

An application for Reconsideration

- by -

Kim Bates

- 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

**FILE No.:** 2011A/161

**DATE OF DECISION:** December 12, 2011

## DECISION

### SUBMISSIONS

Kim Bates	on her own behalf
Nicholas Ellegood, Hakemi & Company	on behalf of Integrity Marketing Group Inc.
Emily Yao	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an application by Ms. Bates for a reconsideration of BC EST # D114/11 (the “Original Decision”), issued by the Tribunal on October 21, 2011.
2. Ms. Bates filed a complaint alleging that Integrity Marketing Group Inc. (“Integrity”) had failed to pay her “severance” pay, or compensation for length of service. After investigating the complaint, the Director of Employment Standards determined that Ms. Bates had quit her job and was not entitled to compensation for length of service. The Director concluded that Integrity had not contravened the *Employment Standards Act* (the “*Act*”) and decided to take no further action.
3. Ms. Bates appealed the Determination on the grounds that the Director erred in law and failed to comply with the principles of natural justice. Ms. Bates further alleged that new evidence had become available that was not available at the time the Determination was issued. Ms. Bates sought to have the Determination varied to award her compensation for length of service (“severance”). She also asked the Tribunal to make an Order against Integrity to “stop their criminal activity”.
4. Ms. Bates made no submissions in support of the grounds of appeal that the Director had failed to comply with the principles of natural justice and the Member found no evidence that Ms. Bates was denied the opportunity to adduce her evidence and respond to Integrity’s evidence. The Member also found that Ms. Bates had not presented any evidence that would meet the Tribunal’s test for new evidence. He noted that she had simply reiterated and added further explanations to the evidence she had previously given during the investigation of the complaint. The Member concluded that Ms. Bates was simply re-arguing her case.
5. After reviewing the Director’s analysis on the question of whether or not Ms. Bates had quit her employment, the Member concluded that the Director’s decision was rationally supported in the law and the evidence. The Member also found that the Director had turned his mind to the possibility that a condition of Ms. Bates’ employment had been substantially altered, a statutory concept similar to the common law of constructive dismissal, pursuant to s. 66 of the *Act*. Noting that Ms. Bates had stated in her complaint that she had quit her employment because “there were illegal activities going on at work”, that she could not lie any further for the bosses, and that her conscience was getting to her, the Member concluded that it was open to the Director to find that section 66 did not apply.
6. The Member was not persuaded with the merits of Ms. Bates’ appeal and upheld the Determination.

### ISSUE

7. 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?

## ARGUMENT

8. Ms. Bates seeks reconsideration of the Original Decision. Her application sets out a number of reasons, some of which are as follows:
  - The Member never “heard” her, merely repeating the Determination’s findings. Ms. Bates repeats many of the submissions she made on appeal, alleging, in effect, that the Member never read anything she said;
  - Ms. Bates denies that she was seeking “severance pay for ‘length of service’”, saying that she is requesting severance pay “due to working conditions” and for health reasons;
  - Ms. Bates also alleges that the Member “does not know what he is talking about” and states “You people just refuse to listen to simple facts. So I will have to go above you”.
9. The Director opposes the application, contending that Ms. Bates has not raised any questions of law, fact, principle or procedure that are so significant that they should be reviewed because of their importance to the parties or their implications for future cases. The Director contends that Ms. Bates’ application is nothing more than an attempt to re-argue the case advanced before the Director at first instance and in the Original Decision. The Director further submits that, even if the Tribunal concludes that Ms. Bates has met the threshold test, she has not raised a serious question of law, fact or principle, and that the Decision does not raise potential implications for future cases.
10. In reply, Ms. Bates submits that there was a “lack of law, fact and principle” by Integrity and that the Tribunal is corrupt.
11. Integrity also seeks to have the application for reconsideration dismissed. It argues that the matters raised in the Application do not meet the Tribunal’s reconsideration test.

## ANALYSIS

12. The *Employment Standards Act*, R.S.B.C. 1996 c. 113 (“*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
    - 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.

### 1. The Threshold Test

13. 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.”

14. In *Milan Holdings* (BC EST # D313/98) the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the Tribunal 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.
15. 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)
16. 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.
17. 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.
18. 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...
19. 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 favour 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.
20. One of the issues to be considered in a reconsideration application is the timeliness of the application. The Tribunal will consider delay in deciding whether to exercise the reconsideration discretion and where delay is

significant, an applicant should offer an explanation for the delay. An unexplained delay will militate against reconsideration. (*The Director of Employment Standards (Re Primadonna Ristorante Italiano)*, BC EST # RD046/01)

21. Although Ms. Bates' application is for a reconsideration of the Original Decision, issued by the Tribunal on August 23, 2011, her submissions consist of allegations of, in essence, corruption and bad faith by Integrity staff, the Director's delegates and the Tribunal Member. She repeats the allegations she made before the Director as well as those she made on appeal. She continues to assert that the Determination was "wrong", despite the conclusions of the Member. Ms. Bates repeats her assertion that she did not claim compensation for length of service. The record discloses that, in her Request for Payment Form, Ms. Bates sought "severance pay". There is nothing in the *Act* that entitles her to "severance pay". However, as the Director noted in the Determination, employees are entitled to compensation for length of service under section 63 of the *Act* unless the employer can demonstrate that the employee quit her employment. Although Ms. Bates does not dispute that she quit her employment, she contended that she did so because of her working conditions and several of Integrity's business practices. The Director analyzed those reasons and determined that they did not constitute a 'substantial alteration of a condition of her employment'. That determination was upheld by the Member on appeal. Ms. Bates' submissions, rather than addressing any of the factors the Tribunal has set out for an exercise of the reconsideration power, constitute, in effect, a denunciation of her former employer, the Director's delegates and the Original Member. Those allegations are not worthy of analysis or further comment.
22. The Member in the Original Decision carefully reviewed the Determination's factual findings and conclusions. He considered the arguments advanced by Ms. Bates and found no basis to interfere with the Determination. There is nothing in Ms. Bates' application that addresses any of the factors set out above regarding the exercise of the reconsideration power.
23. I find that Ms. Bates has not demonstrated that this is an appropriate case for the exercise of the Tribunal's reconsideration power. I am not persuaded, in reviewing the Determination, the arguments made on appeal, the Original Decision and the submissions on the application for reconsideration, that she has raised significant questions of law that should be reviewed because of their importance to the parties and /or their implications for future cases.

## **ORDER**

24. Pursuant to section 116 of the *Act*, the application for reconsideration is denied.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**