An Application for Reconsideration

- by -

Bevan Thistlethwaite
("Thistlethwaite")

- 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: David B. Stevenson

FILE No.: 2002/484

DATE OF DECISION: December 10, 2002

DECISION

OVERVIEW

Bevan Thistlethwaite ("Thistlethwaite") seeks reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision of the Tribunal, BC EST #D340/02 (the "original decision"), dated July 22, 2002. The original decision considered an appeal of a Determination issued on April 23, 2002, which had concluded Thistlethwaite's former employer, QI Systems Inc. ("QI Systems") had contravened the *Act* and ordered QI Systems to pay an amount of $3,698.43.

The original decision varied the Determination, ordering QI Systems to pay Thistlethwaite an amount of $1,010.00 together with any interest that had accrued under Section 88 of the *Act*.

Thistlethwaite says the Adjudicator of the original decision may have erred in the calculation of the amount owed.

ISSUE

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. If satisfied the case is appropriate for reconsideration, the substantive issues raised in this application is whether the amount owed was correctly calculated in the original decision.

ANALYSIS OF THRESHOLD ISSUE

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

Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is *"to provide fair and efficient procedures for resolving disputes over the interpretation and application"* of its provisions. Another stated purpose, found in subsection 2(b), is to *"promote the fair treatment of employees and employers"*. The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. An assessment is also be made of the

merits of the Adjudicator's decision. Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the tribunal as including:

- failure to comply with the principles of natural justice;
- mistake of law or fact;
- significant new evidence that was not reasonably available to the original panel;
- inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration.

This application takes issue with the conclusion in the original decision that QI Systems had satisfied their statutory obligation under Part 7 of the *Act* relating to Thistlethwaite's annual vacation and vacation pay entitlement for the first two years of his employment by providing him with six weeks' paid vacation during that time. Thistlethwaite says the conclusion reached in the original decision appears to be inconsistent with Section 59 of the *Act* and the Adjudicator's commentary on, and application of, that provision in the original decision.

This application does not raise a dispute on the facts.

Thistlethwaite commenced his employment with QI Systems on November 1, 1996. His employment ended on September 30, 1999. There was agreement between them that Thistlethwaite would be entitled to two weeks paid vacation for his first year of employment and three weeks paid vacation in each year thereafter up to the fifth year. Thistlethwaite acknowledged he took a five week paid vacation leave between December 1, 1997 and January 9, 1998 and another one week of paid vacation leave in October 1998. All of this vacation leave occurred during his second year of employment - November 1, 1997 to October 31, 1998. He took another week of vacation leave in August 1999, but that has little significance in this application.

There is no dispute, and no disputing, that following twelve consecutive months of employment, QI Systems was *statutorily required*, pursuant to Sections 57 and 58 of the *Act*, to give Thistlethwaite at least 2 weeks off (subsection 57(1)(a)) and to pay him at least 4% of total wages earned during that year (subsection 58(1)(a)). Similarly, in respect of his second year of employment, QI Systems was *statutorily required* to give Thistlethwaite at least two weeks off and to pay him at least 4% of total wages earned during the second year[1]. During his second year of employment, Thistlethwaite received six weeks vacation time off with pay. The original decision found that the six weeks paid vacation leave given to Thistlethwaite by QI Systems during his first two years of employment satisfied their obligations under

[1]In fact, QI Systems had agreed to give Thistlethwaite three weeks annual vacation for his second year and (by implication) to pay him 6% of total wages earned.

Part 7 of the *Act*. Thistlethwaite does not dispute that QI Systems discharged their statutory requirements in respect of his first year of employment in the five weeks paid vacation in provided to him in December 1997 and January 1998, although I believe he over-reaches by suggesting the entire five week period should be applied to the statutory entitlement he had accrued up to December 1997. In fact and in law, he was entitled to no more than two weeks vacation and 4% vacation pay. There is no reason in law or logic for rolling the other three weeks paid vacation leave into his statutory entitlement for his first year of employment. I note in the original decision that Thistlethwaite took the position the additional three weeks paid vacation was a form of 'bonus' or compensation for working a large number of additional hours in the previous period. By necessary implication, this position was rejected in the original decision.

Having failed to convince the Adjudicator of the original decision that the additional three weeks of paid vacation given to him in the period December 1997 to January 1998 should be considered a form of 'bonus' or overtime compensation, Thistlethwaite says, in any event, that it should not have been accepted as discharging QI System's statutory obligation under Part 7 of the *Act* in respect of his second year of employment. He says such a result appears to go against the provisions of Section 59 of the *Act*. I disagree. A fair and reasonable reading of Section 59, when considered in light of the purposes and objectives of the *Act*, does not compel a conclusion that paid vacation leave given to an employee during the year for which the statutory vacation entitlements are accruing can be found to be a 'reduction' of that employee's annual vacation of vacation pay for that year.

Thistlethwaite also says the original decision is internally inconsistent because the Adjudicator rejected the argument that the "extra week" of vacation and vacation pay given to Thistlethwaite for his second year of employment could be "carried forward" into his third year of employment and reduce his vacation and vacation pay entitlement for that year of employment. I see no inconsistency. If Section 59 is to have any meaning at all, it must operate to preclude an employer from carrying forward, from one year to the next, vacation or vacation pay given to an employee which were in excess of the minimum requirements of the *Act* and attempting to apply those to the statutory requirements for the year in question. That is exactly what was done in the original decision.

I am not satisfied this is a case that warrants reconsideration.

ORDER

Pursuant to Section 116 of the *Act*, we order the original decision, BC EST #D340/02, be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal