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/109

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 # D102/12 issued by Tribunal Member Bhalloo on October 3, 2012. This latter decision was issued, and is closely linked to BC EST # D075/12, also issued by Tribunal Member Bhalloo, dated July 26, 2012. United Specialty similarly applied for reconsideration of this latter decision and I am issuing, concurrent with these reasons, my decision regarding United Specialty's reconsideration application concerning BC EST # D075/12. *These reasons for decision relate solely to BC EST # D102/12.*

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 delegate's August 8, 2012, report that was prepared as directed by Tribunal Member Bhalloo's July 26, 2012, "referral back" order. These reasons for decision should be read in conjunction with my reasons concerning United Specialty's reconsideration application with respect to BC EST # D075/12. However, for convenience, I shall now briefly summarize the prior proceedings that culminated in the Tribunal decision that is now before me (BC EST # D102/12, issued on October 3, 2012).

PRIOR PROCEEDINGS

5. United Specialty is the British Columbia distributor for a line of cleaning products. Ms. Diana Douglas ("Douglas") was a sales and marketing representative for United Specialty and following her dismissal she filed an unpaid wage complaint under section 74 of the *Act*. Following a 2-day complaint hearing, the Director of Employment Standard's delegate (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. The delegate also levied two $500 monetary penalties against United Specialty and thus the total amount payable under the Determination was $2,991.71.

6. United Specialty appealed the Determination to the Tribunal principally on the ground that the delegate erred in law in finding that there was an employment, rather than an independent contractor, relationship between the parties. United Specialty also applied for a section 113 suspension order and on June 13, 2012, Tribunal Member Roberts issued an order suspending the Determination provided United Specialty deposited Ms. Douglas' unpaid wages with the Director (see BC EST # D060/12). United Specialty deposited the requisite funds and they are currently standing in an interest bearing trust account.

7. On July 26, 2012, Tribunal Member Bhalloo issued reasons for decision concerning the merits of the appeal (BC EST # D075/12). I am concurrently issuing reasons for decision refusing United Specialty's reconsideration application as it relates to this latter decision. Although Tribunal Member Bhalloo, for the most part, confirmed the Determination, he concluded that the delegate erred in finding that Ms. Douglas' weekly $500 payment was not an advance against future commissions and the relevant portions of his decision on this 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*.

8. As directed by Tribunal Member Bhalloo, 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. The delegate, in her report to the Tribunal dated August 8, 2012, calculated Ms. Douglas' claim based on an $8 minimum hourly wage (the prevailing rate at the time in question) and a 40-hour workweek. In light of Tribunal Member Bhalloo's express directions, the entire re-calculation exercise was rather *pro forma* with the ultimate wage determination being essentially a *fait accompli*. Thus, the delegate awarded Ms. Douglas two weeks' wages of $640 ($8 x 40 x 2), 1 week's wages as compensation for length of service (40 x $8 = $320), concomitant 4% vacation pay based on her total earnings to November 17, 2010, and section 88 interest.

9. By letter dated August 10, 2012, the Tribunal provided the delegate's report to the parties and sought their submissions. Given the express nature of Tribunal Member Bhalloo's directions in his "referral back" order, the only consequential comments the parties could make would have been in regard to the delegate's arithmetic. Nevertheless, and as recounted in BC EST # D102/12 (the "Wage Confirmation Decision"), both parties attempted to introduce new substantive arguments relating to Ms. Douglas' unpaid wage entitlement. Ms. Douglas, for her part, attempted to advance new claims, and United Specialty attempted to

introduce an entirely new argument relating to its purported right to "claw back" certain monies that it had previously paid to Ms. Douglas (this argument was advanced despite the absence of any written assignment of wages as required by section 22(4) of the *Act*). Not surprisingly, Tribunal Member Bhalloo rejected both parties' arguments and, in the absence of any evidence of a calculation error, confirmed the amount owing to Ms. Douglas as set out in the delegate's report.

10. United Specialty now seeks reconsideration of Tribunal Member Bhalloo's Wage Confirmation Decision.

FINDING

11. United Specialty in its letter dated October 3, 2012, (appended to its Reconsideration Application Form) and in a separate submission dated October 8, 2012, has essentially reiterated the new arguments it made regarding the delegate's report that were properly rejected by Tribunal Member Bhalloo. United Specialty's reconsideration application is simply an attempt to reargue the very point it tried to advance before Tribunal Member Bhalloo. As I previously noted, this argument was quite properly rejected. Accordingly, this application does not pass the first stage of the *Milan Holdings* test. There is no need to seek submissions from the respondents since this application must be refused.

ORDER

12. United Specialty's application made pursuant to section 116 of the *Act* to reconsider the Wage Confirmation Decision (BC EST # D102/12) is refused. In light of this decision, the Tribunal's order issued on June 13, 2012, (BC EST # D060/12), suspending the effect of the Determination, is no longer in effect.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal