

Citation: North Shore Home Services Ltd. (Re)
2018 BCEST 52

An Application for Reconsideration

- by -

North Shore Home Services Ltd.
("NSHS")

- 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: David B. Stevenson

FILE NO.: 2018A/43

DATE OF DECISION: May 8, 2018

DECISION

SUBMISSIONS

Troy Thompson

on behalf of North Shore Home Services Ltd.

OVERVIEW

1. North Shore Home Services Ltd. (“NSHS”) seeks reconsideration of a decision of the Tribunal, Decision Number 2018 BCEST 14 (the “original decision”), dated February 7, 2018.
2. The original decision considered an appeal of a determination issued by Guy Massey, a delegate of the Director of Employment Standards (the “Director”), on November 7, 2017 (the “Determination”).
3. The Determination was made by the Director on a complaint filed by a former employee (“the complainant”) who had alleged NSHS had contravened the *ESA* by failing to pay regular wages, overtime wages, statutory holiday pay, and annual vacation pay.
4. In the Determination, the Director found NSHS had contravened sections 17 and 18 of the *ESA* and section 46 of the *Employment Standards Regulation*. The Director found the complainant was owed wages under the *ESA* in the amount of \$3,807.04, plus interest, and that NSHS was liable for administrative penalties in the amount of \$1,500.00.
5. An appeal of the Determination was filed by NSHS alleging the Director had erred in law, failed to observe principles of natural justice in making the Determination, and there was evidence that had become available that was not available when the Determination was being made.
6. The Tribunal Member making the original decision dismissed the appeal under section 114(1)(f) of the *ESA*, applying the principle developed in *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97, and, in any event, found the appeal “to be wholly lacking any substantive merit”.
7. At the root of both the Determination and the original decision was the conclusion, which was never accepted by NSHS, that the complainant was an employee under the *ESA* and therefore entitled to the benefit of its provisions.
8. This application was delivered to the Tribunal on April 13, 2018, more than a month outside the statutory time period for filing an application for reconsideration found in section 116 of the *ESA*, which expired on March 9, 2018. NSHS has applied for an extension of the reconsideration period to allow for the application to be accepted as timely. The application seeks to have the original decision cancelled and the matter referred back to the original panel or another panel of the Tribunal.

ISSUE

9. In any application for reconsideration, there is a threshold, or preliminary, issue of whether the Tribunal will exercise its discretion under section 116 of the *ESA* to reconsider the original decision. If satisfied the case warrants reconsideration, the issue raised in this application is whether the Tribunal should cancel the original decision and refer the matter back to the original panel or, if more appropriate, to the Director.

ARGUMENT

10. This application is limited to the continued refusal by NSHS to accept the conclusion in the Determination, affirmed in the original decision, that the complainant was an employee of NSHS under the *ESA*, accompanied by a brief explanation for its refusal to participate in the complaint process, which included refusals to comply with a Demand for Employer Records and to attend the complaint hearing. This explanation seems to suggest the failure to participate in the complaint process was attributable to the weight of personal matters that Troy Thompson (“Mr. Thompson”), the president and owner of NSHS, was experiencing. The explanation does not seem to accord with the Determination or the record, which mention nothing of personal matters but do indicate Mr. Thompson, from the outset of communications with the Employment Standards Branch in mid-July 2017, bluntly stated he would not attend any mediation or hearing.
11. In this application NSHS has done no more than re-submit the identical submission made in the appeal when challenging the finding of the Director that the complainant was an employee of NSHS under the *ESA*. There is no reference to the original decision at all and no submissions relating to the correctness of the original decision.
12. In respect of its application for an extension of the reconsideration application period, NSHS says the reconsideration application was delayed because Mr. Thompson was “the only one capable of handling this matter” and was “extremely busy with personal matters since Fall 2017”. These matters with which he was busy are listed in his request for an extension and need not be repeated here.

ANALYSIS

13. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally.
14. Section 116 of the *ESA* reads:
- 116 (1) *On an application under subsection (2) or on its own motion, the tribunal may*
- (a) *reconsider any order or decision of the tribunal, or*
- (b) *confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.*
- (2) *The director or a person served with an order or a decision of the tribunal may make an application under this section.*
- (2.1) *The application may not be made more than 30 days after the date of the order or decision.*

- (2.2) *The tribunal may not reconsider an order or decision on the tribunal's own motion more than 30 days after the date of the decision or order.*
- (3) *An application may be made only once with respect to the same order or decision.*
- (4) *The director and a person served with an order or a decision of the tribunal are parties to a reconsideration of the order or decision.*

15. The authority of the Tribunal under section 116 is discretionary. A principled approach to this discretion has been developed and applied. The rationale for this approach is grounded in the language and purposes of the *ESA*. One of the purposes of the *ESA*, found in section 2(d), is “to provide fair and efficient procedures for resolving disputes over the application and interpretation” of its provisions. Another stated purpose, found in section 2(b) is to “promote the fair treatment of employees and employers”. The approach is fully described in *Milan Holdings Inc.*, BC EST # D313/98 (Reconsideration of BC EST # D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In *The Director of Employment Standards (Re Giovanni (John) and Carmen Valoroso)*, BC EST # RD046/01, the Tribunal explained the reasons for restraint:

... 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” not be 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 able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

16. In deciding whether to reconsider, the Tribunal considers timeliness and such factors as the nature of the issue and its importance both to the parties and the system generally. Delay in filing for reconsideration will likely lead to a denial of an application. An assessment is also made of the merits of the original decision. The focus of a reconsideration application is, generally, the correctness of the original decision.

17. The Tribunal has accepted an approach to applications for reconsideration that resolves itself 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 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.

18. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively re-visit the original decision and come to a different conclusion.
19. 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 in the reconsideration.
20. I find this application does not warrant reconsideration.
21. There are two considerations that weigh heavily against this application. First, it was filed outside of the statutory time period for reconsideration applications. Second, even if I were persuaded to extend the application period, there is nothing about this application that raises any circumstance which would mitigate in favour of reconsideration.
22. The request for an extension of the reconsideration application period is denied.
23. In considering a requested extension of the statutory reconsideration application period, the Tribunal has adopted and applied an approach that evaluates the same criteria that have been identified when considering an application to extend an appeal period to requests for that invoked consideration of the criteria: see *Serendipity Winery Ltd.*, BC EST # RD108/15.
24. These criteria, are summarized in *Re Niemisto*, BC EST # D099/96:
- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
 - iii) the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
 - iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
 - v) there is a strong *prima facie* case in favour of the appellant.
25. In the circumstances of this case, there was considerable delay in filing this application. I do not find the reasons advanced for the delay to be reasonable or credible. The reconsideration process is not so onerous that he could not have committed sufficient time to ensure the reconsideration application was completed and filed within the reconsideration application filing period. Information for filing a reconsideration application was included in the Tribunal correspondence that accompanied the original decision when it was e-mailed and mailed to NSHS. While not seeking to diminish the importance of the personal matters that might have absorbed Mr. Thompson's time since the fall of 2017, I do not accept that Mr. Thompson was genuinely committed to seeking a reconsideration of the original decision.
26. In this application, NSHS has not presented a strong *prima facie* case. As indicated above, this application does nothing more than reiterate the position on the complainant's status under the *ESA* that NSHS has advanced throughout the complaint and appeal processes, seeking to have this reconsideration panel of the Tribunal re-visit the question that was decided in the Determination and affirmed in the original decision.

27. I agree with the result and the reasoning in the original decision: the steadfast refusal by NSHS to participate in the complaint process justified a refusal to consider an appeal in which NSHS sought to make a case that should have and could have been made to the Director. There is nothing in the instant application that seriously challenges the correctness of the original decision.
28. I also completely agree with the Tribunal Member making the original decision that the appeal was completely lacking any substantive merit.
29. The application is denied.

ORDER

30. Pursuant to section 116 of the *ESA*, the original decision, 2018 BCEST 14, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal