Employment Standards TRIBUNAL

Citation: Neil Fridd (Re)
2018 BCEST 23

An Application for Reconsideration

- by -

Neil Fridd
(the "Applicant")

- 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/21

DATE OF DECISION: March 15, 2018

DECISION

SUBMISSIONS

Daleen A. Thomas — counsel for Neil Fridd

OVERVIEW

1. Neil Fridd (the "Applicant") applies for an extension of the time to file an application for reconsideration (see subsection 116(2.1) of the *Employment Standards Act* – the "*ESA*"). This application is made pursuant to subsection 109(1)(b) of the *ESA*.

BACKGROUND FACTS

2. On April 21, 2017, and following an oral complaint hearing held on March 9, 2017, Jordan Hogeweide, a delegate of the Director of Employment Standards (the "delegate"), issued a Determination and accompanying "Reasons for the Determination" (the "delegate's reasons"). The Applicant, despite being given ample notice of the complaint hearing (see the delegate's reasons, at pages R4 – R5), did not attend the hearing.

3. By way of the Determination, the delegate ordered the Applicant to pay a former employee (the "complainant") the total sum of $13,022.46 on account of unpaid wages and section 88 interest. Further, and also by way of the Determination, the delegate levied four separate $500 monetary penalties against the Applicant. Thus, the total amount payable under the Determination is $15,022.46.

4. The following text box was set out at the bottom of the second page of the Determination:

> **Appeal Information**
>
> Should you wish to appeal this Determination, your appeal must be delivered to the **Employment Standards Tribunal** by 4:30 pm on May 29, 2017.
>
> The Employment Standards Tribunal is separate and independent from the Employment Standards Branch. Information on how to appeal a Determination can be found on the Tribunal's website at www.bcest.bc.ca or by phone at (604) 775-3512.

5. Notwithstanding the clear direction given to the Applicant regarding when an appeal must be filed, the Applicant did not file an appeal of the Determination until August 28, 2017, some three months after the statutory appeal period expired. Accordingly, the Applicant sought an extension of the appeal period under subsection 109(1)(b) of the *ESA*. In a decision that is the subject of the present application, Tribunal Member Stevenson refused to extend the appeal period (see 2018 BCEST 2).

6. In refusing to extend the appeal period, Member Stevenson made the following findings:

   i) there was significant delay and that the Applicant failed to provide a reasonable explanation for the delay (para. 31) – the Applicant's lawyer advised that she had only been retained a few days

prior to filing the appeal and neither she, nor the Applicant, provided any explanation as to why the Applicant had waited so long to take any action in the form of consulting legal counsel;

ii) the Applicant appeared to have been motivated to file an appeal only when faced with collection proceedings and he did not otherwise have an ongoing intention to appeal (para. 32);

iii) if the appeal period were to be extended, that would prejudice the complainant (para. 33); and

iv) the Applicant did not have, even on a *prima facie* basis, meritorious grounds of appeal (see paras. 39 – 51).

7. Thus, and in light of the above findings, Member Stevenson concluded "there was no justification for extending the appeal period" (para. 51) and that decision, of itself, was sufficient to dispose of the appeal (see para. 52) – see subsection 114(1)(b): "At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply…(b) the appeal was not filed within the applicable time limit".

8. However, in addition, and this aspect of the appeal decision is arguably *obiter dicta*, Member Stevenson concluded that the appeal had no reasonable prospect of succeeding and, on that basis, could equally be dismissed under subsection 114(1)(f) of the *ESA*.

THE APPLICANT'S SUBSECTION 109(1)(b) APPLICATION

9. The appeal decision was issued on January 16, 2018. The 30-day reconsideration application period expired on February 15, 2018; the instant reconsideration application was not filed until February 19, 2018.

10. The Applicant's explanation for his tardy application – provided by his legal counsel (who also acted on his behalf in the appeal) – is that it was entirely his counsel's fault: "…the due date for a reconsideration of the appeal, was due on February 15th, 2018. The reason for the delay is mine, as [the Applicant's] counsel, not due to his actions". Counsel's argument continues: "Although we started work on the reconsideration after receiving the appeal, I had set the 15th aside to complete my submission". However, as counsel explains, she was delayed in that latter endeavour by an "urgent" mediation and due to other problems (including an alleged power outage at her office), she was not able to complete the submission until it was filed on February 19.

FINDINGS AND ANALYSIS

11. I am not persuaded that the Applicant has provided a satisfactory explanation justifying extending the reconsideration application period. While the delay involved in this instance is not particularly problematic, I note that this is the *second* time that the Applicant has failed to comply with statutory time limits. Section 2(d) of the *ESA* states that one of its purposes is the fair and efficient resolution of disputes. In this case, the complainant's wage claim dates from early February 2016 – over two years ago – and while this delay cannot be entirely attributed to the Applicant's conduct, I note that he refused to attend the complaint hearing (at

which he could have advanced many of the arguments he tried to advance on appeal), and only appears to have been motivated to file an appeal when faced with collection proceedings.

12. Counsel's assertion is, essentially, that she waited to the very last day to file a reconsideration request and then was unable to do so due to the pressing demands of her practice. Indeed, the "urgent" mediation was supposed to end at 11 AM on February 15 (but ended at 4 PM) and thus counsel actually left the matter to the very last few hours before the deadline expired. That is simply not a good enough explanation. While I realize that people often leave many things to the very last moment and apparently live their lives barely meeting each deadline as it looms, the facts of this case are that the Applicant and his counsel had ample time to file a timely application and simply failed to do so. Counsel's explanation may leave the Applicant with some sort of recourse against his counsel – and I express no view on that matter – but that explanation does not, of itself, justify an extension of the reconsideration application period. If a lawyer is too busy to take on a client's case, then they should say so, refuse the retainer and refer the client to another lawyer who is able to assume conduct of the file and deal with it in a timely manner.

13. Returning to the appeal decision, I note that the Applicant did not provide any sort of reasonable explanation for his failure to file a timely appeal and, on that basis alone, his application to extend the appeal period was properly dismissed. However, and in addition, Member Stevenson found that the Applicant did not have an ongoing *bona fide* intention to appeal and that an extension would be prejudicial to the complainant. I endorse Member Stevenson's findings on those two latter points.

14. Quite apart from considering the lack of presumptive merit to the appeal, Member Stevenson was quite correct, in my view, to refuse to extend the appeal period. At the very least, I cannot say that he exercised his discretion to refuse to extend the appeal period in a manner that would suggest an abuse of discretionary authority. More to the point, I would have reached the very same conclusion as did Member Stevenson had I been originally presented with the extension request.

15. *Even if the Applicant's appeal had some presumptive merit*, in my view, given the delay involved, the lack of an adequate explanation for that delay and the matter of prejudice, it still would have been appropriate to refuse to extend the appeal period. However, Member Stevenson nonetheless reviewed the Applicant's grounds of appeal and found that each of them fundamentally lacked presumptive merit – I entirely agree with his analysis of the underlying merits of the appeal.

16. For the most part, the present reconsideration application seeks to reargue points made on appeal (and that, in general, is not a proper basis to justify hearing the application on its merits – see *Director of Employment Standards (Milan Holdings Inc.*), BC EST # D313/98). As previously noted, I consider Member Stevenson's analysis regarding the appeal's lack of merit to be entirely correct. However, very briefly, I will address the principal arguments that the Applicant has advanced in this application.

17. The Applicant says that the complainant is "an alleged employee, who is actually an imposter". The short answer to this assertion is, quite simply, if that is the Applicant's position, he should have attended the original complaint hearing where he would have been afforded the opportunity to challenge the complainant's evidence and provide his own testimony. As it was, the evidence before the delegate clearly demonstrated that the complainant was an employee and not an independent contractor.

18. The Applicant's legal counsel asserts that the Employment Standards Branch and its officers had some sort of independent duty to "remind" the Applicant "of his need to apply for and obtain legal assistance…both prior to and after the ESB decision [*i.e.*, the Determination] was made". I am not aware that there is any such duty – as is found in section 10(b) of the *Charter* regarding criminal offences – insofar as the adjudicative proceedings under the *ESA* are concerned. Counsel has not provided any authority for that proposition.

19. Counsel says that the Applicant submitted some information to the Employment Standards Branch after the Determination was issued and that this "new evidence should have been sufficient to trigger either an appeal or internal review". The short answer to this assertion is that the burden is on a *party* to file a proper appeal, within the statutory appeal period, if they wish to challenge a determination. The Employment Standards Branch has no legal authority to launch an appeal on behalf of an aggrieved party. If the Applicant wished to appeal the Determination – as was his statutory right – he was obliged to file a timely appeal (something he failed to do). The relevant appeal procedures were clearly spelled out in the text box in the Determination that I previously reproduced.

20. As part of the appeal process, the Director is obliged to provide the "record" that was before the delegate when the Determination was made (subsection 112(5) of the *ESA*). The Applicant now says that the record was deficient because it did not include documents that the Applicant was apparently seeking from the complainant but were never obtained. However, such documents, not being before the delegate, do not constitute part of the subsection 112(5) record. As for the documentary record that was before the delegate, if the Applicant wished to file other documents, or to secure documents from the complainant, he could have attended the hearing and either tendered his own documents or have made an application for the complainant to produce certain records.

21. Counsel says that Member Stevenson erred in his view of the Applicant's grounds of appeal and in refusing to make an "anonymization" order (see appeal decision, paras. 12 – 14). I have already expressed the view that I see no error whatsoever in Member Stevenson's treatment of the Applicant's original grounds of appeal and, further, I am not persuaded that he erred in rejecting the Applicant's anonymization request.

22. Counsel says that the delegate's submission made during the appeal process (regarding the Applicant's anonymization request) clearly shows that he was biased against the Applicant. Although, by way of response to the delegate's submission, the Applicant's counsel suggested that the delegate's submission contained factual errors, she did not specifically raise an issue of bias. This "bias" assertion was formally raised for the first time in the reconsideration application. I have reviewed the delegate's submission in the appeal proceeding and, having done so, cannot find anything therein that suggests he was biased – or even appeared to be biased – against the Applicant.

23. Finally, the Applicant says that there is a comparatively minor calculation error in wage award ($360.00), but this error operates to the credit, not the detriment, of the Applicant. Nevertheless, the Applicant maintains that because of this error, a "new determination is required". There may be an error – at page R3 of his reasons, the delegate summarized the wage payments the complainant testified he received and the total is $6,260, not the $6,620 that was actually credited to the Applicant. However, given that the complainant did not appeal, and my uncertainty as to whether there truly is a calculation error or an error in recording one or

more of the various wage payments made, I see no reason to vary the Determination or to remit the matter back to the Director.

24. For the reasons set about above, the application to extend the time for filing a section 116 reconsideration application must be refused.

25. Further, and in any event, even if this application were timely (or if the application to extend the reconsideration application period were granted), this application does not pass the first stage of the *Milan Holdings* test and, on that basis, should be dismissed.

ORDER

26. The Applicant's application to extend the time for applying for reconsideration is refused.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal