRAL BACK DECISION

12. The Referral Back Decision was issued on July 26, 2012. United Specialty's application to reconsider this decision was filed on October 19, 2012 (nearly three months after the decision was issued). Rule 25(2) of the Tribunal's *Rules of Practice and Procedure* states that reconsideration applications must be filed within 30 days after the date of the decision in question. Accordingly, this application is not timely. I will return to this point later on in these reasons.

13. United Specialty's substantive grounds for reconsideration relate, firstly, to the question of Ms. Douglas' status. United Specialty asserts, as it has throughout these entire proceedings, that she was an independent contractor rather than an "employee" as defined in section 1 of the *Act*. Secondly, United Specialty says that the delegate's and Tribunal Member Bhalloo's treatment of certain evidence is so clearly misguided as to constitute a breach of the rules of natural justice.

FINDINGS AND ANALYSIS

14. As noted above, this application is not timely. United Specialty says that it was confused by a statement appearing in the Tribunal's "guide" to the reconsideration form regarding "preliminary rulings" – the guide states that an application to reconsider a preliminary ruling should not be filed until the Tribunal has issued a final decision. United Specialty says that it was under the impression that it was not entitled to seek reconsideration until the "referral back" process had been completed and further observes that the full amount of Ms. Douglas' unpaid wage claim is currently being held in an interest bearing trust account and that no party has been unduly prejudiced by the delay. In these circumstances, and given that United Specialty did file a timely reconsideration application in relation to the Wage Confirmation Decision, I am not prepared to dismiss this application solely on the basis that it is untimely.

15. Despite my finding that this application should not be summarily dismissed because it was not filed within the 30-day application period, I am nevertheless of the view that the application, on its face, does not raise any issue that would justify moving to the second stage of the *Milan Holdings* test. Undoubtedly, United Specialty strongly disagrees with the notion that Ms. Douglas was an employee rather than an independent

contractor. This was a central issue in the hearing before the delegate and the fundamental basis for its appeal to the Tribunal.

16. United Specialty says that both the delegate and Tribunal Member Bhalloo misapprehended the "chance of profit/risk of loss" criteria that are routinely weighed when determining if a person is an employee under the common law. However, I would note that while the common law considerations – also including ownership of equipment, integration and control – may be relevant in determining if a person is an "employee" for purposes of the *Act*, the primary considerations are those set out in the section 1 definition of that term (including, as well, the definitions of "work" and "wages"). Given that, Ms. Douglas received a weekly $500 advance against commissions; United Specialty paid an allowance for her work-related expenses; she serviced United Specialty's client base rather than her own (and under United Specialty's close direction including an obligation to adhere to a dress code); she was held out, through business cards and her e-mail address, as a United Specialty employee; and utilized United Specialty's promotional material in carrying out her duties, I find it wholly unreasonable to suggest that she was not an employee. At the very least, it was open to the delegate, on the evidence before her, to conclude that the parties were in an employment relationship and that conclusion cannot, in my opinion, be characterized as palpably erroneous.

17. Even accepting that the delegate erred in characterizing Ms. Douglas' $500 weekly draw as a "wage" rather than an advance against commissions, section 1 of the *Act* defines an "employee" as a person receiving a "wage" (which can be a commission) for "work" and Ms. Douglas' compensation arrangement clearly falls within the *Act's* statutory framework.

18. United Specialty takes issue with the delegate's finding that Ms. Douglas was an integral component of United Specialty's business operations since "sales represent a substantial part" of its business (see Referral Back Decision, para. 14). United Specialty has submitted an excerpt from what it says is its 2010 income tax return. This evidence was not before the delegate nor submitted on appeal so, in terms of admissibility, it is highly problematic. That said, however, I fail to see the relevance of the evidence. The excerpted portion of the return shows "total sales of goods and services" to be $204,274 and United Specialty says "it is clear that Ms. Douglas' contribution to United's sales was not significant" since she was only responsible for "barely over $20,000". But this point is completely irrelevant to the issue of whether Ms. Douglas was an "employee". The fact that an employee may be responsible for a small portion of total sales volume (and about 10% is not, in my view, an insignificant contribution) is not necessarily probative of their status. The more fundamental consideration is that United Specialty needed sales in order to prosper and Ms. Douglas was engaged to generate sales. Her relative success or failure in that regard does not determine her status.

19. This is a case where some of the evidence pointed to an independent contractor relationship – most obviously, the parties' written agreement – but taking the evidence as a whole, I am in complete agreement with Tribunal Member Bhalloo that the delegate's determination that Ms. Douglas was an "employee" was one that is credibly supported by the evidentiary record.

20. In my view, the current application is simply an undisguised attempt to have the Tribunal re-weigh an issue of mixed fact and law (namely, Ms. Douglas' status) that has already been determined and, in my view, determined correctly. This application does not pass the first stage of the *Milan Holdings* test. Accordingly, there is no need to seek submissions from the respondents since this application must be refused.

ORDER

21. United Specialty's application made pursuant to section 116 of the *Act* to reconsider the Referral Back Decision (BC EST # D075/12) is refused.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal