

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 -

Guy Marchand

- of a Decision issued by -

The Employment Standards Tribunal

PANEL: David B. Stevenson

FILE No.: 2023/110

DATE OF DECISION: September 5, 2023

DECISION

SUBMISSIONS

Guy Marchand on his own behalf

OVERVIEW

1. Guy Marchand (“Mr. Marchand”) seeks reconsideration of a decision of the Tribunal, 2023 BCEST 49 (“original decision”), dated June 26, 2023.
2. The original decision considered an appeal of a determination issued by a delegate of the Director of Employment Standards (“Director’s delegate”) on December 13, 2022 (“Determination”).
3. The Determination was made by the Director’s delegate on a complaint filed by a former employee of Mr. Marchand, who alleged she was owed unpaid wages.
4. The Director’s delegate found the former employee was owed wages, and section 88 interest, in the amount of \$420.90. The Director’s delegate also found Mr. Marchand had contravened six provisions of the *ESA* and imposed administrative penalties in the amount of \$3,000.00.
5. An appeal of the Determination was filed by Mr. Marchand alleging the Director erred in law and failed to observe principles of natural justice in making the Determination. The appeal was filed late. Mr. Marchand requested an extension of the statutory appeal period.
6. The Tribunal Member making the original decision denied the requested extension and, applying section 114(1)(b) of the *ESA*, dismissed the appeal. In the course of analyzing the appeal, the Tribunal Member also considered, applying the provisions of section 114(1)(f) of the *ESA*, whether, even had he been inclined to grant an extension of the appeal period, the appeal had any reasonable prospect of succeeding. He found it did not, indicating the Director’s delegate’s conclusion that wages, and interest, were owed in the amount set out in the Determination was correct on the evidence – and not seriously contested by Mr. Marchand – and the administrative penalties imposed were correct based on the material before the Tribunal Member.
7. This application seeks to have the original decision, and the Determination, varied to cancel five of the six administrative penalties imposed in the Determination, arguing the administrative penalties are wrong, unjustified, and amount to a gross injustice.
8. In his application for reconsideration, Mr. Marchand requested more time to provide additional documents. He was allowed until August 8, 2023, to provide such documents and identify their relevance to the reconsideration application. The Tribunal has received nothing further from Mr. Marchand.

ISSUE

9. 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 the original decision and the Determination.

ARGUMENTS

10. In this application for reconsideration, Mr. Marchand does nothing more than restate the submissions he made in the appeal on his request for an extension of the appeal period and on his challenge to the imposition of six administrative penalties.

ANALYSIS

11. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally. Section 116 of the *ESA* reads:

- 116 (1) On an 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.
- (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.
- (4) The director and a person served with an order or a decision of the tribunal are parties to a reconsideration of the order or decision.

12. The authority of the Tribunal under section 116 is discretionary. A principled approach to this discretion has been developed and applied. The rationale for this approach is grounded in the language and purposes of the *ESA*. One of the purposes of the *ESA*, found in section 2(d), is “to provide fair and efficient procedures for resolving disputes over the application and interpretation” of its provisions. Another stated purpose, found in section 2(b) is to “promote the fair treatment of employees and employers.” The approach is fully described in *Milan Holdings Inc.*, BC EST # D313/98 (Reconsideration of BC EST # D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In *Director of Employment Standards (Re Giovanni (John) and Carmen Valoroso)*, BC EST # RD046/01, the Tribunal explained the reasons for restraint:

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

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 able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

13. In deciding whether to reconsider, the Tribunal considers timeliness and such factors as the nature of the issue and its importance both to the parties and the system generally. An assessment is also made of the merits of the original decision. The focus of a reconsideration application is, generally, the correctness of the original decision.
14. The Tribunal has accepted an approach to applications for reconsideration that resolves itself into a two-stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. The circumstances where the Tribunal’s discretion will be exercised in favour of reconsideration are limited and have been identified by the Tribunal as including:
 - failure to comply with the principles of natural justice;
 - mistake of law or fact;
 - significant new evidence that was not available to the original panel;
 - inconsistency between decisions of the Tribunal that are indistinguishable on the critical facts;
 - misunderstanding or failure to deal with a serious issue; and
 - clerical error.
15. If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised in the reconsideration.
16. I find this application does not warrant reconsideration.
17. It is not the function of a reconsideration panel to change the original decision unless the applicant can demonstrate some manifest error in it that justifies intervention and correction.
18. I am not satisfied any error in the original decision, or any other circumstance that requires intervention, has been shown. Based on the material before the Tribunal Member making the original decision, I completely endorse the reasons for the disposition of the appeal.
19. On the matter of the requested extension, the Tribunal Member making the original decision did not accept the reasons given by Mr. Marchand for the delay in submitting an appeal of the Determination to be an “adequate explanation.” I do not disagree with his assessment of the request for an extension of the appeal period, and, in any event, Mr. Marchand has not shown the refusal to extend the appeal period was either an error of law or a failure to observe principles of natural justice.

20. On the question of the administrative penalties, the arguments made in the submission provided with this application are identical to those made in the appeal and all were addressed in the original decision. Mr. Marchand has not shown the disposition of the appeal on the challenge to the administrative penalties was wrong and justifies intervention.
21. For the above reasons, the application for reconsideration is denied.

ORDER

22. Pursuant to section 116 of the *ESA*, the original decision, 2023 BCEST 49, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal