

An application for Reconsideration

- by -

Rite Style Manufacturing Ltd. and M.D.F. Doors Ltd.
(collectively, the “Employer”)

- 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: Matthew Westphal

FILE No.: 2005A/143

DATE OF DECISION: November 4, 2005

complaint with the Director, adding claims for compensation for length of service and for retaliatory discharge.

5. The Employer admitted having withheld wages from Costanzo, and said it had done so because Costanzo had damaged equipment and his poor work had resulted in the wastage of materials. The Employer denied having fired Costanzo in retaliation for his having filed a complaint with the Director, and said that it fired Costanzo because he had been playing video games instead of monitoring his equipment, and that materials and an expensive machine had been damaged because of Costanzo's carelessness.
6. The Delegate preferred the evidence of Costanzo to that of the Employer's witnesses, and found that the Employer had unlawfully withheld wages from Costanzo. He also found that the Employer had terminated Costanzo's employment as a direct result of Costanzo's complaint, so he awarded Costanzo compensation for retaliatory discharge under s. 79(2)(c) of the *Act*, instead of ordering his reinstatement.
7. The Delegate ordered that the Employer pay a total of \$11,164.94 for unpaid regular and overtime wages, annual vacation pay, compensation for retaliatory discharge, interest, and five administrative penalties, of \$500.00 each, for contraventions of ss. 18, 21, 40, 46, and 83 of the *Act*.

The Original Decision

8. The Employer appealed from the Determination, alleging an error of law. It provided no particulars of the alleged error of law, and filed no submission, despite having been specifically invited to do so by the Tribunal's Registrar.
9. The Member dismissed the Employer's appeal. He noted that the Delegate's findings concerning unpaid regular wages, overtime pay, vacation pay, and statutory holiday pay, had been based on the Employer's own payroll records, and were therefore supported by evidence. The Employer had admitted to having intentionally withheld some of Costanzo's wages. The Member also upheld the Delegate's finding that the Employer had dismissed Costanzo as retaliation for his having filed a complaint about unpaid wages and overtime. He considered the Delegate's analysis of the conflicting evidence regarding the reason for Costanzo's termination, and found that retaliatory discharge was "a reasonable and, indeed, the most reasonable inference to be drawn from the facts as found by the delegate". The Member noted that the Delegate had spoken to the parties and their witnesses directly, and had thus been in the best position to assess their credibility. The Member then reviewed the Delegate's award of lost wages resulting from the retaliatory discharge, and found that it had been reasonable.

SUBMISSIONS

10. The Employer requested reconsideration of the Original Decision, but only challenged the Member's upholding of the award of \$7,488.00 as compensation for retaliatory discharge. The Employer says that it terminated Costanzo not because he filed a complaint with the Director—which the Employer characterizes as "seeking information on overtime/statutory holidays etc."—but because Costanzo caused damage to company property through his carelessness, and refused to admit his error when confronted. The Employer's submission consists primarily of a narrative of the events it says prompted the dismissal.
11. Counsel for Costanzo argues that the request for reconsideration should be denied because the Employer was mainly asking the Tribunal "to re-weigh the evidence and to reverse adverse findings affecting the

credibility of Rite-Style’s witnesses,” and because the Employer “has not provided any compelling new evidence or demonstrated that an important finding of fact was not rationally supported by the evidence.”

12. The Delegate also filed a submission. He describes the evidence upon which he had based his findings, and also emphasizes that the burden had been on the Employer to demonstrate an error in the Determination in its appeal to the Tribunal. He also argues that the Employer seeks to have the Tribunal “re-weigh” evidence previously considered by him, and that the reconsideration process is not designed to give parties an opportunity to re-argue their case.

ANALYSIS

13. The legislature has conferred an express reconsideration power on the Tribunal in Section 116 which provides:

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.

14. The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97). The reconsideration power is discretionary, and the Tribunal exercises it with restraint. In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the Act to reconsider the original decision. Only if satisfied the case is appropriate for reconsideration will the Tribunal address the substantive issues raised in the application: in this case, whether the Member erred in law in confirming the Determination. One factor cited by the Tribunal in *Milan Holdings*, *supra* as militating against reconsideration is whether “the application’s primary focus is to have the reconsideration panel effectively “re-weigh” evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence).”

15. A useful summary of the approach to be taken at this first stage of the reconsideration analysis is set out in *Super Save Disposal Inc. and Accton Transport Ltd.*, BC EST # RD124/05, at paras. 14-15:

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.

In *Zoltan Kiss* BC EST #D122/96, the Tribunal set out a number of reasons a decision would be reconsidered, including a mistake in stating the facts and serious mistake in applying the law. The Tribunal emphasised that it would use the reconsideration power only in very exceptional

circumstances, and that it was not meant to allow parties another opportunity to re-argue their case. The focus of the reconsideration panel will in general be with the correctness of the decision being reconsidered.

16. Having reviewed the Original Decision, the Determination, the submissions of the parties, and the record that was before the Delegate, I am not persuaded that the Employer's application makes out a good arguable case warranting reconsideration.
17. Although the Employer bases its application on an error of law, its application is really a challenge to the Delegate's inference of fact that the Employer terminated Costanzo because he had filed a complaint with the Director. The Employer reiterates the position it took before the Delegate and the Member: namely, that it dismissed Costanzo because of incompetence and damage to company property. I agree with counsel for Costanzo and with the Delegate that the Employer's application is unsuitable for reconsideration because it is simply an attempt to have the Tribunal re-weigh evidence.
18. Further, even if I were to exercise my discretion to reconsider the Original Decision, I would not interfere with it because it was, in my view, correct. In the Original Decision the Member fully considered the Employer's position and the record that was before the Delegate. As the Member noted, the Delegate had the advantage of speaking to the parties and their witnesses, and did not find the Employer's witnesses credible on the issue of why Costanzo's employment was terminated. The Member held that there was evidence to support the Delegate's finding that the Employer dismissed Mr. Costanzo in retaliation for Costanzo's having filed a complaint with the Director of Employment Standards. I agree with that conclusion, and with the Member's finding that the Delegate acted reasonably in ordering that the Employer pay Costanzo compensation for the retaliatory discharge. For this further reason, the Employer's application for reconsideration must fail.

ORDER

19. Pursuant to Section 116 of the *Act*, I order the Original Decision be confirmed.

Matthew Westphal
Member
Employment Standards Tribunal