

An Application for Reconsideration

- by -

Soane Puamau  
("Mr. Puamau")

- 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/94

**DATE OF DECISION:** September 26, 2018

## DECISION

### SUBMISSIONS

Soane Puamau on his own behalf

### OVERVIEW

1. Soane Puamau (“Mr. Puamau”), seeks reconsideration of a decision of the Tribunal, 2018 BCEST 87 (the “original decision”), dated August 27, 2018.
2. The original decision considered an appeal of a Determination issued by Janko Predovic, a delegate of the Director of Employment Standards (the “Director”), on October 20, 2017 (the “Determination”), and an application under section 109(1)(b) of the *ESA* for an extension of the statutory appeal period.
3. The Determination was made by the Director on a complaint filed by Melaia Tubuna (“Ms. Tubuna”), who had alleged Mr. Puamau had contravened the *ESA* by failing to pay regular and overtime wages, annual and statutory holiday pay, length of service compensation, and for unlawfully imposing business costs on her. The Determination found Mr. Puamau had contravened Part 2, section 14, Part 3, sections 17, 18, and 27 of the *ESA*, and section 46 of the *Employment Standards Regulation*. Mr. Puamau was ordered to pay Ms. Tubuna wages, including interest under section 88 of the *ESA*, in the amount of \$32,188.60 and administrative penalties in the amount of \$2,500.00.
4. An appeal of the Determination was filed by Mr. Puamau, alleging evidence had come available that was not available at the time the Determination was being made. Mr. Puamau sought to have the Determination cancelled.
5. The appeal was filed more than seven months after the expiry of the statutory time period set out in section 112(3) of the *ESA*; a request for an extension of the statutory appeal period was included in the appeal.
6. The Tribunal Member making the original decision denied the requested extension and dismissed the appeal under section 114 of the *ESA*.
7. In the original decision, the Tribunal Member assessed the criteria used by the Tribunal when considering a request to extend the statutory appeal period and, finding there was no reasonable and credible explanation for the lengthy delay in filing the appeal, finding no evidence that Mr. Puamau had formed and communicated an ongoing intent to file an appeal, and finding the appeal had no presumptive merit, exercised the discretion granted in section 109(1)(b) to refuse the extension.
8. The original decision then confirmed the Determination.
9. This application seeks to have the original decision cancelled.

## ISSUE

10. 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 this panel of the Tribunal should cancel the original decision.

## ARGUMENT

11. The application for reconsideration is succinct, comprising a completed Reconsideration Application form, a letter attaching the form, and a three-paragraph submission advancing two points of submission for the application:
- i. Mr. Puamau did not employ Ms. Tubuna;
  - ii. Mr. Puamau had produced all the legal documents relating to his late wife's care-giving, and to the request from Ms. Tubuna to extend her visa, the denial of that request and the subsequent order from Canadian Immigration services for Ms. Tubuna to return to Fiji.
12. The application does not touch at all on the refusal in the original decision to deny an extension of the statutory appeal period.

## 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. As a result of amendments to the *ESA* made in the *Administrative Tribunals Statutes Amendment Act, 2015*, parts of which came into effect on May 14, 2015, section 116 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, 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.*
14. 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 *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 best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

15. 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.
16. 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 reasonably 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.
17. 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.
18. I find this application does not warrant reconsideration. I am satisfied there was no error made in the original decision and I view this application as nothing more than an attempt by Mr. Puamau to have this panel re-visit his appeal, allow an extension of the appeal period (thus cancelling the original decision),

consider all of the “new” evidence submitted with the appeal, consider the merits of the appeal, decide the appeal in favour of Mr. Puamau, and cancel the Determination.

19. I note first that the original decision, about whether or not to extend the statutory time period for the appeal, involved an exercise of discretion by the Tribunal Member making the original decision. The Tribunal does not lightly interfere with such an 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*.
20. This application does not in any way address the decision denying an extension of the time period for an appeal and, on its face, there is no basis upon which the exercise of discretion by the Tribunal Member making the original decision can be considered reviewable.
21. Looking at that matter, I find the reasons given in the original decision for denying the request for an extension of the time period were reasonable and correct.
22. The criteria that are set out in *Niemisto*, BC EST # D099/96, for assessing requests for extension of the appeal period are of long standing and, as noted in the original decision, have been consistently applied. These criteria are solidly grounded in the statutory purposes of efficiency, finality and fairness – to all parties, not just the applicant. The Tribunal Member making the original decision objectively and fairly considered those criteria, finding none of them supported the requested extension.
23. Mr. Puamau has done nothing in this application that remotely suggests the original decision warrants reconsideration.
24. This application is denied.

## **ORDER**

25. Pursuant to section 116 of the *ESA*, the original decision, 2018 BCEST 87, is confirmed.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**