

An Application for Reconsideration

- by -

Bayliff Enterprises Ltd. carrying on business as Bayliff Enterprises
("Bayliff")

- 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.: 2019/168

DATE OF DECISION: November 28, 2019

DECISION

SUBMISSIONS

Jeannette Fischer

on behalf of Bayliff Enterprises Ltd.

OVERVIEW

1. Bayliff Enterprises Ltd. (“Bayliff”), seeks reconsideration of a decision of the Tribunal, 2019 BCEST 88 (the “original decision”), dated August 21, 2019, and an extension of the statutory period for filing for reconsideration.
2. The original decision considered an appeal of a determination (the “Determination”) issued by Jeff Bailey, a delegate of the Director of Employment Standards (the “Director”), on May 10, 2019, and a request for an extension of the statutory appeal period.
3. The Determination was made by the Director on a complaint filed by a former employee who had alleged Bayliff had contravened the *ESA* by failing to pay overtime wages, statutory holiday pay, and annual vacation pay. The Determination found Bayliff had contravened Part 4, section 40, Part 5, section 45, and Part 7, section 58 of the *ESA* and ordered Bayliff to pay the former employee wages, including interest under section 88 of the *ESA*, in the amount of \$3,401.00 and administrative penalties in the amount of \$1,000.00.
4. An appeal of the Determination was filed by Bayliff alleging the Director had failed to observe principles of natural justice in making the Determination. Bayliff sought to have the Determination varied. A request to extend the statutory appeal period accompanied the Appeal Form.
5. While the Appeal Form was filed within the statutory appeal period, it was incomplete. The appeal provided no reasons supporting the chosen ground of appeal. The requested extension was based on an upcoming personal small claims action between Bryce Bayliff, owner of Bayliff, and the former employee, but the request provided no particulars linking the personal small claims action to the unpaid wage claim under the *ESA*.
6. The Tribunal Member making the original decision denied the requested extension and dismissed the appeal under section 114 of the *ESA* finding there was “no presumptive merit” to the appeal and no reason to grant the extension.
7. The original decision then confirmed the Determination.
8. This application seeks to have the original decision referred back to an appeal 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 this panel of the Tribunal should cancel the original decision.

ARGUMENT

10. This application for reconsideration has been submitted to the Tribunal in two parts.
11. The first is a Reconsideration Application Form, delivered to the Tribunal on September 19, 2019 – one day before the expiry of the reconsideration period – that does nothing more than request an extension of the reconsideration period to October 31, 2019, ostensibly, for the purpose of “gathering all the missing documents” mentioned in the original decision.
12. The Tribunal responded to the above request on September 19, 2019, indicating, among other things, that Bayliff was required to provide written reasons and argument for the application for reconsideration along with any supporting documents by October 31, 2019.
13. On October 28, 2019, the second part of the reconsideration application was delivered to the Tribunal. Bayliff replied to the above correspondence, listing a number of points believed to be relevant to the former employee’s wage entitlement. No supporting documents were submitted.
14. Neither part of the application touches at all on the refusal in the original decision to deny an extension of the statutory appeal period.

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. 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.*

16. 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.

17. 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.

18. 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.

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. I am satisfied there was no error made in the original decision, and I view this application as nothing more than an attempt by Bayliff to have this panel re-visit the appeal, allow an extension of the appeal period

(thus cancelling the original decision), and have another panel of the Tribunal consider the merits of the appeal.

22. 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*.
23. This application does not in any way address the decision denying an extension of the time period for the 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.
24. 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.
25. As well, Bayliff has done nothing that advances the merits of the appeal or show there was any mistake in the view of the Tribunal Member in the original decision, that there was “no presumptive merit” to the appeal. In response to the points made in the October 28, 2019 submission, I echo a comment made in the original decision, that none of those matters would create a direct set-off against wages owed under the *ESA*. They are, in all material respects, irrelevant to the decision made by the Director under the *ESA*.
26. Bayliff has done nothing in this application that remotely suggests the original decision warrants reconsideration.
27. This application is denied.

ORDER

28. Pursuant to section 116 of the *ESA*, the original decision, 2019 BCEST 88, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal