Citation: RL7 Mechanical Ltd. (Re)
2019 BCEST 132

An Application for Reconsideration

- by -

RL7 Mechanical Ltd.
(the "Employer")

- 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.: 2019/186

DATE OF DECISION: November 28, 2019

DECISION

SUBMISSIONS

Lori Whittingham on behalf of RL7 Mechanical Ltd.

OVERVIEW

1. This is an application by RL7 Mechanical Ltd. (the "Employer"), for a reconsideration of 2019 BCEST 107 (the "Original Decision"), issued by the Tribunal on October 4, 2019.

2. A former employee of the Employer filed a complaint with the Employment Standards Branch alleging that she had not been paid compensation for length of service and outstanding wages. Following an investigation, the Director of Employment Standards concluded that the Employer had contravened the *Employment Standards Act* (the "*ESA*") in failing to pay the employee compensation for length of service and unpaid annual vacation pay. In the Determination, issued May 30, 2019, the Director ordered the Employer to pay wages, vacation pay, accrued interest, and an administrative penalty in the total amount of $11,120.07.

3. The Employer appealed the Determination contending that the Director erred in law and failed to observe the principles of natural justice in making the Determination. The Tribunal dismissed the appeal, concluding that the Employer had not demonstrated any basis to interfere with the Determination (the "Original Decision").

4. The Employer now seeks reconsideration of the Original Decision.

ISSUE

5. 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?

ARGUMENT

6. In the reconsideration request, the Employer states that it is "appealing the decision Determination" on the basis of just cause. The Employer contends that the former employee quit her job and refused to return to work. The Employer also says that it had just cause to terminate the employee's employment for a number of reasons which it enumerates in the application. The Employer relies on two sentences of a 1967 Ontario Court of Appeal decision, which is not cited, in its request. The Employer contends that the sentences set out the test for just cause for termination.

7. The document concludes as follows: "please accept this appeal of the determination as justified termination of the employment" of the employee.

THE FACTS AND ANALYSIS

8. The *ESA* confers an express reconsideration power on the Tribunal. Section 116 provides as follows:

> (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.

1. The Threshold Test

9. 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."

10. In *Milan Holdings*, 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.

11. 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)

12. 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.

13. 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.

14. 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…
>
> 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 favor 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. The reconsideration request is nothing more than a restatement of arguments made to the Tribunal in the Employer's June 11, 2019, appeal. Indeed, the appeal letter is identical to the request for reconsideration, save for the date, the grounds enumerated for the appeal in the June 11, 2019 letter, and additional reasons for terminating the employee's employment.

16. In his October 4, 2019 decision, Tribunal Member Maxwell ("Member Maxwell") set out the ground for appeal was that the employee quit her position. However, the Employer also contended, in the alternative, that it had just cause for terminating the employee. Member Maxwell interpreted that argument to be that the Director erred in law, particularly in his application of section 66 of the *ESA*.

17. Member Maxwell considered the Tribunal's jurisprudence on the operation of section 66 as well as the Director's conclusion that the Employer's unilateral reduction of the employee's wages by 10% amounted to a termination of her employment and for which the Employer was liable to pay the employee compensation for length of service.

18. Member Maxwell found that the Director "correctly applied the applicable legislation, correctly assessed the relevant factors to evaluate whether the change in the employment conditions was substantial, and correctly concluded that the imposition of a wage reduction amounted to a termination of the Employee's employment."

19. Member Maxwell found the actions of the employee, after learning her salary had been reduced, to be irrelevant to this analysis, as the Employer's unilateral reduction of the employee's wages amounted to a deemed termination.

20. Member Maxwell also found the Employer's argument that it had just cause to terminate the employee for poor performance to be without merit. He noted that at no time had the Employer purported to terminate the employee.

21. Member Maxwell also found no evidence that the Director failed to observe the principles of natural justice in making the Determination and dismissed the appeal.

22. I find that the Employer's application is not appropriate for reconsideration. As noted above, the reconsideration process is not meant to allow parties another opportunity to re-argue their case.

23. The Employer's request simply repeats the arguments made before the Tribunal on appeal. It does not raise any questions of law, fact, principle or procedure that were not fully and properly addressed by Member Maxwell in the Original Decision.

24. The application is denied.

ORDER

25. Pursuant to subsection 116(1)(b) of the *ESA*, the decision of Tribunal Member Maxwell issued in 2019 BCEST 107 is confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal