Citation: Cameron McDonald (Re)
2020 BCEST 49

An Application for Reconsideration

- by -

Cameron McDonald

- 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.: 2020/061

DATE OF DECISION: May 25, 2020

DECISION

OVERVIEW

1. Cameron McDonald (the "Applicant") seeks a reconsideration of a decision of the Tribunal (the "Appeal Decision") dated March 12, 2020, and referenced as 2020 BCEST 19.

2. The Appeal Decision dismissed the Applicant's appeal of a determination (the "Determination") issued by a delegate (the "Delegate") of the Director of Employment Standards (the "Director") on October 11, 2019.

3. The Determination arose from a complaint by the Applicant alleging that his former employer, Trojan Safety Services Ltd. (the "Employer"), had contravened the *Employment Standards Act* (the "*ESA*") when it failed to pay him compensation for length of service.

4. In the Determination, the Delegate decided that she would not proceed with the complaint because it had been delivered outside the six months limitation period prescribed in section 74 of the *ESA*.

5. The Appeal Decision confirmed the Determination.

6. 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

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

8. The period of the Applicant's employment that concerns us in this proceeding commenced on June 19, 2017. A dispute arose between the Applicant and the Employer concerning the date on which that period of employment ended.

9. The Applicant contended that he was temporarily laid off at the end of March 2018, when a contract the Applicant had been working on for the Employer was concluded. Some weeks later, on April 22, 2018, he began an extended vacation out of the country, during which he suffered a broken ankle. He returned to Canada on May 18, 2018.

10. The Employer asserted that the Applicant's work ended on March 30, 2018. He then took a few days of authorized leave, but he was expected to return to work thereafter.

11. The Employer stated that its dispatcher made several calls to the Applicant early in April. The dispatcher could not reach the Applicant on all of the calls, but when a connection was made there were occasions

when the Applicant refused work that was offered to him. On a later call, the Applicant advised the dispatcher that he was on vacation outside the country.

12. The Employer also stated that it maintained a process its employees were meant to follow when requesting vacation, and that vacation time had to be approved. In this instance, the Applicant had made no such request. The Employer confirmed that there was work available for the Applicant to do while he was away, which resulted in the Employer hiring additional employees. However, the Applicant did not make himself available despite the repeated calls from the dispatcher.

13. In the circumstances, the Employer concluded that the Applicant had abandoned his employment, on or about March 30, 2018.

14. In August 2018 the Employer had further work available. It contacted the Applicant, among others, to see if he would fill the need. The Applicant agreed, but when he commenced to work on August 28, 2018, he soon became aware that his ankle injury would prevent him from continuing. He worked but 2.5 days after his return. His last day of work was August 30, 2018.

15. The Employer issued three Records of Employment for the Applicant. The first ROE was dated September 13, 2018. It stated that the Applicant was employed from June 19, 2017, to August 30, 2018. It also showed that the Applicant received earnings up to the end of March 2018, and for the days he worked in August, but no earnings for the months in between. As a result of a subsequent telephone conversation in which a Service Canada representative advised the Employer that the Applicant's break in service meant that the ROE misrepresented his period of employment, the Employer issued two new ROE's on September 25, 2018. The first of these referred to a period of employment for the Applicant which ended on March 30, 2018. The reason for the employment coming to an end was recorded as "E", a quit. The second ROE issued on September 25 referred to the Applicant's period of employment in late August, with the reason for the issuance stated as "A", shortage of work/end of contract or season.

16. Subsection 74(3) of the *ESA* requires that a complaint must be delivered to the Employment Standards Branch within 6 months of the last day of employment. The Applicant's complaint was delivered on April 15, 2019. In its response, the Employer argued that the complaint was delivered out of time because, it said, the Applicant's last day of employment was August 30, 2018.

17. The Applicant contended that he was, once again, temporarily laid off on August 30, 2018, this time due to his ankle injury. He argued that this assessment was supported by a communication from Service Canada advising him that it had decided to treat the reason for the termination of his employment as a shortage of work, and not a quit. That being so, the Applicant asserted that the application of the definition of "temporary layoff" in section 1 of the *ESA* meant that his employment was extended by 13 further weeks, with the result that the delivery of his April 2019 complaint was timely.

18. In further reply, the Employer submitted that even if the Applicant's complaint had been delivered within time, the Employer could not be required to pay compensation for length of service because the Applicant's last period of employment, covering but 2.5 days, did not meet the threshold prescribed in subsection 63(1) of the *ESA*. That subsection mandates that an employee must be employed for 3 consecutive months before compensation for length of service is payable.

19. The Delegate determined that the Applicant had been employed by the Employer for two distinctly separate periods in 2018, and so his employment was not continuous. The first period of employment ended no later than June 29, 2018. This was so because, even if it could be said that the Applicant had been laid off after March 30, 2018, the June 29, 2018, date marked the end of the 13 weeks temporary layoff period without the Applicant performing any further work for the Employer. For the Delegate, the second period of employment commenced on August 28, 2018, and ended on August 30, 2018.

20. The Delegate also concluded that there was no evidence suggesting the Applicant was the subject of a second temporary layoff after it became clear he could not continue to perform his work for the Employer on August 30, 2018, due to his ankle injury. Instead, the Delegate determined that the Applicant terminated his employment on that date because he could not do the work he had been hired to perform.

21. The Applicant delivered his complaint 7.5 months later, outside the mandatory time period established in subsection 74(3) of the *ESA*. The Delegate found that the Applicant was aware of the limitation period for delivering his complaint, as the Applicant had relied on the argument that he had been temporarily laid off to ground a submission that his complaint had been filed within time. As the Applicant provided no other explanation why his complaint was made late, the Delegate determined that there were no exceptional circumstances warranting an exercise of her discretion that might result in her extending the time for delivery.

22. Despite this, the Delegate's Reasons went on to state that if she was incorrect in deciding that the investigation of the Applicant's complaint should be stopped because he had delivered it out of time, since the Applicant only worked for 2.5 days in August 2018, and not the 3 months stipulated in subsection 63(1) of the *ESA*, he was not entitled to claim compensation for length of service in any event.

23. The Appeal Decision confirmed the Determination.

24. The Tribunal concluded that the Applicant had established no error in the Delegate's findings that there were two separate periods of employment for the Applicant with the Employer in 2018.

25. Nor could the Tribunal find that the Applicant was temporarily laid off after August 30, 2018, despite the Employer's issuing a ROE that gave a shortage of work as the reason the employment came to an end. Both the Applicant and the Employer had stated the Applicant was unable to perform his duties due to his ankle injury, and there was no evidence the Applicant asked for time off to recover, or ever provided medical information to the Employer regarding his ability to return to work. But even if the Applicant was laid off, and his complaint delivered within time, the Tribunal was *ad idem* with the conclusion drawn by the Delegate that an application of subsection 63(1) to the Applicant's 2.5 day period of employment commencing on August 28 meant that he was precluded from claiming compensation for length of service from the Employer.

26. The Tribunal also affirmed that the Applicant provided no reason for his delivering his complaint late, apart from his reliance on the assertion that the timeline was extended due to his having been temporarily laid off after August 30, 2018, and so there were no exceptional circumstances present that might have justified an exercise of discretion by the Delegate resulting in an extension of the time for delivery. In addition, the Tribunal determined that there was no evidence supporting a conclusion the Delegate

exercised her discretion arbitrarily, that she failed to consider all relevant factors, that she based her conclusions on irrelevant factors, or that she acted in bad faith.

ISSUES

27. 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

28. 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.

29. 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.

30. 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.

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

32. 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.

33. 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).

34. 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.

35. 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 a reconsideration.

36. On this application for reconsideration the Applicant contends, for the first time, that he was "authorized for a vacation via a verbal agreement with the General Manager" at the time a drilling rig shut down for spring breakup. He also states that the General Manager "changed" while he was on vacation. I infer from this that the Applicant is speaking of the period when he ceased to work after March 30, 2018. If so, his submission conflicts with the position he asserted before the Delegate, and on appeal, that he was temporarily laid off during that period. It also conflicts with the Delegate's findings of fact that the Employer considered the Applicant to be absent from work without permission for all but a few days after March 30, and unresponsive to its dispatcher's calls to return. In any event, the Applicant's submission should have been made to the Delegate. It cannot be relied upon at this late stage in these proceedings.

37. The Applicant also submits that he informed the Employer he had suffered an ankle injury, and that he had provided it with medical evidence. On this point, I note that the Delegate's Reasons state that the Employer was not aware of the Applicant's injury until he returned to work in August 2018. The Appeal Decision notes that the Applicant broke his ankle while on vacation, but he did not make the Employer aware of the injury.

38. My review of the record reveals to me that the Delegate, at least, appears to have been mistaken. In an email dated October 12, 2018, the office administrator for the Employer stated that the Applicant contacted her on May 14, 2018, to advise that he had suffered an injury earlier that month. The office administrator informed the Applicant that disability benefits were not available to him through the Employer, and that he should apply for EI. She also asked him to email her with details of his injury, any doctor's notes he might have, and his plans for a return to work. The Applicant did not respond to these requests. He did contact the Employer at the end of July 2018 to complain about the loss of his benefits, but he did not provide information about his injury or the effect it had on his ability to work until he began his second period of employment on August 28, 2018. In addition, it does not appear that the Applicant provided medical information to the Employer until sometime in September 2018, after his second period of employment was alleged to have come to an end.

39. In my opinion, whether the Applicant informed the Employer that he was injured before he returned to work in August 2018 is immaterial. The Applicant's position before the Delegate, and on appeal, was presented in response to the Employer's argument that the Applicant's deciding to take several weeks of vacation without permission, over a period time when work was available to him, meant that he had abandoned his employment. The Applicant's position was that he did not quit. Instead, he argued that he was temporarily laid off.

40. The Delegate did not expressly decide whether the Applicant had quit. Instead, she concluded that even if the Applicant was laid off, the layoff ended on June 29, 2018, without a return to work on the part of the Applicant. Accordingly, the Applicant's first period of employment for the purposes of his complaint terminated on that date, whether he was injured or not.

41. The Applicant also asserts that the "Director may have erred in law." The Applicant's submission in this regard is cryptic. The words "Not redacting" are enclosed in brackets, with nothing more. Such a submission is entirely inadequate to establish a basis for interfering with the conclusions drawn in the Appeal Decision. It is hazardous to speculate, but I suspect that what the Applicant is referring to is correspondence from the Tribunal to the parties and the Director during the course of the appeal proceedings advising that when the Director delivered the record as required pursuant to subsection 112(5) of the *ESA* he neglected to redact information relating to the Applicant's social insurance number, his personal health number, and his date of birth. If this is what the Applicant is referring to, it is unhelpful.

42. The Applicant also alleges that the Director failed to observe the principles of natural justice. Again, no details are provided. The Applicant does say that evidence he might have provided was on a cellphone that was lost or stolen. I have no reason to doubt that this is true, but it in no way supports a finding that the Director, or the Delegate for that matter, prevented the Applicant from presenting his case, or acted in a manner that showed bias.

43. The Applicant's submission further states that he did not apply for employment insurance benefits between March and August 2018, but that he did receive "EI sickness in 'lieu' of Short Term Disability" in March 2019. Nothing further is added to the Applicant's statements, and so I cannot discern the point the Applicant sought to establish when he decided to provide this information. It is trite to say that an application for reconsideration must set out the specific basis on which an applicant seeks a section 116 remedy from the Tribunal. It is not for the Tribunal to intuit an applicant's purpose in the submissions that are made.

44. An application for reconsideration under section 116 of the *ESA*, like an appeal, is an exercise in error correction. The burden is on an applicant to establish that a decision of the Tribunal on appeal exhibits reviewable error. For the reasons I have set out, I am of the view that the Applicant has failed to meet that burden.

ORDER

45. The Applicant's application for reconsideration is denied. Pursuant to section 116 of the *ESA*, the Appeal Decision, 2020 BCEST 19, is confirmed.

Robert E. Groves
Member
Employment Standards Tribunal