Employment Standards TRIBUNAL

Citation: George Dumitrache (Re)
2018 BCEST 15

An Application for Reconsideration

- by -

George Dumitrache
("Dumitrache")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2018A/9

DATE OF DECISION: February 7, 2018

DECISION

SUBMISSIONS

George Dumitrache on his own behalf

INTRODUCTION

1. I have before me an application filed by George Dumitrache ("Dumitrache") pursuant to section 116 of the *Employment Standards Act* (the "*ESA*"). Mr. Dumitrache has applied for reconsideration of BC EST # D128/17, an appeal decision issued by Tribunal Member Roberts on December 18, 2017 (the "Appeal Decision"). By way of the Appeal Decision, Member Roberts confirmed a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on July 18, 2017.

2. These proceedings concern an unpaid wage complaint filed by Mr. Dumitrache on March 20, 2017. The delegate dismissed Mr. Dumitrache's unpaid wage complaint on the ground that there was no persuasive evidence before her that Mr. Dumitrache's former employer, Glenlyon Norfolk School Society ("GNS"), had contravened the *ESA*.

3. In my view, this application does not pass the first stage of the *Milan Holdings* test (see *Director of Employment Standards and Milan Holdings Inc. et al.*, BC EST # RD313/98) and accordingly, it must be dismissed. My reasons for reaching that conclusion now follow.

BACKGROUND FACTS AND PRIOR PROCEEDINGS

4. Mr. Dumitrache was formerly employed with GNS as a custodian. His employment was terminated, on a without cause basis, and GNS and Mr. Dumitrache subsequently negotiated a settlement agreement pursuant to which Mr. Dumitrache would be paid a certain sum of money in exchange for a full release including, in very specific terms, a release of any and all claims he might have otherwise had under the *ESA*.

5. The delegate, in her "Reasons for the Determination" appended to the Determination (the "delegate's reasons"), made several findings of fact. First, she concluded that the settlement agreement, supported by adequate consideration, was a *bona fide* agreement not induced by any sort of action on the part of GNS that would have rendered the agreement void or voidable (for example, duress, fraud or misrepresentation). Second, Mr. Dumitrache either secured legal advice or, at the very least, was given every reasonable opportunity to obtain legal advice, prior to agreeing to the settlement (there was conflicting evidence from Mr. Dumitrache's evidence in this regard). Third, the funds payable under the agreement (a "gross" amount – *i.e.*, subject to statutory deductions – of $8,900 over and above three weeks' compensation for length of service that had already been paid to Mr. Dumitrache under section 63 of the *ESA*) were subject to an adjustment for vacation taken in excess of his entitlement as of the termination date – there was a $423.37 adjustment on this account. Fourth, Mr. Dumitrache was paid his statutory holiday pay and vacation pay entitlements in full.

6. Having made the above findings, the delegate stated, at page 10 of her reasons: "I will not proceed with the complaint" (see subsection 76(3)(i) of the *ESA*). However, in fact, Mr. Dumitrache's unpaid wage complaint *was* the subject of a formal oral complaint hearing and the delegate, following that hearing, issued detailed reasons explaining why the complaint was not meritorious.

7. Mr. Dumitrache appealed the Determination to the Tribunal, relying on all three statutory grounds (see subsection 112(1) – "error of law", "breach of natural justice" and "new evidence"). After receiving and reviewing submissions filed by the appellant, GNS and the delegate, Tribunal Member Roberts dismissed the appeal and Mr. Dumitrache now applies to have the Appeal Decision reconsidered.

8. Member Roberts held that the delegate properly gave full effect to the settlement agreement inasmuch as there was no legal basis for setting it aside, and she concluded "this is simply a situation where Mr. Dumitrache had second thoughts about the settlement" (para. 57). Member Roberts also found that the delegate did not make any legal or calculation error regarding Mr. Dumitrache's vacation pay entitlement.

