

Citation: Mammoth Landscaping and Masonry Ltd. (Re)
2021 BCEST 54

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

Mammoth Landscaping and Masonry Ltd.
("Mammoth")

- 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.: 2021/039

DATE OF DECISION: June 09, 2021

DECISION

SUBMISSIONS

Ashley Xu

on behalf of Mammoth Landscaping and Masonry Ltd.

OVERVIEW

1. Pursuant to section 116 of the *Employment Standards Act* (the "ESA"), Mammoth Landscaping and Masonry Ltd. ("Mammoth") applies for a reconsideration of a decision (the "Appeal Decision") of a member of the Employment Standards Tribunal (the "Appeal Panel") dated April 6, 2021 and referenced as 2021 BCEST 31.
2. This matter arose when a former employee of Mammoth, Michael Shane Soderberg (the "Complainant"), filed a complaint pursuant to section 74 of the *ESA* (the "Complaint") alleging that Mammoth had failed to pay him wages owed, and compensation for length of service. The Complainant also asserted that Mammoth had required him to pay its business costs in contravention of the statute.
3. The Complainant commenced employment with Mammoth in 2015. Early in 2019, the Complainant suffered a workplace injury that interfered with his ability to perform his employment duties. His last day of work for Mammoth was April 11, 2019. Shortly thereafter the Complainant commenced to receive compensation benefits from WorkSafeBC.
4. A delegate (the "Delegate") of the Director of Employment Standards (the "Director") was assigned to investigate the Complaint. The investigation revealed that Mammoth operated a landscaping and masonry business in Victoria, and that the principal of the company was Yuqing Zhao ("Mr. Zhao"). The Delegate concluded that Mammoth had terminated the Complainant's employment, and that it had contravened the *ESA*.
5. The Delegate issued a determination of the Complaint (the "Determination") dated December 11, 2020. In it, the Delegate ordered that Mammoth pay \$4,970.07 for wages, vacation pay, compensation for length of service, and interest. The Determination also required Mammoth to pay four \$500.00 administrative penalties. The total found to be owed was \$6,970.07.
6. Mammoth appealed the Determination pursuant to section 112 of the *ESA*, contending that the Director had failed to observe the principles of natural justice. In the Appeal Decision subsequently issued by the Tribunal, the Appeal Panel dismissed the appeal, employing its jurisdiction set out in section 114(1)(f) of the *ESA*, which permits the Tribunal to take this action when it is determined that an appeal has no reasonable prospect of succeeding. The Appeal Panel confirmed the Determination, pursuant to section 115 of the *ESA*.
7. The Appeal Panel determined that there was no evidentiary basis established in Mammoth's submissions supporting a conclusion that the proceedings before the Delegate were tainted on natural justice grounds. The Appeal Panel noted that the Delegate took pains to apprise Mammoth of the issues to be addressed, as they were developed based on the Complaint, and that a representative of Mammoth, Ashley Xu ("Ms.

Xu"), took full advantage of the multiple opportunities provided by the Delegate for Mammoth to deliver submissions in reply.

8. Indeed, Mammoth's appeal chiefly took issue with the Delegate's findings of fact. The Appeal Panel observed, correctly, that the Tribunal has no jurisdiction to consider appeals which seek to have it reach different factual conclusions from those drawn by the Director unless the Director's findings reveal an error of law. The Appeal Panel decided that the Delegate's factual conclusions were not unreasonable, and so the Determination could not be successfully challenged on this ground.
9. It follows that I accept, and rely upon, the relevant facts ably set out at length in the Delegate's Reasons for the Determination, and later summarized in the Appeal Decision. That said, I note that Mammoth has challenged what it interprets as an error relating to a statement made in the Appeal Decision, which appears to be the basis for its application that the Appeal Decision be reconsidered, and so I will address this assertion later in these reasons.
10. In sum, the Appeal Panel was of the view that Mammoth had failed to demonstrate any reviewable error on the part of the Delegate, and that its appeal was nothing more than an attempt to re-argue the case it had advanced, unsuccessfully, in response to the Complaint during the Delegate's investigation. The Appeal Panel noted that the use by Mammoth of the appeal procedures made available in the *ESA* in this way was improper, because it was inconsistent with a purpose of the *ESA* set out in section 2(d) that the statute was to provide fair and efficient procedures for resolving disputes over its application and interpretation.
11. I have before me Mammoth's appeal form and application for reconsideration, its 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 section 112(5) of the *ESA*. I have not requested responding submissions from the Complainant or the Director on this application for reconsideration.

ISSUES

12. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:
 - a. Does the request meet the threshold established by the Tribunal for reconsidering a decision?
 - b. If so, should the decision be confirmed, cancelled, varied, or referred back to the original panel or another panel of the Tribunal?

ARGUMENTS

13. Mammoth limits its challenge of the Appeal Decision to the Appeal Panel's discussion of their communications with the Delegate relating to the suggestion that a representative of WorkSafeBC had told the Complainant that Mammoth had terminated his employment, and that this was later acknowledged by WorkSafeBC to have been an error. The relevant passage from the Appeal Decision is paragraph 57, which reads:

At pages 15 to 22, Ms. Xu advances arguments reiterating Mammoth's position in the investigation of the Complaint, namely, that the Complainant's employment was never terminated by Mammoth and he is not entitled to termination pay under section 63 of the *ESA*. She questions why the delegate did not contact the WCB manager during his investigation of the Complaint as he would have discovered that the WCB manager did not tell the Complainant he was fired. **Curiously, in her submissions, Ms. Xu also quotes what appears to be an email from the delegate informing her that while he appreciates her position that WCB informed the Complainant that he had been terminated and later indicated it was mistaken in so informing him,** his preliminary assessment that the Complainant was terminated by Mammoth is not based on WCB's assessment but his own conclusion "based upon the messages send [sic] to [the Complainant] by Mr. Zhao". The delegate also says in the same communication to Ms. Xu that Mammoth may dispute his assessment to the Employment Standards Tribunal, which evidently Mammoth has done. ***(Emphasis in Mammoth's submission in this application)***

14. On behalf of Mammoth, Ms. Xu states that the Delegate misunderstood her statements relating to communications from WorkSafeBC concerning the Complainant. She contends that she never said WorkSafeBC had stated that the Complainant had been terminated. She submits that she explained her position to the Delegate on several occasions, but he ignored her. She clarifies that the statement made by WorkSafeBC that a Mammoth employee had been terminated concerned another employee, and not the Complainant.

ANALYSIS

15. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116 of the *ESA*, 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, vary or cancel the order or decision or refer the matter back to the original panel or another panel.
16. 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.
17. 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.
18. 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.

19. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal considers an applicant's submissions, the record that was before the Tribunal in the appeal proceedings, and the decision the applicant wishes to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. A "yes" answer means that the applicant has raised questions of fact, law, principle, or procedure flowing from the appeal decision which are so important that they warrant reconsideration.
20. 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 appeal decision of the Tribunal (see *Re Middleton*, BC EST # RD126/06).
21. 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.
22. I have decided that Mammoth's application fails at stage one of the analysis. I discern in the application no question of fact, law, principle, or procedure flowing from the Appeal Decision which warrants reconsideration.
23. Mammoth's submission focuses on a possible misapprehension on the part of the Delegate regarding Ms. Xu's understanding of the existence of a statement made by a representative of WorkSafeBC that Mammoth had terminated the Complainant's employment. However, a finding that a WorkSafeBC representative had, or had not, made such a statement was of no consequence when it came time for the Delegate to decide whether Mammoth had, in fact, terminated the Complainant's employment, with the result that the Complainant would then be entitled to be paid compensation for length of service.
24. Indeed, as the Appeal Decision states, the Delegate did not rely on communications from WorkSafeBC when he determined that Mammoth had terminated the Complainant's employment. Rather, the Delegate based his decision regarding this point on communications the principal of Mammoth, Mr. Zhao, forwarded to the Complainant. Mammoth does not question that it was proper for the Delegate to rely on those communications. It merely contends that the communications did not properly capture Mr. Zhao's true intentions.
25. The Delegate did not accept that there was any misunderstanding regarding the substance of Mr. Zhao's communications to the Complainant on this topic. But even if Mr. Zhao's messages were somehow altered in translation, the Delegate observed that any misunderstanding could easily have been rectified if only Mammoth had chosen to respond to the Complainant's inquiries regarding the termination of his employment, which it did not do. For the Delegate, Mammoth's choosing to ignore the Complainant's inquiries regarding his employment further diminished the credibility of its argument that there had been a miscommunication regarding his status. Mammoth has provided no compelling argument suggesting that it was inappropriate for the Delegate to have drawn this conclusion, or for the Appeal Panel to have affirmed it in the Appeal Decision.

ORDER

- ²⁶. Mammoth's application is dismissed. Pursuant to section 116, I order that the Appeal Decision, referenced as 2021 BCEST 31, be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal