

An Application for Reconsideration

- by -

Ahmad Zarei (Re)
("Mr. Zarei")

- 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/47

DATE OF DECISION: July 9, 2018

DECISION

SUBMISSIONS

Ahmad Zarei on his own behalf

OVERVIEW

1. Pursuant to section 116 of the *Employment Standards Act* (“ESA”), Ahmad Zarei (“Mr. Zarei”) has filed an application for reconsideration of the Tribunal’s decision, 2018 BCEST 38 (the “original decision”), issued on April 18, 2018.
2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 8, 2017.
3. The Determination was made by the Director on a complaint filed by Mr. Zarei, who alleged Celine Supermarket Ltd. carrying on business as Persian Kebab and Groceries (“Celine”) had contravened the *ESA* by failing to pay all wages owing to him.
4. In the Determination, the Director found Celine had contravened sections 18, 40, and 58 of the *ESA* and was ordered to pay Mr. Zarei wages in the amount of \$2,224.16, an amount which included interest under section 88 of the *ESA* and administrative penalties in the amount of \$2,000.00.
5. An appeal of the Determination was filed by Mr. Zarei alleging the Director had erred in law in making the Determination.
6. While the appeal was grounded in an alleged error in law, the appeal argument also raised a question of natural justice: whether Mr. Zarei had received a fair hearing.
7. The Tribunal Member making the original decision dismissed the appeal under section 114 of the *ESA*, finding Mr. Zarei was not denied a fair hearing, having been given the opportunity to present his case and to respond to the evidence that was before the Director, and concluding Mr. Zarei had demonstrated no statutory ground of appeal.
8. In making the original decision, the Tribunal Member found that all of the matters raised in the appeal, apart from the “fair hearing” argument, did no more than challenge factual conclusions made by the Director and that:

... the delegate fairly considered the evidence of both parties, made findings of fact and provided reasons for his conclusions. I find his conclusions were made on the evidence before him and they were rationally supported by the evidence.
9. The Tribunal Member correctly stated the Tribunal had no authority to consider appeals based on alleged errors in findings of fact unless such alleged errors amounted to error of law, and no such error was demonstrated in Mr. Zarei’s appeal.

10. This application was delivered to the Tribunal on June 5, 2018, a little more than two weeks after the expiry of the statutory time period for reconsideration applications found in section 116(2.1) of the *ESA*.
11. On May 5, 2018, Mr. Zarei had communicated with the Tribunal requesting an extension of the reconsideration filing period, to June 7, 2018. The Tribunal acknowledged the request for an extension of the time period by correspondence dated May 9, 2018, affirming the statutory deadline of May 18, 2018, for filing a reconsideration application and that the request for an extension of time would be decided in the course of deciding the request for reconsideration.

ISSUE

12. 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

13. Mr. Zarei has done nothing more in this application than resubmit substantially the same arguments made unsuccessfully to the Director and, also without success, to the Tribunal Member making the original decision.
14. He requests this panel of the Tribunal review the findings made by the Director, and confirmed in the original decision, on the following matters: the date of the cancellation of the partnership agreement; the scope of the partnership; the Director's treatment of some of the evidence and documentation; and the weight given to the evidence of witnesses presented by Mr. Zarei in support of his claim. He also requests this panel of the Tribunal to consider what he refers to as "other items", which include a commentary on a reference in the original decision to the "purchase of kitchen supplies", an attachment Mr. Zarei says demonstrates payment of wages and an argument, which is not supported by the Determination, that Mr. Zarei was not paid for his last three days of work.
15. The application also seeks to have this panel re-visit the finding in the original decision on Mr. Zarei's contention the complaint hearing was not fair to him.

ANALYSIS

16. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally.
17. Section 116 of the *ESA* reads:
- (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.*

- (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.*

18. 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.

19. 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.

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. 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.

22. Mr. Zarei has requested an extension of the statutory reconsideration application period. In considering such a request, 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.

23. These criteria are summarized in *Re Niemisto*, BC EST # D099/96:

1. a reasonable and credible explanation for failing to request an appeal within the statutory time limit;
2. a genuine and ongoing *bona fide* intention to appeal the Determination;
3. the responding party and the Director have been made aware of the intention;
4. the respondent party will not be unduly prejudiced by the granting of an extension; and
5. a strong *prima facie* case in favour of the appellant.

24. There was a delay of more than two weeks in filing this application. The explanation given for the delay and the need for an extension of time are not unreasonable. Ultimately however, this application is not timely. The delay weighs against the application, though not significantly in this case.

25. Of more relevance on the requested extension of time is whether Mr. Zarei has presented a strong *prima facie* case for reconsideration, and I find he has not.

26. As indicated above, this application does no more than reiterate arguments Mr. Zarei advanced in the complaint and appeal processes, seeking to have this reconsideration panel of the Tribunal re-visit matters that were decided in the Determination and affirmed in the original decision. I will note the “other items” raised in the reconsideration application submission, while focussing on specific matters, were incorporated within findings of fact made in the Determination.

27. I agree with the result and the reasoning in the original decision: Mr. Zarei was not denied a fair hearing and the matters he sought to have the Tribunal review in the appeal were findings of fact over which the Tribunal had no authority as they were not shown to amount to error of law.

28. I completely agree with the Tribunal Member making the original decision that Mr. Zarei’s appeal did not demonstrate any statutory ground of appeal. It follows the appeal had no reasonable prospect of succeeding and the Tribunal Member making the original decision was correct to dismiss it.

29. I would not extend the statutory filing period in the circumstances of this case.

30. In addition to being filed outside of the statutory time period for filing reconsideration applications, this application represents a clear example of circumstances where the Tribunal will not grant reconsideration; it is entirely grounded in a challenge to conclusions of fact made in the Determination and confirmed in the original decision as being “rationally supported in the evidence”. It seeks to have this reconsideration panel of the Tribunal re-visit the result of the original decision and come to a different conclusion without demonstrating any error in the original decision, which, I add, found Mr. Zarei had shown no reviewable error in the Determination.
31. For all of the above reasons, I find this application does not warrant reconsideration.
32. The application is denied.

ORDER

33. Pursuant to section 116 of the *ESA*, the original decision, 2018 BCEST 38, is confirmed.

David B. Stevenson
Panel
Employment Standards Tribunal