Employment Standards TRIBUNAL

Citation: James Smith (Re)
2020 BCEST 36

An Application for Reconsideration

- by -

James Smith
(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: Robert E. Groves

FILE No.: 2020/051

DATE OF DECISION: April 27, 2020

DECISION

SUBMISSIONS

James Smith — on his own behalf

OVERVIEW

1. Pursuant to section 116 of the *Employment Standards Act* (the "*ESA*"), James Smith (the "Applicant") seeks reconsideration of a decision of the Tribunal dated March 12, 2020, referenced as 2020 BCEST 18 (the "Appeal Decision").

2. The Appeal Decision was issued in response to the Applicant's appeal of a determination (the "Determination") of a delegate (the "Delegate") of the Director of Employment Standards (the "Director") dated November 22, 2019.

3. The Determination followed a complaint filed with the Director by the Applicant claiming that his former employer, Northern Lite MFG. GP Inc. (the "Employer"), had failed to pay him compensation for length of service. The Delegate decided that she would not proceed with the complaint as it had been made outside the time limit provided for in section 74 of the ESA.

4. The Tribunal member issuing the Appeal Decision concluded that the Determination should be confirmed.

5. I have before me the Applicant's appeal form and application for reconsideration, his submissions delivered in support, the Determination and its accompanying Reasons, the Appeal Decision, and the record the Director was required to deliver to the Tribunal pursuant to subsection 112(5) of the ESA. I find that I can decide the application without the need to burden the Employer and the Director with a request for submissions.

FACTS

6. I accept, and incorporate by reference, the facts set out in the Determination and the Appeal Decision. What follows is a summary.

7. The Applicant was employed as a labourer by the Employer, commencing in March 2018. On October 19, 2018, the Applicant began a medical leave following an injury to his back. The Employer issued a Record of Employment for the Applicant, which he received on October 31, 2018. The reason for issuing the ROE was marked as "Illness or injury", and the date of recall was stated to be "UNKNOWN".

8. The Applicant continued to receive medical benefits from the Employer until February 2019. In an email to the Employer dated March 4, 2019 the Applicant stated: "As of February 14th 2019 my doctor believes I'm healed of my back injury but doesn't want me doing my same position and since you can't accommodate me with a different one, I can no longer work at Northern Lite."

9. On March 5, 2019 the Employer replied to the Applicant's email, as follows: "This email confirms receipt of your resignation."

10. The Applicant also filed a claim for lost wages with WorkSafe BC. He told the Delegate he did not receive a report from WorkSafe BC regarding his claim until September 2019. It was only then, he said, that his entitlement officer at WorkSafe BC informed him the Employer had reported his employment had been terminated on October 31, 2018. Prior to his receiving this information, the Applicant had believed that he continued to be employed by the Employer from the date he went on medical leave until he submitted his resignation earlier in 2019.

11. The Applicant did not file his *ESA* complaint until October 8, 2019.

12. In her Reasons for the Determination the Delegate referred to subsection 74(3) of the *ESA*, which requires that "[a] complaint relating to an employee whose employment has terminated must be delivered…within 6 months after the last day of employment." As the last day of the Applicant's employment was March 4, 2019, the day he delivered notice of his resignation to the Employer, it was clear that the Applicant's complaint under section 74 of the *ESA* had been delivered late.

13. This was not the end of the matter, however, as subsection 76(3) of the *ESA* states that the Director "may" refuse to accept, review, mediate, investigate or adjudicate a complaint that is made outside the time limit, the Delegate determined, correctly, that such a decision incorporated the exercise of a discretion.

14. That being said, the Delegate also concluded that since subsection 74(3) was a mandatory provision, a decision to exercise the discretion embodied in subsection 76(3) resulting in the acceptance of a complaint made too late should only occur "in exceptional circumstances where there are compelling reasons to do so." The Delegate found support for this approach in subsection 2(d) of the *ESA*, which identifies as one of the purposes of the legislation is to provide the provision of "fair and efficient procedures for resolving disputes" that arise pursuant to it. For the Delegate, an important way to assure such an outcome, at least in the normal course of events, was to require that complaints be made within the time limit specified.

15. Here, however, the time limit had not been met, and in the opinion of the Delegate, the Applicant had provided no compelling reason why the complaint should continue to be processed, notwithstanding the delay. Accordingly, the Delegate concluded that she should stop investigating the complaint.

16. On his appeal form, the Applicant offered as grounds for the appeal that the Delegate had failed to observe the principles of natural justice, and that evidence had become available that was not available at the time the Determination was being made.

17. The Appeal Decision rejected the Applicant's submissions on both these grounds.

18. The Tribunal observed that the Delegate had acted properly when she informed the Applicant that his complaint appeared to have been filed late and gave him a reasonable opportunity to offer an explanation. Conversely, there was nothing in the Applicant's submission that identified any specific act or omission that supported a conclusion the principles of natural justice had been contravened.

19. The new evidence offered by the Applicant on appeal consisted of communications with his Employer, documents relating to his WorkSafe BC claim, and his doctor's medical certificate. The Tribunal concluded that all this material was available to the Applicant during the investigation of his complaint and could have been provided to the Delegate before the Determination was made. The Tribunal also decided that the material was of little probative value, as it added nothing of substance to what the Applicant had provided to the Delegate, and so it was incapable of supporting a result that was different from what the Delegate had decided in the Determination.

20. Notwithstanding that these were the only two grounds for appeal noted on the Applicant's appeal form, the Tribunal also addressed what it determined to be the Applicant's contention that the Delegate had erred in law when she stated that the discretion conferred in subsection 76(3) should only be exercised "in exceptional circumstances where there are compelling reasons to do so."

21. On this point, the Appeal Decision stated the Tribunal's oft-expressed position that it will be reluctant to interfere with a delegate's exercise of a statutory discretion. Generally, the Tribunal will do so only where it can be shown there has been an abuse of power, there has been a mistake in construing the limits of the delegate's authority, there has been a procedural irregularity; or the decision based on the exercise is unreasonable because it incorporates a misdirection in law, it did not include a consideration of matters it was bound to consider, or it relied on matters that were irrelevant (see *Re: Jody L. Goudreau et al.*, BC EST # D066/98).

22. The Tribunal also repeated the admonition of the Supreme Court of Canada in *Maple Lodge Farms v. Government of Canada* [1982] 2 SCR 2 that "courts should not interfere with the exercise of a discretion by a statutory authority merely because the court might have exercised the discretion in a different manner had it been charged with that responsibility."

23. Having regard to these guiding principles, the Tribunal decided that the Delegate's exercise of the discretion in this instance was lawful. More particularly, the Tribunal determined that the criteria the Delegate applied in the exercise of the discretion were relevant, and the decision she made was not unreasonable.

24. The analysis of the Tribunal on this point is captured in the following excerpts from the Appeal Decision, at paragraphs 38 – 40:

> The legislature has spoken in clear and strong terms that timely filing of complaints is an important element in ensuring fair and efficient procedures for resolving disputes under the *ESA*. The language of section 74 of the *ESA* speaks in mandatory, not permissive, terms and should be read accordingly. Without attempting to catalogue the circumstances that would require a complaint filed outside of the time limits set out in section 74 to be accepted, reviewed, investigated and/or adjudicated, I would anticipate such cases would be rare. I do not find the use by the Director of the terms exceptional or extraordinary to be particularly concerning. There is no indication those terms describe anything other than the view already taken by the Tribunal that proceeding with complaints filed out of time will rarely occur.
>
> In sum, I cannot say the Director made a careless or otherwise unreasoned decision to refuse to adjudicate the complaint on its merits. The Director asked for a compelling reason justifying the late filing and did not accept the explanation provided by Mr. Smith was sufficiently compelling

> to warrant proceeding with the complaint. There is nothing to suggest that the Director's decision was tainted by bad faith or that it lacked any principled justification.
>
> As stated above, short of showing the Director acted arbitrarily, without authority or not in good faith, the Tribunal will not interfere with the exercise of such discretion: *Takarabe and others*, BC EST #D160/98. No basis for interfering with the Director's discretion in this matter has been shown in this case.

25. The Appeal Decision concluded that there was no apparent merit in the Applicant's appeal, and no reasonable prospect that it would succeed. It followed, and the Tribunal ordered, that the Determination be confirmed.

ISSUES

26. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:

1. Does the request meet the threshold established by the Tribunal for reconsidering a decision?
2. If so, should the decision be confirmed, cancelled, varied or referred back to the original panel, or another panel of the Tribunal?

DISCUSSION

27. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116, the relevant portion of which reads as follows:

> 116 (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, cancel or vary the order or decision or refer the matter back to the original panel or another panel.

28. As the Tribunal has stated repeatedly, the reconsideration power is discretionary, and must be exercised with restraint. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal.

29. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the ESA, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the statute. It is also derived from a desire to preserve the integrity of the appeal process mandated in section 112.

30. With these principles in mind, the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful if absent of exceptional circumstances, the existence of which must be clearly established by the party seeking to have the Tribunal's appeal decision overturned.

31. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal considers the applicant's submissions, the record that was before the Tribunal in

the appeal proceedings, and the decision the applicant seeks to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. In order for the answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the appeal decision which are so important that they warrant reconsideration.

32. In general, the Tribunal will be disinclined to reconsider if the primary focus of the application is to have the reconsideration panel re-weigh arguments that failed in the appeal. It has been said that reconsideration is not an opportunity to get a "second opinion" when a party simply does not agree with an original decision of the Tribunal (see *Re Middleton*, BC EST # RD126/06).

33. If the applicant satisfies the requirements in the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.

34. I have decided that the Applicant's application must be dismissed because I do not discern the Applicant has raised any questions of fact, law, principle or procedure flowing from the Appeal Decision which are so important that they warrant reconsideration. Quite simply, the Applicant has provided no argument which leads me to conclude that the Tribunal's analysis in the Appeal Decision regarding the Delegate's exercise of the discretion contained in subsection 76(3) of the *ESA* is flawed.

35. What the Applicant challenges is the result of the Delegate's exercise of the discretion. He contends that the Delegate's decision was wrong, and the Tribunal's confirmation of the Determination merely affirms that error. What the Applicant does not do, however, is offer an argument that suggests the Delegate acted unreasonably when exercising the discretion, at least in the sense the word is utilized in the legal authorities to which the Tribunal alluded in the Appeal Decision, and to which I have referred earlier in this decision. To repeat the statement drawn from *Maple Lodge Farms*, *supra*, absent a finding of legal error in the exercise of a statutory discretion, the fact that another decision-maker might have exercised the discretion in a different manner provides no justification for it to interfere with the decision that has been made.

36. The essence of the Applicant's position is that he was unaware the Employer had informed WorkSafe BC that the Applicant's employment had been terminated as of October 31, 2018, until his entitlement officer at WorkSafe BC advised him in September 2019 that the Employer had made such a statement regarding his status. The Applicant states that prior to his receiving this information from WorkSafe BC he "believed he continued to be employed by the respondent employer while he was injured and until he submitted his resignation in February 2019." He also submits that he could not file his *ESA* complaint any sooner than October 8, 2019, because he was unaware until that time that his employment had terminated a year earlier.

37. The Applicant's position mirrors the position he articulated in the appeal proceedings. It was addressed by the Tribunal in the Appeal Decision in the following terms, at paragraph 41:

> I will add a gratuitous comment on the merits of the appeal. Based on the material provided by Mr. Smith, which included a communication from him to the respondent employer in March 2019, saying he can no longer work for the respondent employer, the acceptance of that communication by the respondent employer as a resignation, and the finding by the Director that

> those communications signaled the end of his employment, I see no possibility of Mr. Smith successfully establishing a claim for length of service compensation or a refund of extended health benefits for what appears to be a phantom termination in October 2018. Except for a comment in the WorkSafe BC decision, which has no evidentiary foundation, there is nothing to support a conclusion that Mr. Smith was terminated in October 2018.

38. I agree with these comments. The Applicant has offered no compelling reason why the result set out in the Appeal Decision should be disturbed. It follows that his application for reconsideration cannot succeed.

ORDER

39. The Applicant's application for reconsideration is denied. Pursuant to section 116 of the *ESA*, the Appeal Decision, 2020 BCEST 18, is confirmed.

Robert E. Groves
Member
Employment Standards Tribunal