

Citation: Bito Plumbing & Heating Ltd. (Re)
2018 BCEST 101

An appeal

- by -

Bito Plumbing & Heating Ltd.
(the “Applicant”)

- of a Determination issued by -

The Director of Employment Standards

pursuant to section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

PANEL: Carol L. Roberts

FILE NO.: 2018A/95

DATE OF DECISION: October 1, 2018

DECISION

SUBMISSIONS

Chi Hang Ip

on behalf of Bito Plumbing & Heating Ltd.

OVERVIEW

1. This is an application by Bito Plumbing & Heating Ltd. (the “Applicant”) for a reconsideration of Tribunal Decision 2018 BCEST 80 (the “Original Decision”), issued by the Tribunal on August 14, 2018.
2. On December 15, 2017, a complainant alleged that the Applicant had contravened the *Employment Standards Act*, R.S.B.C. 1996 c. 113 (“*ESA*”) in failing to pay him wages and by requiring him to pay its business expenses (the “complaint”).
3. A delegate (the “delegate”) of the Director of Employment Standards (the “Director”) conducted a hearing into the complaint, and following that hearing, issued a Determination (the “Determination”) concluding that the Applicant had contravened the *ESA* in failing to pay the complainant wages and requiring him to pay its business expenses.
4. The Applicant appealed the Determination to the Tribunal on the grounds that the Director erred in law, specifically in finding that the complainant was an employee. The Applicant argued that the complainant was an employee of the previous, rather than the current, owner of the store.
5. The Tribunal Member dismissed the appeal under section 114(1) of the *ESA* after concluding that the appeal had no reasonable prospect of succeeding.

ISSUE

6. There are two issues on reconsideration:
 1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?
 2. If so, should the decision be cancelled or varied or sent back to the Member?

ARGUMENT

7. The Applicant seeks reconsideration of the Original Decision. In the request for reconsideration, the Applicant sets out the same argument as it made in its appeal; that is, that the complainant was not an employee. Included with the request for reconsideration is a statement from the previous owner.

THE FACTS AND ANALYSIS

8. The *ESA* confers an express reconsideration power on the Tribunal. Section 116 provides
 - (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) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

1. The Threshold Test

9. The Tribunal reconsiders a decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *ESA* detailed in section 2 “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act.”
10. In *Milan Holdings Inc.*, BC EST # D313/98, the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the Tribunal to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle, or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.
11. The Tribunal may agree to reconsider a Decision for a number of reasons, including:
- The Member fails to comply with the principles of natural justice;
 - There is some mistake in stating the facts;
 - The Decision is not consistent with other Decisions based on similar facts;
 - Some significant and serious new evidence has become available that would have led the Member to a different decision;
 - Some serious mistake was made in applying the law;
 - Some significant issue in the appeal was misunderstood or overlooked; and
 - The Decision contains a serious clerical error.
- (*Zoltan Kiss*, BC EST # D122/96)
12. While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The reconsideration process was not meant to allow parties another opportunity to re-argue their case.
13. After weighing these and other factors, the Tribunal may determine that the application is not appropriate for reconsideration. Should the Tribunal determine that one or more of the issues raised in the application is appropriate for reconsideration, the Tribunal will then review the matter and make a decision. The focus of the reconsideration panel will in general be with the correctness of the decision being reconsidered.

14. In *Voloroso*, BC EST # RD046/01, the Tribunal emphasized that restraint is necessary in the exercise of the reconsideration power:

... the *Act* creates a legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute...

There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the “winner” is not deprived of the benefit of an adjudicator’s decision without good reason. A third is to avoid the spectre of a Tribunal process skewed in favour of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

Analysis and Decision

15. The Applicant has failed to demonstrate that this is an appropriate case for the exercise of the Tribunal’s reconsideration power.
16. In dismissing the Applicant’s argument on appeal that the delegate erred in law, the Member wrote that the Applicant:
- ... appears to be re-arguing the position she took at the hearing before the Director that the Employer was Babito, not Bito. This was not supported on the facts at the hearing before the Director. The Director found that although there was a change of name of the business from Babito to Bito during the course of [the complainant’s] employment, there was no termination of [the complainant’s] employment on July 3, 2017. The delegate found that [the complainant] was continuously employed by Bito without interruption. Bito fails to identify any error of law on the part of the Director.
17. The reconsideration application does not argue, or establish, that the Member misunderstood a significant issue or that the decision is not consistent with other decisions based on similar facts. In my view, the Member both understood the issue and arrived at a conclusion which is consistent with other Tribunal decisions.
18. Section 97 of the *ESA* preserves the employment status of employees when their employer’s business or business assets are transferred to a third party. The evidence before the delegate was that the complainant’s employment was not terminated upon the sale of the business from the previous owner, Mr. Lorenzo, to the Applicant. The Member found no error of law in this conclusion.
19. The reconsideration application merely repeats the arguments made before the delegate and on appeal. The argument is not novel and the issue of successor employers has been addressed by the Tribunal on many occasions. The Original Decision was consistent with those decisions. That the Applicant disagrees with the result is not a basis for an exercise of the reconsideration power.
20. Furthermore, a reconsideration application is not an opportunity to present, for the first time, evidence that ought to have been presented to the delegate at first instance. The evidence consists of a letter from Mr. Lorenzo. Mr. Lorenzo appeared at the hearing before the Director and had full opportunity to

present this evidence to the delegate at the time of the hearing. The letter does not constitute significant and serious new evidence that was unavailable at the time of the hearing before the delegate.

ORDER

21. The request for reconsideration is denied. I order that the Original Decision, 2018 BCEST 80, issued August 14, 2018, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal