Employment Standards TRIBUNAL

Citation: 1136498 B.C. Ltd. (Re)
2019 BCEST 76

An Application for Reconsideration

- by -

1136498 B.C. Ltd. carrying on business as Canna-Place
(the "Applicant")

- 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.: 2019/82

DATE OF DECISION: August 7, 2019

DECISION

SUBMISSIONS

Gyasi Stevens	on behalf of 1136498 B.C. Ltd. carrying on business as Canna-Place

OVERVIEW

1. This is an application by 1136498 B.C. Ltd. carrying on business as Canna-Place (the "Applicant") for a reconsideration of Tribunal Decision 2019 BCEST 51 (the "Original Decision"), issued by the Tribunal on June 3, 2019.

2. The deadline for filing the application to reconsider the Tribunal decision was July 3, 2019. The reconsideration application was filed on July 4, 2019.

3. On December 27, 2018, a delegate of the Director of Employment Standards (the "Director") issued a determination (the "Determination") ordering the Applicant to pay a former employee $4,727.07 in unpaid wages and interest. The delegate also imposed six $500 administrative penalties bringing the amount owed to $7,727.07.

4. The deadline for filing an appeal of the Determination, pursuant to section 112 of the *Employment Standards Act (the "ESA")* was February 4, 2019. The Applicant filed its appeal on March 20, 2019, alleging that new evidence had become available that was not available at the time the Determination was issued (section 112 (1)(c) of the *ESA*). The Applicant also sought an extension of time in which to file the appeal.

5. The Tribunal Member (the "Member") dismissed the appeal under section 114(1) of the *ESA* on the basis that the Applicant had not met the test for new evidence and had not provided any explanation for filing the appeal outside the statutory deadline.

6. The Applicant seeks reconsideration of the Original Decision and an extension of time for filing the application for reconsideration.

ISSUE

7. 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

8. The Applicant seeks reconsideration of the Original Decision as well as an extension of time in which to file the application.

9. Section 116(1) of the *ESA* provides that, upon application, the Tribunal may reconsider any order or decision of the Tribunal. Such applications must be made not more than 30 days after the date of the order or decision (section 116 (2.1)).

10. The application for reconsideration was made one day after the statutory time period. The Applicant says that the Tribunal initially sent it the wrong [Original] Decision, demonstrating that "human clerical errors" had been made by "both parties."

11. The Applicant asks that the Tribunal "reflect on the evidence submitted for consideration of a revision of this matter," stating that "the clock records are the original printed clock sheets."

12. The Applicant also says that it submitted its appeal to the Employment Standards Branch rather than the Tribunal, and once made aware of its mistake, submitted it to the Tribunal immediately.

THE FACTS AND ANALYSIS

13. 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.

1. The Threshold Test

14. 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(d) "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act."

15. 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 that 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.

16. 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 T. Kiss*, BC EST # D122/96)

17. 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 is not intended to allow parties another opportunity to re-argue their case.

18. 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.

19. In *Volorosos* (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…

20. 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

21. The Applicant has not demonstrated that this is an appropriate case for the exercise of the Tribunal's reconsideration power. The application does not refer to any of the grounds identified by the Tribunal for exercising the reconsideration power; rather, the application is nothing more than an attempt to have the Tribunal reconsider arguments made on appeal.

22. In dismissing the Applicant's appeal, the Member noted that, although the appeal form clearly requested that the Applicant provide a reasonable and credible explanation for failing to file an appeal within the statutory time-period, the Applicant had provided no explanation for its failure to file a timely appeal.

23. In support of the appeal, the Applicant submitted an argument respecting the complainant's unpaid wage entitlement, as well as a summary of the complainant's working hours generated, apparently, from "time clock" records.

24. The Member inferred that the time clock records constituted the "new evidence" the Applicant relied on for the grounds for appeal and noted that those records were available at the time the Determination was issued. Consequently, the Member found those records inadmissible since they could have been submitted to the delegate during the investigation of the complaint.

25. The Member noted that the Applicant appeared to also argue that the delegate erred in law in finding that there was an employment relationship between it and the complainant, that it had just cause to terminate the complainant's employment, and that the complainant never earned the wages, overtime pay, statutory holiday pay, or vacation pay that had been awarded to him in the Determination.

26. The Member noted that these allegations were unsupported by any evidence and constituted nothing more than a disagreement with the delegate's findings.

27. After reviewing the record, the Member noted that the delegate had not issued any reasons for her decision, as the Applicant had not made a timely request for written reasons. The Member noted, however, that the delegate had sent a detailed preliminary findings letter to the Applicant on November 30, 2018, inviting it to provide all written argument and evidence in support of any disagreement with those findings no later than December 14, 2018. The Member noted that not only did the Applicant not respond to the preliminary findings letter, it did not comply with the Director's demand for production of employment records.

28. The Member concluded that the appeal had no reasonable prospect of succeeding even if it were a timely appeal properly before the Tribunal.

29. In the absence of any explanation for its failure to file its appeal in a timely manner as well as his conclusion that the appeal had no merit, the Member refused to extend the appeal period and dismissed the appeal.

30. After reviewing the Determination, the arguments made on appeal, the Original Decision, and the submissions on the application for reconsideration, I find that the Applicant has not raised significant questions of law that should be reviewed because of their importance to the parties or their implications for future cases. As I have already concluded, the application is nothing more than an attempt to have the Tribunal reconsider the unmeritorious submissions it made on appeal. These do not constitute exceptional circumstances that would warrant an exercise of the reconsideration power.

31. Furthermore, the issues raised are not novel, as the Tribunal have addressed them on many occasions.

ORDER

32. I deny the request for reconsideration. I confirm the Original Decision (2019 BCEST 51) issued June 3, 2019.

Carol L. Roberts
Member
Employment Standards Tribunal