Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Mike Rogozinski
("Rogozinski")

- 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

ADJUDICATOR: April D. Katz

FILE No.: 2001/083

DATE OF DECISION: May 17, 2001

DECISION

SUBMISSIONS

Mike Rogozinski	on his own behalf
Yasmin S. Amlani	on behalf of Tri-M Systems Inc.
No One	on behalf of the Director of Employment Standards

OVERVIEW

This is an Application for Reconsideration of a Tribunal Decision, which cancelled a Determination. In the Determination the Director of Employment Standards (" Director") found that Tri M Systems Inc. ("Tri-M") owed Mike Rogozinski (" Rogozinski") one week of compensation for length of service when he employment was ended on July 4, 2000. The Tribunal Decision concluded that the money Rogozinski thought he received as sick pay from Tri-M was his week of compensation for length of service.

This matter proceeded by way of written submission.

ARGUMENT

Rogozinski sought a reconsideration on the basis that the Tribunal Decision contained clerical errors, mistakes in stating the facts, issues in the appeal that were misunderstood and failed to consider new evidence.

Tri-M'S position is that it has no standard sick leave policy. Tri-M's practice is to provide no paid sick leave during the first three months of employment, the probationary period. After the first 3 months employees will be paid for up to 3 days a year when they provide a doctor's note for their absence. Any absence for sickness beyond 3 days is unpaid.

Tri-M argues that when it paid Rogozinski for the 5 days absence in his last month of probation, which was immediately preceding his last day of work, it did so as compensation for length of service.

ISSUES

1. Has Rogozinski met the requirements to justify a reconsideration of a Tribunal Decision?

2. If so, was Rogozinski paid a week's pay as paid sick leave or as compensation for length of employment?

REQUEST FOR RECONSIDERATION

In his application for reconsideration Rogozinski indicates that he seeks a reconsideration because

1. The Decision contains clerical errors in referencing him as "Oswald" or "Rogozinsky".

2. The Decision failed to consider some of the evidence submitted with respect to the source of the evidence and the timing of events.

THE LAW

Reconsideration

Tribunals have written extensively about the basis for a reconsideration. Section 116 of the *Employment Standards Act* (the "*Act*") states:

> 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) cancel or vary the order or decision or refer the matter back to the original panel.

The power to reconsider orders and decisions under Section 116 is a discretionary power that is exercised with caution. The Tribunal has adopted limited grounds for reconsideration of decisions. Those grounds include

> (a) a failure by an adjudicator to comply with principles of natural justice;
>
> (b) where a mistake of fact has been made;
>
> (c) where a decision is inconsistent with other decisions not distinguishable on the facts;
>
> (d) where significant and serious new evidence has become available that had such evidence been presented to the adjudicator it would have lead the adjudicator to a different conclusion;
>
> (e) serious mistake in applying the law;
>
> (f) misunderstandings or failure to deal with a significant issue; and
>
> (g) a clerical error in the decision.

The purpose of the *Act* is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act", section 2(d). Allowing more than one hearing in a matter extends the proceedings and delays the remedy or resolution of the complaint. The Tribunal's authority is limited to confirming, varying or canceling a determination, or referring a matter back to the Director of Employment Standards under Section 115. The above reasons imply that a degree of finality is desirable. (See Re: Kiss BC EST # D122/96; Re: Pacific Ice Company BC EST # D241/96; Re: Restaurontics Services Ltd. BC EST # D274/96; and Re: Khalsa Diwan Society BC EST # D199/96).

The purpose of the *Act* is to facilitate the quick, efficient and inexpensive adjudication of complaints. It has been stated that the reconsideration power should be used sparingly and only in exceptional cases. (See World Project Management Inc. BC EST # D134/97; Re: Allard BC EST # D265/97).

The criteria for exercising the discretion to reconsider a decision was stated in Re Milan Holdings Ltd., BC EST # D313/98. In Milan Holdings, the Tribunal set out a two-stage process for analyzing requests for reconsideration. The first stage is to decide whether the matter raised in the application for reconsideration warrants a second examination. In deciding this question, the Tribunal considers whether the focus of the request for reconsideration is to have a second panel effectively re-examine the evidence presented to the adjudicator in the first decision. The primary factor weighing in favour of a reconsideration is whether the applicant has raised significant questions of law, fact, principle or procedure of sufficient merit to merit reconsideration. Reconsideration will not be used to allow a "re-weighing" of evidence or the seeking of a "second opinion" when a party simply disagrees with the original decision. (See Wicklow Properties Ltd., et al., BC EST # D518/99)

Rogozinski has demonstrated that clerical errors were made in the decision that require amendment. Rogozinski is referred to as both "Oswald" and "Rogozinsky ". Given these errors it is important to reconsider the other aspects of the Decision to ensure that all the evidence was fairly considered.

FACTS

The facts are well covered in the Determination and most of them are not disputed. Tri-M is an engineering company. Tri-M employed Rogozinski as a Sales Associate from April 3, 2000 to July 4, 2000. Rogozinski was off sick from June 26 to July 3, 2000.

In response to a request from Tri-M's Administrator/Office Manager Rogozinski obtained a doctor's note to explain his absence from work from June 26, 2000 to July 3, 2000. Rogozinski believed the note was required to ensure he received paid sick leave. Tri-M paid Rogozinski for the period June 26, 2000 to July 3, 2000.

The Delegate interviewed various staff at Tri-M. All the evidence from those interviewed by the Delegate and those who gave written evidence afterwards supported Tri-M's claim that no one was given paid sick leave during the first three month probation period.

Tri-M indicated that every employee who is absent for more than one day of sickness is required to provide a doctor's note to explain the absence. This is consistent with Rogozinski's experience.

The evidence of paid sick leave is inconsistent after the first 3 months of work. The written policy produced by the Administrator is denied to be current practice. The written policy states that employees may have up to three paid sick days a year. One employee reported he was absent for a day and did not need to make up the time. One employee reported that time could be made up with shorter lunches and extended days of work. The policy is not articulated or apparently consistently applied, if there is one at all.

Tri-M denies ever telling Rogozinski that he was entitled to any paid sick leave. Rogozinski states that he could not imagine any other reason to require him to produce a doctor's note for his absence. He believed the representations at the last meeting with Tri-M that they were "all square" and the fact that he was given a cheque for the week he was off sick meant that Tri-M had decided to give him paid sick leave.

The Delegate explained to Tri-M in a letter dated August 4, 2000 that Tri-M could not pay sick benefits and then decide to label the payment vacation pay or compensation for length of service.

ANALYSIS

Tri-M appealed the Determination and an oral hearing was held. Tri-M appeared with counsel. Rogozinski did not appear because he felt he could not afford to lose a day's pay to attend the hearing.

The Tribunal held that Tri-M is under no statutory obligation to provide paid sick leave. The fact that Tri-M provides paid sick leave inconsistently is within their discretion. Tri-M may allow some employees to work for the time lost and others with longer period with the company to have 3 days a year. Neither of these scenarios deters from the consistent practice of not providing paid sick leave to probationary employees.

Tri-M paid Rogozinski for the period from June 26, 2000 to July 2, 2000 because they had decided to end his employment before he became ill. Tri-M's plan was to let Rogozinski know that his employment ended at the end of his first day back at work. The first day he was back was July 4, 2000. The cheque had been prepared in advance of the meeting. It is consistent with this interpretation to find that Rogozinski received his week's pay as compensation for length of service at the time his employment ended.

The fact that Tri-M paid separate vacation cheques on a different day does not disturb the fundamental conclusion of the Tribunal that Rogozinski's pay was not paid sick leave but compensation for length of service. The facts as related by Rogozinski and the Tribunal's analysis are consistent. I find no error.

Rogozinski has not argued that there was an error of law if the facts are as stated in the Tribunal decision.

CONCLUSION

Based on the facts in evidence I find no error in fact or law in the Decision BC EST # D013/01.

ORDER

This Application is denied pursuant to Section 116 of the *Act*.

The Employment Standards Tribunal Decision BC EST # D013/01 is confirmed.

APRIL D. KATZ

April Katz
Adjudicator
Employment Standards Tribunal