9. Mr. Dumitrache's "natural justice" arguments principally turned on events that transpired at the complaint hearing although he also alleged that the delegate was "biased". Member Roberts found absolutely no evidence in the record before her to support this latter allegation (nor do I). With respect to the conduct of the hearing, Mr. Dumitrache complained that he was not permitted to question GNS's witnesses or was otherwise prevented from presenting his entire case. This essentially factual assertion was not accepted since the weight of the evidence on appeal was that Mr. Dumitrache *was* allowed to question witnesses and present his case; the delegate only reined him in when he became aggressive in his questioning, was otherwise being unduly repetitive, or was pursuing irrelevant lines of inquiry with his questions. I should note that factual determinations are not reviewable on reconsideration unless there was no evidence to support the impugned factual findings – a circumstance that clearly was not the situation in the instant case.

10. Finally, and with respect to the "new evidence" ground of appeal, Member Roberts held (at para. 60): "It is unclear from Mr. Dumitrache's submissions what 'new evidence' he seeks to submit. I have reviewed the appeal submission and the documents attached and I find there is nothing attached to the appeal submission that would meet the test for new evidence" (see also *Davies et al.*, BC EST # D171/03).

THE APPLICATION FOR RECONSIDERATION

11. Mr. Dumitrache filed a "Reconsideration Application Form" (Form 2) within the statutory 30-day time period (see subsection 116(2.1) of the *ESA*). However, he did not provide any written reasons or argument to support his reconsideration request. Rather, he sought an extension of the reconsideration period to January 29, 2018, so that he could perfect his application by providing proper reasons. The Tribunal's *Rules of Practice and Procedure* (especially Part 4) require that a complete application (including written reasons for seeking reconsideration) be filed within the statutory time limit.

12. On January 29, 2018, Mr. Dumitrache filed further argument with the Tribunal including "new evidence to be considered". Mr. Dumitrache submits that the Appeal Decision should not stand because "the wrong standard of proof" was applied to his "evidence regarding a fair hearing". He also says that Member Roberts erred in finding that there was no breach of natural justice and also erred in her treatment of the vacation pay

issue. Mr. Dumitrache has also advanced some other arguments but, in each case, he merely asserts error without providing any cogent argument or reasons supporting the bald assertions of error. I should add that his application merely repeats arguments that were advance on appeal and fully addressed by Member Roberts in the Appeal Decision.

13. In addition, Mr. Dumitrache submitted two 1-page affidavits – one from himself and a second from another person who attended the complaint hearing. Mr. Dumitrache's affidavit is simply a recitation of his argument that he was not given a full and fair opportunity to present his own case or to challenge the evidence submitted by GNS. The other affidavit essentially advances the same points made by Mr. Dumitrache regarding the oral complaint hearing and there is nothing in the material before me explaining why this second person could not have provided such an affidavit as part of the original appeal.

FINDINGS

14. Given that this application was not perfected within the statutory 30-day time period, it could be summarily dismissed solely on the basis that it was untimely. I am not persuaded that this is a proper case to extend the reconsideration application period but I prefer not to rest my decision on timeliness since, in any event, the application must be dismissed because it fails to pass the first stage of the *Milan Holdings* test.

15. There is nothing in the material before me to show that Member Roberts erred in her treatment of the issues raised by Mr. Dumitrache on appeal. This application is simply an unvarnished attempt to reargue (and without any compelling new evidence or arguments) the case put forward on appeal. While I do not find either affidavit to have much, if any, probative value, I will simply observe that they do not raise anything new. Mr. Dumitrache's arguments were fully explored by Member Roberts and I wholly endorse her reasons for dismissing the appeal.

16. Reconsideration applications do not proceed to the second stage of the *Milan Holdings* test unless there is a serious question raised in the application regarding the correctness of the Appeal Decision or it otherwise raises a serious natural justice concern. In my view, this application does not raise, even on a *prima facie* basis, a serious concern about the correctness of the Appeal Decision nor does it demonstrate that there was a failure to abide by the principles of natural justice regarding either the proceedings before the delegate or in the appeal proceedings before the Tribunal.

17. That being the case, there is no need to seek submissions from the respondent parties as this application must be dismissed.

ORDER

18. This application for reconsideration of the Appeal Decision is dismissed. Pursuant to subsection 116(1)(b) of the *ESA*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal