An Application for Reconsideration

- by -

Director of Employment Standards
(the "Director")

- 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: Robert E. Groves

FILE No.: 2015A/98

DATE OF DECISION: November 26, 2015

DECISION

SUBMISSIONS

Melanie Zabel	on behalf of the Director of Employment Standards
Jacob R. Parkinson	counsel for K & R Poultry carrying on business as Farm Fed
Gurcharan Basrom	on his own behalf

OVERVIEW

1. This is an application for reconsideration filed by the Director of Employment Standards (the "Director") pursuant to section 116 of the *Employment Standards Act* (the "*Act*").

2. The Director seeks a reconsideration of a decision of a Member of the Tribunal dated June 18, 2015, under BC EST # D059/15 (the "Original Decision").

3. The Original Decision was issued in respect of an appeal delivered on behalf of K&R Poultry Ltd. carrying on business as Farm Fed (the "Employer") seeking cancellation of a determination (the "Determination") issued by a delegate of the Director (the "Delegate") on January 14, 2015.

4. The Determination followed a hearing of a complaint brought by one Gurcharan Basrom (the "Complainant"), a former employee of the Employer, alleging that the Employer had contravened the *Act* when it had failed to pay him regular wages, made unauthorized deductions from his wages, and failed to pay him compensation for length of service as required.

5. The Delegate rejected the Complainant's claims for failure to pay regular wages, and the alleged unauthorized deductions. She did, however, accept the Complainant's claim that the Employer owed him compensation for length of service. The Delegate therefore ordered the Employer to pay the Complainant compensation, annual vacation pay, and interest totaling $8,422.78. The Delegate also imposed an administrative penalty of $500.00.

6. The Employer filed an appeal. The Original Decision which followed it contained an order cancelling the Determination pursuant to section 115 of the *Act*.

7. I have before me the Delegate's Determination, her Reasons for it, the Employer's Appeal Form and attached submission, the Original Decision, the Director's application for reconsideration, as well as later submissions from the Employer, the Director, and the Complainant. I also have the record the Director delivered to the Tribunal pursuant to section 112(5) of the *Act*.

8. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings on applications for reconsideration. Having reviewed the materials before me, I find I can decide this application based on the written materials filed, without an oral or electronic hearing.

FACTS

9. The Employer operates a poultry processing plant. It employed the Complainant as a janitorial supervisor and labourer commencing in 2005.

10. In July 2013, the Employer demoted the Complainant and placed him on probation, alleging various acts of workplace misconduct as the cause.

11. The Complainant continued to work for a time pursuant to the new terms of employment imposed upon him by the Employer. However, on September 9, 2013, the Complainant commenced an unpaid medical leave when he submitted a physician's note to the Employer indicating that he was expected to be "off work" until October 9, 2013.

12. On September 25, 2013, at the Complainant's request, the Employer issued him a Record of Employment, stating that the reason for its issuance was "illness or injury" and that the Complainant's expected date of recall was "unknown".

13. The Complainant did not return to work on October 9, 2013. The Employer's plant manager made inquiries of other employees asking them if they had heard from the Complainant or if they knew whether he was coming back to work. The replies were in the negative. The Employer's controller also attempted to contact the Complainant by telephone, but no one answered his call, and the controller left no message. No other attempts were made by the Employer to contact the Complainant or to ascertain his intentions.

14. By October 23, 2013, the Employer concluded that the Complainant had quit his employment because he had neither returned to work, nor had he contacted the Employer to provide an update as to his condition. The evidence of the Employer at the hearing was that it mailed to the Complainant a cheque for vacation pay and a further Record of Employment ("ROE") indicating that the reason for its issuance was that the Complainant had "quit".

15. On January 14, 2014, the Complainant emailed the plant manager informing her that he was now available for work, and that he awaited her reply. The plant manager responded by letter, dated January 16, 2014. The letter said this, in part:

> After October 9, 2013, we did not receive any updates from you. It was your responsibility to contact us in regards to your availability to return to work. Not hearing from you has indicated to us that you no longer desire to work here. Through your actions, we came to the conclusion that you had terminated your employment with us. We sent you a revised ROE and your vacation pay on October 23, 2013. The revised ROE indicated a quit code.
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> Do [*sic*] to the above actions, we no longer have a position open for you.

16. At the hearing the Complainant produced other medical notes indicating that he should remain off work for further periods after October 9, 2013. The note that he received from his physician on January 15, 2014, stated that he was "fit to work". The Complainant did not deliver these further notes to the Employer after his initial period of medical leave ended on October 9, 2013. He testified that he was not aware of a need to do so. He said he assumed that if the Employer had required further medical evidence to support an extended medical leave, it would have requested it from him.

17. The Complainant said that while he did receive the cheque for his vacation pay, he did not receive the October 23, 2013 ROE which stated he had quit. He also testified that if he had known that his employment

had ended in 2013 he would not have emailed the plant manager on January 14, 2014, informing her that he was ready to come back to work.

18. The Delegate concluded the Employer had failed to establish that the Complainant had quit. She stated that there needed to be unmistakable evidence of an intention to quit on the part of the Complainant before the Employer could successfully assert that it had been relieved of its obligation to pay compensation for length of service. She also stated that the Complainant's failure to contact the Employer, or to report for work, after October 9, 2013, was insufficient to demonstrate a clear and unequivocal intention to quit. It followed, in her view, that the Employer dismissed the Complainant when it declined to accede to his return to work after he recovered in January, 2014.

19. The Original Decision cancelled the Determination on the basis that the Delegate erred when she failed to conclude that the Complainant had abandoned his employment, thereby terminating it pursuant to section 63(3)(c) of the *Act*. The rationale supporting this conclusion is captured in the following excerpt from paragraph 37 of the Original Decision:

> ...I am satisfied that Mr. Basrom abandoned his employment when he failed to return to work after his originally scheduled October 9, 2013, return to work date and, in addition, failed to provide any medical evidence to, or communicate in any way with, K&R for several months until his e-mail of January 14, 2014. In early November 2013, at the very latest, he knew that K&R was taking the position that he had "quit" – this was expressly noted on the ROE he received at this time – and, yet, even in the face of that information, he resolutely failed to communicate in any fashion with K&R for a further two months. In my view, the only reasonable inference to be objectively drawn from Mr. Basrom's actions (and inaction) was that he had abandoned his employment.

20. The Director's application for reconsideration of the Original Decision alleges that the Member erred by questioning the Complainant's credibility, by substituting a different view of the facts than those found by the Delegate, and by applying an incorrect legal test for determining whether the Complainant had quit.

ISSUES

21. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:

1. Does the request meet the threshold established by the Tribunal for reconsidering a decision?
2. If so, should the decision be confirmed, cancelled, varied or referred back to the original panel, or another panel of the Tribunal?

DISCUSSION

22. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116 of the *Act*, the relevant portion of which reads as follows:

> 116 (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
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> (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

23. The reconsideration power is discretionary, and must be exercised with restraint. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal.

24. The attitude of the Tribunal towards applications under section 116 of the *Act* is derived in part from section 2 of the *Act*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is also derived from a desire to preserve the integrity of the appeal process mandated in section 112 of the *Act*.

25. With these principles in mind, the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party seeking to have the Tribunal's appeal decision overturned.

26. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal considers the applicant's submissions, the record that was before the Tribunal in the appeal proceedings, and the decision the applicant seeks to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. In order for the answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the appeal decision which are so important that they warrant reconsideration.

27. In general, the Tribunal will be disinclined to reconsider if the primary focus of the application is to have the reconsideration panel re-weigh arguments that failed in the appeal. It has been said that reconsideration is not an opportunity to get a "second opinion" when a party simply does not agree with an original decision (see *Re Middleton*, BC EST # RD126/06).

28. If the applicant satisfies the requirements in the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.

29. I have decided that the Director has met the requirements of the first stage of the analysis. In my view, the application raises issues of law which justify a consideration on their merits. I propose to examine the grounds referred to in the order in which they have been presented by the Director.

Credibility

30. The Director submits that the Member made comments in the Original Decision which implied that the Complainant lacked credibility regarding the circumstances under which he was absent from work, and the quality of the medical evidence the Complainant produced in support of his need to take leave. The Director also refers to comments of the Member noting the fact that the Complainant made use of an email account that was not his own to inform the Employer of his intention to take leave, the manner in which the Employer could have been expected to react to the leave announcement, and whether the circumstances grounding the discipline the Employer imposed prior to the Complainant's taking leave could also have justified a dismissal.

31. The Director's position is that with the exception of a comment by the Employer in the proceedings before the Delegate, to the effect that the physician's note the Complainant provided was "generic", the Employer made no issue of any of these matters, and so it was an error for the Member to have mentioned them.

32. I have decided that the Director's submission falls short of establishing that the Original Decision should be disturbed merely because the Member elected to note the matters to which I have referred. The Member made no express finding concerning the credibility of the Complainant, and despite what can arguably be construed to be the Member's reservations about some of the evidence presented by the Complainant, the

Member accepted the relevant facts as found by the Delegate, at least insofar as they can be said to relate to the specific credibility concerns the Director has raised in this part of its application.

Substituting a different view of the facts than those found by the Delegate

33. There are two items which form a part of the submission of the Director in this part of its application which I must address, as they have import when determining whether the Complainant can be said to have terminated his employment with the Employer.

34. The Director challenges the statement of the Member in the Original Decision to the effect that the only reasonable inference to be drawn from the facts surrounding the Complainant's taking leave was that the Employer was prepared to permit an unpaid leave of a limited, but uncertain, duration of no more than one month.

35. The Director asserts that the Employer did not argue before the Delegate that the amount of medical leave it was prepared to permit was limited to one month. The Director states that at no time did the Employer inform the Complainant he needed to be back at work on October 9, 2013. Finally, the Director argues that another reasonable inference that may be drawn from the insertion of the word "unknown" in the space indicating the date for return to work on the September 25, 2013, ROE was that the Employer understood the Complainant had medical issues, that it did not know, definitively, when those medical issues would be resolved, but that they prevented the Complainant from returning to work until at least October 9, 2013.

36. I agree with the position stated by the Director. In my view, it was an error for the Member to conclude that the only reasonable inference to be drawn by the parties from the circumstances surrounding the leave was that the Complainant would return to work on or about October 9, 2013. It is clear from the evidence accepted by the Delegate that the Complainant did not understand that to be so. As for the Employer, the fact that the ROE it issued marked the return to work date as "unknown" expressly contradicts a conclusion that it expected the leave to end, of necessity, on or about October 9, 2013.

37. The second important concern the Director raises with regard to the Original Decision is the Member's accepting as a fact that the Complainant received the Employer's second ROE dated October 23, 2013, which stated he would not be returning as he had "quit". The Member relied heavily on this perceived version of events. He stated that despite having received formal notification the Employer considered him to have quit the Complainant took no action whatsoever for a period of over two months before advising the Employer in January 2014, that he was available to return to work.

38. The Director argues, correctly in my view, that the Delegate made no finding the Complainant actually received the October 23, 2013, ROE. The position of the Employer, expressed at the hearing, was that the Complainant's cheque for vacation pay, and the ROE, were placed in the same envelope and sent by regular mail. The Complainant testified that he did receive the cheque, but not the ROE. He stated the first time he had any notice from the Employer that he had no job was in January 2014.

39. As the burden of proof was on the Employer to establish the facts necessary to support a finding that the Complainant had quit, the inference to be drawn from the Determination is that the Employer failed to establish that the Complainant did, in fact, receive the October 23, 2013, ROE or, for that matter, any other communication indicating that his employment was at an end, prior to January 2014.

40. That being so, it was, in my view, an error for the Member to accept as a fact that the Complainant understood, some months prior to his January 14, 2014, communication to the Employer requesting a return to work, that the Employer believed he had quit.

41. These errors are significant, in my opinion. I agree with the Director's submission that matters of fact determined by a delegate are not reviewable by the Tribunal on appeal, absent evidence of palpable and overriding error. This is so even in circumstances where the evidence before the delegate might have led the Tribunal to make different findings of fact than those appearing in a determination (see *Britco Structures Ltd.*, BC EST # D260/03; *Carestation Health Centres (Seymour) Ltd.*, BC EST # RD106/10).

42. In my view, the Member's conclusions regarding the facts I have identified contradict the positions relating to those facts that are to be derived from the Delegate's Reasons for the Determination. I am also of the view that the Delegate's findings in relation to those facts, whether they were expressed or merely implied, are neither perverse nor inexplicable. I say this because there was at least some evidence on the basis of which the Delegate, acting reasonably, could have made those findings of fact. It follows that even if I was to decide, as the Member seems to have done, that I disagree with the Delegate's findings, it is not open to me, and so it was not open to the Member, to exercise the Tribunal's jurisdiction in a manner that is inconsistent with them.

The test for determining whether the Complainant quit

43. The Director submits that the Member misapplied the legal test for determining whether the Complainant terminated his employment. I disagree.

44. The Director argues that a valid quit incorporates two essential elements. The first requirement is that the employee, acting voluntarily, must form a subjective intention to quit. Second, there must be conduct on the part of the employee which, viewed objectively, supports a conclusion that the employee intended to bring the employment to an end.

45. The Director relies on previous decisions of the Tribunal which affirm this formulation (see *Burnaby Select Taxi*, BC EST # D091/96; *RTO (Rentown) Inc.*, BC EST # D409/97; *MacNutt Enterprises Ltd.*, BC EST # D030/13; *Paradigm Management (BC) Ltd.*, BC EST # D428/02).

46. The Director alleges that the Original Decision establishes a test that is entirely objective, because the Member decided the Complainant terminated his employment, notwithstanding the evidence supports a finding he never intended to cause that result, subjectively.

47. It is important to remember that the *Act* does not specify what constitutes a "quit", nor does it even employ that word when it refers to the circumstances under which an employer's liability to pay compensation for length of service may be discharged. Instead, it says, in section 63(3)(c), that the liability may be discharged if the employee, among other things, "terminates the employment".

48. I do not disagree with the Director's statement that an employee's terminating the employment by quitting requires an examination of subjective and objective elements. However, I cannot agree that in order for an employee to terminate the employment the employer must always establish a subjective intention on the part of the employee to bring the relationship to an end. In my view, the subjective element relates to the question of how the employee's intention is demonstrated, at least in situations where the allegation is that the employee has quit.

49. There will be cases where an employee forms a subjective intention to terminate the employment relationship. If the employee acts on that intention in a way that is consistent with the subjective desire to quit, the employee may well be found to have terminated the relationship.

50. There will be other cases, however, where the employee forms no subjective intention to quit, but the employee's actions are sufficient to satisfy an objective observer that the employee did have that intention, and acted in a way that was consistent with the employee's achieving that result. In those types of cases, too, the employee may well have successfully terminated the employment relationship pursuant to section 63(3)(c) of the *Act*.

51. These two aspects of the legal landscape relating to situations where it is alleged that an employee has quit are summarized in *Beggs v. Westport Foods Ltd.* 2011 BCCA 76. In paragraph 36 of the decision, the court says this:

> It is common ground that both a dismissal by an employer and a voluntary resignation by an employee require a clear and unequivocal act by the party seeking to end the employment relationship. There is a distinction, however, in the tests to be met in order to establish each of these methods for ending the employment relationship. A finding of dismissal must be based on an objective test: whether the acts of the employer, objectively viewed, amount to a dismissal. A finding of resignation requires the application of both a subjective and objective test: whether the employee intended to resign and whether the employee's words and acts, objectively viewed, support a finding that she resigned.

52. In the immediately succeeding paragraph 37, the court then cites with approval certain extracts from the David Harris text on *Wrongful Dismissal*, and in particular this passage, referred to by the Member in the Original Decision, which deals with the distinction to be drawn between a dismissal and a voluntary resignation:

> ...The test for voluntary resignation (as opposed to dismissal) is objective, focusing on the perceptions of a "reasonable employer" of the intentions of the employee based on what the employee actually says or does or, in some cases, on what he or she fails to do. Among the relevant circumstances are the employee's state of mind, any ambiguities in relation to the conduct which is alleged to constitute "resignation" and, to a certain degree, the employee's timely retraction, or attempted retraction, of his or her "resignation."
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> (Emphasis added.)

53. A concept that is closely related to a voluntary quit, and which may also result in a finding that the employee has terminated the employment, is the concept of abandonment of the employment by an employee. Another way the authorities have described abandonment is to characterize it as a "constructive resignation" (see *Wichito Marine Services Ltd.*, BC EST # D014/15).

54. The test for abandonment has been set out recently in *Pereira v. Business Depot Ltd.* 2011 BCCA 361, at paragraph 47. The Member reproduced it in his Original Decision. It reads:

> The parties agree that it is an implied term of every employment contract that an employee must attend work. They also agree that when an employee fails to comply with that term he or she will be taken to have abandoned (i.e., repudiated) the contract, entitling the employer to treat the contract as being at an end. Lastly, the parties agree that the trial judge properly stated the test for determining whether an employee had abandoned his or her employment, namely, whether, viewing the circumstances objectively, would a reasonable person have understood from the employee's words and actions, that he or she had abandoned the contract: *Assouline v. Ogivar Inc.* (1991), 39 C.C.E.L. 100 at 104 (B.C.S.C.); *Danroth v. Farrow Holdings Ltd.*, 2005 BCCA 593, 47 B.C.L.R. (4th) 56 at para. 8.

55. It is clear from the Original Decision that the Member decided the Complainant had abandoned, and therefore terminated, his employment, with the result that the Employer was discharged from its obligation to pay compensation for length of service.

56. In my view, the Member did not err in deciding that the concept of abandonment, as revealed in the authorities, may form the basis for a conclusion that an employee has terminated an employment relationship pursuant to section 63(3)(c) of the *Act*.

57. That being said, I am also of the view that the Member erred in his application of the test for abandonment in the circumstances of this case.

58. In *Pereira*, at paragraph 56, the court stated that the question whether there is an objective basis for a conclusion that an employee has abandoned the employment relationship is a question of law.

59. As I have stated, the Member decided that the only reasonable inference to be drawn from the facts was that the Employer was prepared to allow the Complainant an unpaid medical leave of a limited, but uncertain, duration of no more than one month. That conclusion is inconsistent with the Employer's receiving the Complainant's note from his physician suggesting an absence until October 9, 2013, and then issuing the September 25, 2013, ROE indicating that the Complainant's return date was "unknown". In my view, a reasonable person in the Complainant's position, receiving that ROE, could conclude that the Employer understood the leave might extend beyond October 9, 2013.

60. Further, the Member decided that the Complainant received the second ROE marked "quit", dated October 23, 2013, along with his cheque for vacation pay. The Member then concluded that in early November 2013, at the latest, the Complainant knew the Employer was taking the position he had quit, yet he failed to communicate with the Employer for at least two months thereafter. It was on the basis of those facts that the Member determined the Complainant had abandoned his employment.

61. However, as I have discussed, the Delegate made no finding that the Complainant did receive the second ROE. Given that the Delegate also stated, correctly, that the onus was on the Employer to establish that the Complainant had quit, the inference to be drawn from the Determination is that since the Employer failed to prove, *inter alia*, that the Complainant had received the second ROE, the facts did not support a finding that the Complainant had quit or, alternatively, that he had abandoned his employment.

62. In my view, this was a case, like the circumstances in *Pereira*, where it was unnecessary to decide what the Complainant intended, because the facts within the Employer's knowledge were not capable of objectively supporting its conclusion either that the Complainant had quit, or that he had abandoned his employment.

63. In coming to this conclusion I have been guided by what was said by the Tribunal in *Director of Employment Standards and Ellison*, BC EST # RD122/03. That was a case where the employer argued that the employee's entitlement to compensation for length of service was discharged because the employee had given just cause for dismissal. In rejecting this contention the panel pointed out that the concept of just cause in the *Act* arises in the context of the wording of section 63(3) and, while its formulation at common law was of assistance, one needed to interpret it in a manner consistent with the remedial purpose of the legislation. More precisely, the panel noted that the concept of just cause needed to be applied in such a way as to respect the principle of proportionality and fairness to both employers and employees expressed in section 2(b) of the *Act*.

64. In the same way, I am of the view that one should not be too quick to find that an employee has voluntarily quit, or abandoned an employment relationship. The reason for this is that such a finding will result in the employee's being deprived of the statutory benefit in the form of compensation for length of service which the employee has earned while working for an employer during the period that precedes the end of the employment. Since compensation for length of service is an accrued right that augments in amount merely by reason of an employee's continuous tenure, it should not, in my view, be denied to the employee unless the circumstances justifying the application of section 63(3)(c) of the *Act* are clear.

65. It appears the Delegate did not base her analysis on the concept of abandonment, explicitly. Instead, she emphasized the fact that the Complainant had not voluntarily quit. However, as stated in *Identec Solutions Inc.*, BC EST # D052/03, agreeing that a delegate's analysis is unduly restrictive, and saying that it is wrong, are two different things. In order to be successful, and obtain a remedy from the Tribunal pursuant to section 115 of the *Act*, an appellant must also show that the delegate's analysis led her to a wrong result. I am not persuaded that is what occurred in this case.

66. It is my opinion, therefore, that the Determination reflected the correct result, and that the Member should not have cancelled it on appeal.

ORDER

67. Pursuant to section 116 of the *Act*, I order that the Original Decision be cancelled. The Determination is confirmed.

Robert E. Groves
Member
Employment Standards Tribunal