Citation: Victoria Mackie
2022 BCEST 56

EMPLOYMENT STANDARDS TRIBUNAL

An application for reconsideration
pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Victoria Mackie carrying on business as Happy Home Childcare
("Ms. Mackie")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

PANEL: Shafik Bhalloo

FILE No.: 2022/115

DATE OF DECISION: September 9, 2022

DECISION

SUBMISSIONS

Victoria Mackie — on her own behalf carrying on business as Happy Home Childcare

OVERVIEW

1. Pursuant to section 116 of the *Employment Standards Act* (the "*ESA"),* Victoria Mackie carrying on business as Happy Home Childcare ("Ms. Mackie") seeks reconsideration of a decision of the Tribunal issued on May 13, 2022 (the "original decision").

2. The original decision considered an appeal of a determination issued by Reena Sharma, a delegate (the "Adjudicative Delegate") of the Director of Employment Standards (the "Director"), on November 16, 2021 (the "Determination").

3. The Determination was made by the Director on a complaint filed by Ashley Bauder Eldridge ("Ms. Eldridge"), under section 74 of the *Employment Standards Act* (the "*ESA*") for unpaid wages (the "Complaint"). A delegate of the Director (the "Investigative Delegate") investigated the Complaint and issued an investigation report (the "Investigation Report") on September 21, 2021. On November 16, 2021, the Adjudicative Delegate made the Determination that Ms. Mackie contravened section 21 of the *ESA* and ordered the latter to pay Ms. Eldridge wages and interest totaling $28.47. The Adjudicative Delegate also imposed a mandatory administrative penalty of $500 against Ms. Mackie pursuant to section 98(1) of the *ESA* and section 29(1) of the *Employment Standards Regulation* for contravention of section 21 of the *ESA*. The total amount of the Determination is $528.47 inclusive of interest.

4. The statutory deadline for Ms. Mackie to file the appeal of the Determination was December 10, 2021. Ms. Mackie filed the original Appeal Form on February 14, 2022, requesting an extension of time to file the appeal until April 1, 2022, pursuant to section 109(1)(b) of the *ESA*. Subsequently, on March 3, 2022, Ms. Mackie filed a revised Appeal Form. In the revised Appeal Form, Ms. Mackie advanced two substantive grounds of appeal, namely, the Director failed to observe the principles of natural justice in making the Determination and new evidence has become available that was not available at the time the Determination was made. Ms. Mackie dropped the "error of law" ground of appeal she previously advanced in the original Appeal Form.

5. On May 13, 2022, the Tribunal Member Maia Tsurumi (the "Tribunal Member") denied Ms. Mackie's application to extend the time to file the appeal and dismissed the appeal pursuant to subsection 114(1)(b) of the *ESA.* In so deciding, the Tribunal Member considered the framework set out in *Liisa Tia Anneli Niemisto*, BC EST # D099/96, for determining whether time periods for filing appeals should be extended, namely:

   i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;

   ii) there has been a genuine and ongoing *bona fide* intention to appeal the Determination;

   iii) the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;

iv) the respondent party will not be unduly prejudiced by the granting of an extension; and

iv) there is a strong *prima facie* case in favour of the appellant.

6. The Tribunal Member concluded that in Ms. Mackie's case, an extension of statutory time limit to file an appeal should not be granted for two reasons: (i) Ms. Mackie did not provide a reasonable and credible explanation for the failure to ask for an appeal within the time limits; and (ii) she did not have a strong *prima facie* case for an appeal.

7. With respect to the first reason, the Tribunal Member reasoned in the original decision as follows:

> 31. The Appellant says she did not have any notice about the Determination, wages owing and penalty because she never received the Determination by email or mail. I find the Appellant is responsible for the fact she did not know about the Determination until the Branch removed funds from her bank account and so has no reasonable explanation for her failure to request an appeal on time.
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> 32. The Branch served the Determination by email as it was allowed to do: *ESA*, ss. 122(1). However, after receiving the Investigation Report, the Appellant deleted the email account she had used to correspond with the Branch and did not provide an alternate email address. She told the Investigative Delegate several times to stop calling or e-mailing her (Record at pp. 39, 46 – 47). The Investigative Delegate told her if there was someone who could help her with the matter, he was open to working with that person. The Appellant refused his offer. The Appellant, in her appeal submissions, says she deleted her email account so that the Branch would not contact her.
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> 33. Further, the Investigative Delegate repeatedly warned the Appellant during the investigation that once he issued the Investigation Report, it would be provided to a Branch decision maker who would make a determination, and that the decision maker could make a finding she owed wages to the Complainant and if this occurred, the Appellant would also have to pay at least one $500.00 penalty (Record at pp. 37, 39-40, 43). Then, after he sent the Investigation Report to the Appellant, he told her it would be provided to a Branch decision maker (Record at p. 47). The Appellant received the Investigation Report and so knew the evidence and case against her, including the fact it did not support her assertion that she could deduct the cost of a CRC from the wages owed to the Complainant. Therefore, before the Appellant cut off communication with the Branch, she knew the Determination would be made. She also knew a possible outcome of the Determination would be a finding she owed wages to the Complainant and would receive a $500.00 penalty.
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> 34. The Appellant says she was harassed by the Investigative Delegate, and this is why she had to delete her email account and told him to stop calling her. However, she could have asked the Branch to send her the Determination at her residence and could have provided updated addresses as she moved. She did not do so. She could have asked to deal with someone at the Branch other than the Investigative Delegate, but she did not do so She could have taken the Investigative Delegate up on his offer to have a representative speak with the Branch on her behalf, but she did not do so. In any event, I find the Record shows the Investigative Delegate's attempts to contact her by telephone and email throughout the investigation were very respectful and reasonable.

> 35. For the same reasons the Appellant did not provide a reasonable and credible explanation for her failure to file a late appeal, it might also be said she did not have a genuine and ongoing *bona fide* intention to appeal the Determination (and correspondingly, the Respondent and Director were not made aware of it). But I find these criteria likely do not apply in the present circumstances where the Appellant did not know about the Determination and so would necessarily never have had any intention with respect to an appeal.
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> 36. The Complainant is the Respondent in the appeal. I do not find the Complainant would be unduly prejudiced if I were to grant the extension. There is prejudice to the Complainant in delaying a decision on whether she can receive her unpaid wages, but given the amount is $28.00 (plus $0.47 in interest) and she no longer works for the Appellant, I do not find an almost three-month delay in filing an appeal unduly prejudicial.

8. With respect to the second reason, the Tribunal Member considered all three substantive grounds for appeal under section 112(1)(b) of the *ESA* although Ms. Mackie, in her revised Appeal Form on March 3, 2022, dropped the "error of law" ground of appeal. In concluding that Ms. Mackie did not have a strong *prima facie* case, the Tribunal Member reasoned as follows:

> 38. There was no error of law. Sub-section 21(1) of the *ESA* expressly states an employer must not withhold, deduct or require payment of all or part of an employee's wages for any purpose, except as permitted or required by the *ESA* or any other statute or regulation. There was no requirement in the *ESA*, *Regulation* or any other statute or regulation that allowed the Appellant to deduct the cost of the criminal record check from the wages she owed to the Complainant.
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> 39. There was no breach of principles of natural justice. The Appellant knew the case she had to meet and was given a fair opportunity to respond.
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> 40. There was also no new evidence that was not available at the time the Determination was made that might suggest the appeal could succeed. The Appellant did not submit any new documents in the appeal. She has made substantially the same arguments on appeal as she did during the investigation. The only additional arguments on appeal are the fact the Branch has seized the $528.00 she owes in wages and penalty from her bank account and that as a single mother of very limited means, she requires the seized funds to care for her child. Even if these assertions were admitted as new evidence, they would not change my conclusion she has no strong *prima facie* case, and the appeal has no reasonable prospect of success. The Director is allowed to seize a person's assets to satisfy the amount a determination says the person owes: *ESA*, ss. 92(1). The *ESA* and *Regulation* impose mandatory $500.00 penalties for violations of the *ESA*. The Adjudicative Delegate determined the Appellant violated the *ESA*. Thus, she had to impose the penalty and there was no error of law or breach of natural justice.

9. Having denied Ms. Mackie's application for an extension of time to appeal under subsection 109(1)(b) of the *ESA*, the Tribunal Member went on to add, in *obiter*, that had she decided otherwise, she would have found the appeal had no reasonable prospect of success and dismissed it under subsection 114(1)(f) of the *ESA*.

10. On May 24, 2022, by email to the Tribunal, Ms. Mackie sent a signed and completed Reconsideration Application Form and her written reasons and argument in support ("May 24, 2022, submission"). She also requested in the Reconsideration Application Form an extension to the statutory reconsideration period to August 31, 2022, but did not provide the Tribunal with a reasonable and credible explanation for the extension sought.

11. On May 26, 2022, the Tribunal received a submission from Ms. Mackie via email (the "May 26, 2022, submission") which included a signed and completed reconsideration application form and written reasons and argument for the application for reconsideration in almost identical terms to the May 24, 2022, submission but with a couple variations. The May 26, 2022, submission is missing the date for the extension of the statutory appeal period contained in the May 24, 2022, submission and it is also missing the last few paragraphs on page 2 of the written reasons and argument but otherwise the submissions are identical to the May 24, 2022, submission.

12. On May 26, 2022, by email, a Tribunal Registry Administrator referred Ms. Mackie to the Information Sheet entitled "How to Request an Extension to the Reconsideration Period" on the Tribunal's website. The Registry Administrator also requested Ms. Mackie provide the Tribunal with her written reasons for the request for the extension to the statutory reconsideration period no later than 4:30 p.m. on June 13, 2022 ("the statutory reconsideration deadline").

13. On June 2, 2022, the Tribunal received a submission from Ms. Mackie by email (the "June 2, 2022, submission") which included written reasons for requesting an extension of time to the statutory reconsideration period and an additional "marked" copy of Ms. Mackie's written reasons and argument for the appeal.

14. On June 6, 2022, the Tribunal sent Ms. Mackie, Ms. Eldridge and the Director a letter confirming receipt of Ms. Mackie's May 24, 2022, submission, May 26, 2022, submission and June 2, 2022, submission (collectively "the written submissions"). The Tribunal informed Ms. Eldridge and the Director that a submission on the request to extend the statutory reconsideration period is not requested from them at this time. The Tribunal also informed Ms. Mackie that any additional reasons and arguments for the application for reconsideration and any supporting documents should be provided to the Tribunal by no later than August 31, 2022, and that the deadline of August 31, 2022, is not an extension to the statutory reconsideration period but is a deadline for Ms. Mackie to finalize her application for reconsideration.

15. On July 22, 2022, Ms. Mackie sent the Tribunal a very brief note from her family physician advising wherein the latter advises that she has been following Ms. Mackie in her clinic for PTSD and shoulder injury from an accident.

16. On July 26, 2022, the Tribunal contacted Ms. Mackie by email to inquire as to whether she required until August 31, 2022, to provide her additional reasons and arguments for the application for reconsideration. Ms. Mackie did not respond to the Tribunal and on September 1, 2022, the Tribunal informed the parties by letter of same date that a Panel has been assigned to decide the application based on the materials received to date.

17. The Tribunal will decide Ms. Mackie's application based on the written submissions, the original decision, and the section 112(5) record before me. If the application is not dismissed, the Tribunal will seek

submissions from Ms. Eldridge and the Director on the merits of the application. Alternatively, if the Tribunal determines all or part of the application should be dismissed, the Tribunal will issue a decision.

ISSUE

18. In any application for reconsideration, there is a threshold, or preliminary, issue of whether the Tribunal will exercise its discretion under section 116 of the *ESA* to reconsider the original decision. If satisfied the case warrants reconsideration, the issue raised in this application is whether this panel of the Tribunal should vary or cancel the original decision.

SUBMISSIONS OF MS. MACKIE

19. In the written submissions, Ms. Mackie contends that she is "again appealing this decision to not return the funds deducted from [her] personal bank account in the amount of $528 due to a $28 CRC fee being deducted from [Ms. Eldgridge's] short 4hour shift at [her] house last year".

20. Ms. Mackie then goes on to identify what she refers to as "the facts and incorrect information" in the Determination "along with other information that was not taken in to (*sic*) consideration".

21. She says that:

- She is not carrying on business as Happy Home Childcare. She is simply a single mother trying to put food on the table for her child.
- Ms. Eldridge knew that her role was to assist with 2 to 3 children, including her (Ms. Mackie's) daughter, at her house.
- Ms. Eldridge only worked a short 4-hour shift.
- She assumed the matter was "closed" after she sent "the $40 pay" to Ms. Eldridge.
- Ms. Eldridge lied that she was alone in her (Ms. Mackie's) home for 4 hours with the children.
- She treated Ms. Eldridge "in a professional way and never used profanity or anger" even when Ms. Eldridge did not provide her with 2 weeks' notice of termination.
- The Criminal Records Check ("CRC") document Ms. Eldridge provided to her was not valid as it was 4 years old.
- She is willing to accept that she will be responsible for the $28 cost for the new or more current CRC document she had to obtain for Ms. Eldridge although it was a prerequisite for the latter's job.
- She moved twice and changed her email address and therefore she did not receive notification of the fine (administrative penalty of $500) until her bank account was garnished and she was unable to pay for gas.
- The Investigating Delegate's communications and demeanour with a fragile person such as [her] was "totally inappropriate".

- The Investigation Delegate led her to believe that Ms. Eldridge would be fined $500 because "she initiated this mess".
- She does not have the funds, time or energy to seek out legal representation in this matter.
- In her efforts to obtain a return of the $500 (administrative penalty portion) that was garnished from her bank account she incurred a $75 fee for lodging her claim with Civil Resolution Tribunal.
- The provincial government should be supporting families like hers rather than making it harder for them.
- She does not understand why "people listed in this dispute" do not have more compassion for her particularly when she needs to provide for her 5-year-old daughter.
- The right thing to do is to return to her the $500 (administrative penalty amount) and she will "reimburse the $28 CRC charge" she offset from Ms. Eldridge's wages.
- She has been a victim of harassment and suffered a great deal of stress and this can be verified by contacting the Ministry of Children & Family Development.
- She has not received any assistance or child support from her partner of 3 years and the father of her daughter, and this can be verified by contacting the enforcement officer in the Family Maintenance Enforcement Program in charge of her case.
- She is under the care of a family physician, Dr. Jennifer Kondra ("Dr. Kondra") as a result of a severe accident that required her to undergo two surgeries from which she is still recovering and has had to live with a caretaker for a few months in the last 12 months.
- Ms. Eldridge left her in a difficult situation as she had no one to assist with caring for the children under her care including her daughter who was 4 years old at the time.

22. Ms. Mackie also submits a very brief medical note from Dr. Kondra in which the latter says that her clinic is following Ms. Mackie's care since 2015 and that Ms. Mackie continues to need ongoing treatment for PTSD and shoulder injury she sustained in an accident.

ANALYSIS

23. Section 116 of the *ESA* delineates the Tribunal's statutory authority to reconsider any order or decision of the Tribunal:

> **Reconsideration of orders and decisions**
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> 116 (1) On application under subsection (2) or on its own motion, the tribunal may
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> (a) reconsider any order or decision of the tribunal, and
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> (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.
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> (2) The director or a person served with an order or a decision of the tribunal may make an application under this section.

(2.1) The application may not be made more than 30 days after the date of the order or decision.

(2.2) The tribunal may not reconsider an order or decision on the tribunal's own motion more than 30 days after the date of the decision or order.

(3) An application may be made only once with respect to the same order or decision.

24. A review of the decisions of the Tribunal reveals certain broad principles applicable to reconsideration applications have consistently been applied. The following principles bear on the analysis and result of this reconsideration application.

25. Reconsideration is not an automatic right of any party who is dissatisfied with an order or a decision of the Tribunal. That said, reconsideration is within the sole discretion of the Tribunal, and the Tribunal must be very cautious and mindful of the objects of the *ESA* in exercising its discretion. (See *Re: Ekman Land Surveying Ltd.*, BC EST # RD413/02).

26. *In Director of Employment Standards (Re Giovanno (John) Valoroso and Carmen Valoroso),* BC EST # RD046/01, the Tribunal explained the reasons why it should exercise reconsideration power with restraint:

> . . . the *Act* creates a legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute.
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> 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 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.

27. In *Re: British Columbia (Director of Employment Standards) (sub nom) Milan Holdings Ltd.),* BC EST # D313/98, the Tribunal delineated a two-stage approach for the exercise of its reconsideration power under section 116. In the first stage, the Tribunal must decide whether the matters raised in the application warrant reconsideration. In determining this question, the Tribunal will consider a non-exhaustive list of factors that include:

(i) whether the reconsideration application was filed in a timely fashion;

(ii) whether the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already provided to the adjudicator;

(iii) whether the application arises out of a preliminary ruling made in the course of an appeal;

(iv) 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;

(v) whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. If the applicant satisfies the requirements in the first stage, then the

Tribunal will proceed to the second stage of the inquiry, which focuses on the merits of the original decision.

28. If the Tribunal, after weighing the factors in the first stage, concludes that the application is not appropriate for reconsideration then the Tribunal will reject the application and provide its reason for not reconsidering. However, if the Tribunal finds that one or more issues in the application is appropriate for reconsideration, the Tribunal will proceed to the second stage in the analysis. The second stage in the analysis involves a reconsideration of the merits of the application.

29. Having delineated the parameters governing reconsideration applications, both statutory and in the Tribunal's own decisions, I find Ms. Mackie's application does not warrant the exercise of the Tribunal's discretion in favour of a reconsideration of the original decision.

30. More particularly, Ms. Mackie's application fails to meet the requirements in the first stage of the analysis in *Milan Holdings Ltd., supra.* The application fails to make out an arguable case of sufficient merit to warrant a reconsideration; it does not raise any important questions of law, fact, principle, or procedure of importance to the parties and/or their implications for future cases. It also does not show *any* error in the original decision, or present other relevant circumstances that requires this panel to intervene.

31. It is particularly noteworthy that in her reconsideration application, Ms. Mackie fails to address, meaningfully or at all, the Tribunal Member's reasons in the original decision to deny her request to *extend the time limit* for filing her appeal under subsection 109(1)(b) of the *ESA*. Instead, Ms. Mackie's submissions are largely in the nature of disagreement with the findings of fact of the Adjudicative Delegate in the Determination and a re-argument of the case. Ms. Mackie makes this abundantly clear in the submissions when she sates in the preamble to the submissions: "I am again appealing this decision to not return the funds deducted from my personal bank account in the amount of $528 … ."

32. In my view, Ms. Mackie has misconceived the purpose or object of a reconsideration application. While I very much sympathize with her struggles as a single mother, without child support from the father of her child, and also undergoing medical care, it is not a function of a reconsideration panel to re-weigh the evidence but to consider if the proper legal principles were applied in the original decision. Having reviewed the very persuasive analysis of the Tribunal Member in the original decision (as set out in paragraphs 7 and 8 above), I am confident that the Tribunal Member arrived at the right decision in denying Ms. Mackie's application for an extension of the statutory appeal period to file her reconsideration application. I also agree with the Tribunal Member's remarks, in *obiter*, that had she granted Ms. Mackie an extension of time to file the appeal, the appeal would fail on the merits under subsection 114(1)(f) as it has no reasonable prospect of success.

33. In summary, I find that Ms. Mackie has failed to show any error in the original decision and has failed to show a strong *prima facie* case or any other reason for exercising my decision in favour of reconsideration and I am denying her reconsideration application.

ORDER

34. Pursuant to section 116 of the *ESA*, the original decision, 2022 BCEST 27, is confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal