

An Application for Reconsideration

- by -

Xiaomin Zhang, a Director of Hot Street Productions Ltd.
("Ms. Zhang")

- 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: Carol L. Roberts

FILE No.: 2018A/91

DATE OF DECISION: September 19, 2018

DECISION

SUBMISSIONS

Xiaomin Zhang on her own behalf

OVERVIEW

1. This is an application for reconsideration of 2018 BCEST 85 issued by Tribunal Member Kenneth Wm. Thornicroft on August 15, 2018 (the “Original Decision”).
2. Hot Street Productions Ltd. (“Hot Street”) was a film production company that was the production vehicle for a movie shot in Vancouver. In the fall and early winter of 2016, the Director of Employment Standards (the “Director”) issued three Determinations against Hot Street relating to unpaid wages (the “Corporate Determinations”). None of the Corporate Determinations were appealed.
3. The Director also issued three section 96 Determinations (the “Director Determinations”) relating to the same wages against Christopher Brough (“Mr. Brough”; the “Brough Director Determinations”) as well as three Director Determinations against Xiaomin Zhang (“Ms. Zhang”; the “Zhang Director Determinations”) on the grounds that they were directors of Hot Street at the time the unpaid wages were earned or should have been paid. Mr. Brough appealed the Brough Director Determinations, and in each case, the Brough Director Determination was confirmed.
4. The Director Determinations against Ms. Zhang were issued November 23, 2016, December 12, 2016, and December 30, 2016. Ms. Zhang filed her appeals of the Zhang Director Determinations on March 16, 2018. Because the appeals were filed well after the statutory appeal deadline, Ms. Zhang also sought an extension of time in which to file the appeal.
5. In her appeals, Ms. Zhang argued that the Zhang Director Determinations should be cancelled because the delegate erred in law and failed to comply with the principles of natural justice. The Member found no basis for either of these grounds of appeal.
6. A British Columbia registry search indicated that both Mr. Brough and Ms. Zhang were directors of Hot Street at the time the employees’ wages were earned. The Registry information indicated that Ms. Zhang was a director of Hot Street from December 15, 2015, until July 4, 2016.
7. Ms. Zhang contended that Mr. Brough should be held fully and solely responsible for the employees’ wages, and that the Director of Employment Standards did not conduct a “proper investigation.” She stated that if the Director Determinations issued against her were not cancelled, she would “pursue a lawsuit compensating for [her] mental and financial losses, along with damage to [her] reputation” and that she would disclose the Director’s “illegal and racist suspected actions.”
8. The Member considered the factors outlined in *Niemisto* (BC EST # D099/96) in analyzing whether or not to extend the appeal period.

9. The Member noted that, by her own admission, Ms. Zhang was aware of the Director Determinations issued against her in September 2017, but did not file her appeal until March 16, 2018. The Member noted that Ms. Zhang had counsel in September 2017 and found it difficult to accept that her lawyer would not have advised her of her appeal rights.
10. The Member also noted Ms. Zhang's contention that she had been trying to file an appeal since September 2017, but had been frustrated by the actions of the Employment Standards Branch. The Member found Ms. Zhang's assertion to be "extremely disingenuous," noting that the deadline and information on how to file an appeal were clearly indicated in the body of the Director Determinations. The Member also noted that while Ms. Zhang contended she did not speak "fluent English," her appeal submissions were comprehensible English and that she had legal representation.
11. The Member considered the fact that while Ms. Zhang's appeal was dated November 28, 2017, it was not filed with the Tribunal until March 16, 2018, about 3.5 months later. The Member observed that Ms. Zhang had offered no explanation for the delay.
12. The Member also noted that Ms. Zhang had corresponded with the Tribunal in December 2017 and January 2018, almost one year after the appeal periods had expired, and that the Tribunal had provided her with information about how an appeal could be filed. Nevertheless, Ms. Zhang did not file the appeal until mid-March 2018.
13. The Member concluded that the application to extend the appeal periods was not meritorious, refused to extend any of the appeal periods, and confirmed the Zhang Director Determinations.

ARGUMENT

14. Ms. Zhang's application for reconsideration is, in essence, a repetition of the submissions she made in her appeal of the Director Determinations. She says that she wishes to "appeal" the Employment Standards decision finding her liable for wages of the Hot Street cast and crew. She argues that Mr. Brough was solely responsible for the outstanding wages, that she was not a Hot Street director, that the Determination was "racist", and that one of the reasons for the delay in filing her appeal was her lack of fluency in English.

ISSUE

15. 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?

ANALYSIS

16. The *Employment Standards Act* (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.

The Threshold Test

17. 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*.”
18. 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.
19. 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)
20. 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.
21. 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.

22. 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...

23. 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

24. The Applicant has failed to demonstrate that this is an appropriate case for the exercise of the Tribunal’s reconsideration power.

25. I am not persuaded, in reviewing the Determination, the arguments made on appeal, the Original Decision, and the submissions on the application for reconsideration, that the Applicant has raised significant questions of law that should be reviewed because of their importance to the parties or their implications for future cases. In fact, the Applicant does not address any of the factors to be considered by the Tribunal in exercising the reconsideration power. It is simply a repetition of the argument made before the Member on appeal.

26. There is nothing in the submissions that persuades me that the Member failed to comply with the principles of natural justice, made a mistake in stating the facts, or made a decision not to extend the time in which to file an appeal was not consistent with Tribunal jurisprudence.

27. The issue raised, that is, whether or not to extend the period in which to file an appeal, is not novel and has been addressed by the Tribunal on many occasions.

28. In *Niemisto*, BC EST # D099/96, the Tribunal set out the following criteria which an appellant had to meet in seeking an extension of time in which to file an appeal:

- a) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
- b) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
- c) the respondent party (*i.e.*, the employer or employee), as well as the Director, must have been aware of this intention;
- d) the respondent party will not be unduly prejudiced by the granting of an extension; and
- e) there is a strong *prima facie* case in favour of the appellant.

29. There is no evidence, nor argument, that the Original Decision was inconsistent with those decisions.

ORDER

30. The request for reconsideration is denied. I order that the Original Decision, 2018 BCEST 85, issued August 15, 2018, be confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal