Employment Standards TRIBUNAL

Citation: Nery Santos (Re)
2018 BCEST 58

An Application for Reconsideration

- by -

Nery Santos
("Mr. Santos")

- 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)

PANEL: David B. Stevenson

FILE No.: 2018A/48

DATE OF DECISION: May 25, 2018

DECISION

SUBMISSIONS

Nery Santos — on his own behalf

OVERVIEW

1. Nery Santos ("Mr. Santos") seeks reconsideration of a decision of the Tribunal, number 2018 BCEST 51 (the "original decision"), dated May 8, 2018.

2. The original decision considered an appeal by Mr. Santos of part of a Determination issued by Elaine Ullrich, a delegate of the Director of Employment Standards (the "Director"), on January 19, 2018.

3. The Determination was made by the Director on a complaint filed by Mr. Santos, who had alleged West Coast Home & Truss Ltd. and G S Dhesi and Associates Ltd., associated employers under section 95 of the *ESA* (the "Employer"), had contravened the *ESA* by failing to pay regular and overtime wages, annual vacation pay and compensation for length of service.

4. In the Determination, the Director found the Employer had contravened the *ESA* sections 18, 28, 40, 58 and 63 of the *ESA* and that Mr. Santos was owed wages under the *ESA* in the amount of $12,087.24, plus interest, and that the Employer was liable for administrative penalties in the amount of $2,500.00.

5. The appeal filed by Mr. Santos alleged 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 in respect of his overtime claim.

6. Member Thornicroft, making the original decision, dismissed the appeal under section 114 of the *ESA*, finding no error of law or breach of natural justice by the Director in making the Determination and did not accept the additional material submitted with the appeal, finding Mr. Santos had not met the required threshold for allowing that material to be accepted and considered as new evidence in the appeal. A summary of the result of the appeal is found at para. 37 of the original decision:

> The Tribunal may dismiss an appeal, without hearing from the respondent parties, if the appeal has no reasonable prospect of succeeding (see subsection 114(1)(f) of the *ESA*). I have reviewed the Appellant's various reasons for appeal and I find that each has no merit whatsoever. Fundamentally, the Appellant [Mr. Santos] simply asks the Tribunal to substitute a different decision for that made by the delegate. However, I see no error in the delegate's analysis, or her evaluation of the evidence before her. The Appellant's notebook was not before the delegate but that was solely because the Appellant did not submit it into evidence. Further, even if the notebook had been before the delegate, I am not persuaded that circumstance would have changed the delegate's decision with respect to the overtime claim.

7. More particularly, on the "new evidence" ground of appeal, Member Thornicroft found the evidence Mr. Santos sought to introduce with the appeal did not satisfy the criteria established by the Tribunal for admitting new or additional evidence. He found the notebook evidence was not "new"; it could have

been provided to the Director during the complaint process; Mr. Santos had several opportunities to provide the notebook to the Director before the Determination was made but did not do so. He also expressed some concerns about its veracity and probative value. Member Thornicroft found the other "evidence" Mr. Santos sought to introduce with the appeal was not credible, if it was being introduced for the purpose of demonstrating he was not mentally fit to properly present his case to the Director, and not relevant to any other issue that was before the Director.

8. This 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. At its core, this application is limited to the continued disagreement by Mr. Santos with the conclusions in the Determination, affirmed in the original decision, on his overtime claim.

11. In this application Mr. Santos does no more than reiterate his case for allowing his notebook to be accepted by the Tribunal and used to support his overtime claim. As he states in his submission on this application: "My appeal was basically made regarding the decision of awarding me only partial amount of overtime against [the Employer]".

12. Mr. Santos submits:

> It is evident from the information provided above that my overtime [claim] is legitimate and request that the appeal may be forwarded to a different authority at the Tribunal to review and re-evaluate my case

13. The "information provided above" comprised:

i. an assertion by Mr. Santos that on the day following the complaint hearing he sought to submit his notebook but it was not accepted;

ii. an assertion that his claim was credible because he was performing the work of three people; and

iii. an assertion that he is currently being treated for PTSD.

14. Mr. Santos also points to the comment made in the original decision on the length of time that transpired between the completion of the complaint process and the issuing of the Determination.

ANALYSIS

15. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally.

16. Section 116 of the *ESA* reads:

> *(1) On an 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.*
>
> *(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.*

17. 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 Giovanno (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 best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

18. 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.

19. At the outset, I will make note of an obvious mistake in the original decision, where Member Thornicroft says the wage recovery period for Mr. Santos that is fixed by section 80 of the *ESA*, "runs from mid-November to December 21, 2016". That is wrong. Mr. Santos' employment ended December 21, 2016, and his complaint was filed with the Director on January 17, 2017. Applying section 80 of the *ESA*, his wage recovery period would run from *June 21, 2016* to December 21, 2016. I order the original decision varied to correct that error. This error, however, does not affect the final conclusion in the original decision nor does it advance this application. The variance is purely housekeeping.

20. 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.

21. 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.

22. I find this application does not warrant reconsideration.

23. This application is limited to that part of the original decision dealing with the "new evidence" ground of appeal. Except to reiterate contentions that were made in Mr. Santos' appeal and rejected in the original decision, the application does not contest the disposition in the original decision of the error of law and natural justice grounds of appeal. Even if I have misread the application submission and Mr. Santos continues to advance all grounds of appeal, he has not argued or attempted to establish there was any error in the original decision on the error of law and natural justice grounds.

24. The application is clearly within that category where the primary focus is to have this reconsideration panel re-visit the original decision and come to different conclusion. That weighs heavily against it.

25. As indicated above, the application does no more than seek to have this panel alter the finding in the original decision that the evidence Mr. Santos sought to introduce into the appeal did not meet the criteria established by the Tribunal in *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03 and change the decision not to accept it. Although technically not part of this reconsideration application, Mr. Santos reiterates his contention that this additional evidence proves his overtime claim,

a contention that is questionable at best and which speaks to the probative value of the notebook as evidence.

26. In respect of the disagreement with the decision to not accept the "new evidence", such a decision involved an exercise of discretion by Member Thornicroft. The Tribunal does not lightly interfere with that exercise of discretion unless it can be shown the exercise of discretion was not made in good faith, there was a mistake in construing the limits of authority, there was a procedural irregularity or the decision was unreasonable, in the sense that there was a failure to correctly consider the applicable principles, a failure to consider what was relevant, or a failure to exclude from consideration matters that were irrelevant or extraneous to the purposes of the *ESA*.

27. This application does not indicate, within the above considerations, why this panel should interfere with the decision of Member Thornicroft on the "new evidence" Mr. Santos sought to include with the appeal. The reasons expressed in his submission to support this application address his overtime claim and are, like much of his support for that claim, questionable or irrelevant. None of the submissions address the original decision in the context required when seeking to advance reconsideration.

28. On analysis, I find the reasons given in the original decision for not accepting the "new evidence" were both reasonable and correct. Member Thornicroft applied the test adopted and consistently applied by panels of the Tribunal when considering requests for including new or additional evidence with an appeal. I agree with the reasoning of Member Thornicroft in finding the "new evidence" was not "new", credible, relevant, or of probative value on the questions for which Mr. Santos sought to introduce it.

29. The application is denied.

ORDER

30. Pursuant to section 116 of the *ESA*, the original decision, 2018 BC EST 51, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal