An Application for Reconsideration

- by -

Herbert Van Kampen

- 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: John M. Orr

FILE No.: 2001/731

DATE OF DECISION: December 31, 2001

DECISION

OVERVIEW

This is an application by Herbert Van Kampen ("Van Kampen") under Section 116 (2) of the *Employment Standards Act* (the "*Act*") for a reconsideration of a Decision #D492/01 (the "Original Decision") which was issued by the Tribunal on September 17, 2001.

Van Kampen worked for Gateway File Systems Inc. ("Gateway") and claimed wages including compensation for length of service. The Director of Employment Standards ("the Director") determined that Van Kampen was owed wages including vacation pay and interest. However, the Director determined that Van Kampen was not entitled to compensation for length of service. The determinative issue was whether a condition of Van Kampen's employment had been substantially altered in a manner that ought to have triggered the Director's discretion under section 66 of the *Act.* The Director determined that the changes were only in the contemplative stages and that there had not in fact been a substantial alteration in Van Kampen's conditions of employment.

Van Kampen appealed the determination and a hearing was held on July 9th and 18th, 2001 and Van Kampen was assisted by counsel. On September 17, 2001 the Tribunal issued the adjudicator's decision in which she agreed with the Director's determination on the issue of compensation for length of service.

Van Kampen has now applied for reconsideration of the original decision. The stated grounds for the application for reconsideration are that the adjudicator was wrong in finding that arrears of salary did not constitute termination of the employment contract and that both the Director and the adjudicator were wrong not to have applied section 66 of the *Act.*

ANALYSIS

The current approach to the exercise of the reconsideration discretion under section 116 of the *Act* was set out by the Tribunal in *Milan Holdings Ltd.,* BCEST #D313/98. In *Milan* the Tribunal sets out a two-stage analysis in the reconsideration process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. In deciding this question the Tribunal should consider and weigh a number of factors such as whether the application is timely, whether it is an interlocutory matter, and whether its primary focus is to have the reconsideration panel effectively "re-weigh" evidence tendered before the adjudicator.

The Tribunal in *Milan* went on to state that the primary factor weighing in favour of reconsideration is whether the applicant has raised significant questions of law, fact, principle or procedure of sufficient merit to warrant the reconsideration.

The decision states, "at this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general". Although most decisions would be seen as serious to the parties this latter consideration will not be used to allow for a "re-weighing" of evidence or the seeking of a "second opinion" when a party simply does not agree with the original decision.

It is one of the defined purposes of the *Act* to provide a fair and efficient procedure for resolving disputes and it is consistent with such purposes that the Tribunal's decisions should not be open to reconsideration unless there are compelling reasons: *Khalsa Diwan Society* BCEST #D199/96.

The circumstances in which an application for reconsideration will be successful will be limited. In a Reconsideration decision dated October 23, 1998, *The Director of Employment Standards*, BCEST #D475/98, the Adjudicator sets out those limits as follows:

- *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*

In my opinion this is not a case that warrants the exercise of the reconsideration discretion. The submission made by Van Kampen on this reconsideration application only reiterates the arguments that have already been decided by the director and by the adjudicator in the original decision.

The argument about the application of section 66 of the *Act* was presented fully to the adjudicator and was considered carefully by her. She considered the relevant provisions of the *Act* and the appropriate jurisprudence. There is no suggestion in the appeal that the adjudicator failed to understand the argument or failed to give the appellant's submissions due consideration. The appellant simply submits that the decision is wrong. The adjudicator clearly was cognisant of the arguments put forward by, or on behalf of, Van Kampen. She analysed the material presented carefully and obviously decided that she agreed with the determination that section 66 was not applicable. While I may have not made the same decisions on these points there is no substantial legal reason to interfere with the original decision.

The application for reconsideration relies in great part upon the common law notion of "constructive dismissal" and, while I do not intend to reconsider the original decision I will comment briefly on this aspect of the reconsideration request. I do not intend my comments to be binding or authoritative in any future case where this issue is properly before the Tribunal but in

my opinion the "constructive dismissal" concept has no application under the employment standards legislative regime. Termination of employment is dealt with specifically in section 63 of the Act and it is the task of the Director and the Tribunal to apply that legislative regime. Section 66 is a discretionary power given to the Director and the use, or non-use, of that discretion should be generally respected by the Tribunal unless there are substantial reasons to consider otherwise. In this case the adjudicator agreed with the Director's position.

As stated above, reconsideration should be used sparingly and should not be used to substitute my analysis and my opinion for that of the adjudicator who wrote the original decision. It is fully within the intent and purposes of the act that there be some finality to the decisions of the Tribunal.

I am not persuaded that there is a sufficient basis in fact or in law to warrant any interference in the decision made by the adjudicator in the original decision. Therefore I am not prepared to exercise my discretion to reconsider the original decision.

ORDER

The application to reconsider the decision of the adjudicator in this matter is dismissed.

John M. Orr
Adjudicator
Employment Standards Tribunal