

An Application for Reconsideration

- by -

Northwestern Utility Construction Ltd.
("NUC")

- 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)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2016A/131

DATE OF DECISION: January 16, 2017

DECISION

SUBMISSIONS

John A. McLachlan

counsel for Northwestern Utility Construction Ltd.

OVERVIEW

1. This is an application by Northwestern Utility Construction Ltd. (“NUC”) for a reconsideration of Tribunal Decision BC EST # D107/16 (the “Original Decision”), issued by the Tribunal on August 18, 2016.
2. NUC operates a fibre and copper cable installation and maintenance business. John Ferch (“Mr. Ferch”) was employed by NUC as a lineman helper, working at various sites aiding in the construction, removal and repair of transmission lines. Mr. Ferch’s employment was terminated on July 14, 2015. NUC withheld compensation for length of service pursuant to section 63 of the *Employment Standards Act* (the “*Act*”) on the basis that Mr. Ferch was exempted from entitlement to such compensation by virtue of working in construction.
3. On August 12, 2015, Mr. Ferch filed a complaint alleging that NUC had contravened the *Act* in failing to pay him compensation for length of service. On May 13, 2016, the Director of Employment Standards issued a decision concluding that NUC was not primarily a construction company and was not exempted from paying Mr. Ferch compensation for length of service.
4. The Director concluded that the principal work performed by NUC, and Mr. Ferch, to be “replacing cables in existing structures.” As noted in the Original Decision:

The Director concluded that NUC had failed to establish that its principal business was construction, as defined in the *Act*, but was, on the evidence, more accurately described as “maintenance of existing structures.” The Director also found there was no evidence to show that Mr. Ferch was employed on “one or more construction sites.”
5. The Director concluded that NUC had contravened sections 58 and 63 of the *Act*, and ordered it to pay wages of \$4,140.32 to Mr. Ferch. The Director also imposed a \$500 administrative penalty against NUC for the contravention.
6. NUC appealed the Determination to the Tribunal on the grounds that the Director erred in law in concluding that NUC’s principal business was maintenance and did not fall within the definition of “construction” in the *Act*. The Tribunal dismissed the appeal, concluding that NUC had not demonstrated an error of law. The Tribunal concluded that the Director’s decision was “consistent with the approach to the construction exception on an employee’s entitlement to compensation for length of service mandated by decisions of the Tribunal.”
7. NUC seeks reconsideration of the Original Decision, arguing that the Director erred in concluding that NUC’s principal business was not construction, and that NUC could not benefit from the exception to the length of service compensation provisions.
8. NUC submits that reconsideration of the Tribunal’s decision is warranted as its argument concerns an important question of law that has seldom been considered by the Tribunal, namely, the distinction between “maintenance” and “repair.”

ISSUE

9. There are two issues on reconsideration:
 1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?
 2. If so, should the decision be cancelled or varied or sent back to the Member?

ARGUMENT

10. NUC argues that its principal business is construction; that is, the construction, tear down and repair of telecommunication lines, and that Mr. Ferch was employed at one or more construction sites and therefore ineligible to receive length of service compensation.
11. NUC contends that the Director erred in law in characterizing NUC's principal business as maintenance as opposed to "repair", as that is defined in the term "construction" under the *Act*.
12. NUC says there is little Tribunal commentary on the concept of repair as included in the definition of "construction", noting that in *D. Hall & Associates Ltd.* (BC EST # D503/99, Reconsideration denied BC EST # RD266/00), the Tribunal held that "the concept of 'repair...of property' in the definition of construction contemplated circumstances where the work being done was necessary to restore a system, or part of a system that has ceased, wholly or substantially, to function." NUC argues that the work it carries out falls squarely within the concept outlined in *Hall*.
13. NUC argues that its work is distinguishable from *Hall*, as its work is not preservation work, as it is engaged to fix lines that are no longer, wholly or substantially, functioning, and install new lines.

THE FACTS AND ANALYSIS

14. Section 116(1) of the *Act*, which confers an express reconsideration power on the Tribunal, 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.*

1. The Threshold Test

15. The Tribunal reconsiders a decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *Act* detailed in section 2 "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act."
16. In *Milan Holdings* (BC EST # D313/98) the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the Tribunal to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. The primary factor weighing in favour of reconsideration is 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.

The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

17. The Tribunal may agree to reconsider a Decision for a number of reasons, including:

- failure to comply with the principles of natural justice;
- mistake of law or fact;
- significant new evidence that was not reasonably 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.

(Zoltan Kiss, BC EST # D122/96)

18. While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The reconsideration process was not meant to allow parties another opportunity to re-argue their case.

19. After weighing these and other factors, the Tribunal may determine that the application is not appropriate for reconsideration. Should the Tribunal determine that one or more of the issues raised in the application is appropriate for reconsideration, the Tribunal will then review the matter and make a decision. The focus of the reconsideration panel will in general be with the correctness of the decision being reconsidered.

20. In *Voloroso* (BC EST # RD046/01), the Tribunal emphasized that restraint is necessary in the exercise of the reconsideration power:

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

21. NUC’s reconsideration request is, in essence, a re-argument of the issues it raised on appeal of the Director’s Determination. Indeed, all of its arguments, save one, are directed towards the Director’s analysis, rather than the Tribunal’s decision.

22. In the Original Decision, the Tribunal characterized NUC’s appeal of the Determination as an argument that the Director misinterpreted and misapplied the definitions and terms relating to the construction exception to the facts before the Director. In dismissing the appeal, the Tribunal stated:

... the Tribunal has advocated and adopted a functional analysis to decisions about both the principal business of the employer and the situs of the work of the employee, with the burden of showing the exception applies being on the party, typically the employer, advocating exclusion from the statutory benefit provided in section 63 of the *Act*.

The definition of construction, and the consequent construction exception, is not broadly applied, but rather, for reasons relating to the nature and purpose of the *Act* and the interpretive principles relating to it, is narrowly construed. This approach is expressed in the following excerpt from *Urban Sawing & Grooving Company Ltd.*, BC EST # D112/05 (Reconsideration denied, BC EST # RD188/05) where the Tribunal stated, at pages 6 – 7:

Construction, as defined in the Act means, “*the construction, renovation, repair or demolition of property or the alteration or improvement of land.*” In *E. Nixon Ltd.* BC EST # D573/97, the Tribunal made the following comment concerning that definition:

The definition of construction in the *Act* is comprehensive. Such a broad definition raises certain difficulties, not the least of which is its limits. Technically, one could include in the definition such activities as minor household repairs and gardening. In the context of the Act, this is hardly appropriate. The *Act* is intended to have a general application to employees in the province. Provisions of the *Act* that allow for exceptions to the application of basic standards of compensation and conditions of employment are strictly construed.

23. The Tribunal Member in the Original Decision also reviewed the Tribunal’s decision in *Heron Construction & Millwork Ltd.* (BC EST # D087/08, Reconsideration denied BC EST # RD113/08) as well as *E. Nixon, supra.*
24. Following a review of these decisions, the Tribunal Member concluded that “there is no evidence whatsoever in this case that the principal work of NUC conforms with the above concept of construction or is performed on a construction site.”
25. In my view, NUC’s reconsideration application constitutes what might be characterized as a second attempt to challenge the Director’s Determination. NUC’s application challenges not the Original Decision but the Director’s Determination, on essentially the same grounds it advanced before the Tribunal on appeal. The reconsideration application does not address any of the factors outlined in *Zoltan Kiss* or *Milan Holdings, supra.*
26. The mere assertion that there is little by way of commentary from the Tribunal on the concept of repair as included in the definition of “construction” is not in itself a basis for the exercise of the reconsideration power. In the Original Decision, the Tribunal referred to a number of decisions, some of which were the subject of reconsideration applications, that considered the definition of construction. Northwestern has made no submissions that the Tribunal’s interpretation is in error.
27. I conclude that NUC’s application for reconsideration has not raised any significant questions of law, fact, principle or procedure and I decline to exercise the reconsideration power.
28. The request for reconsideration is denied.

ORDER

29. Pursuant to section 116 of the *Act*, the original decision, BC EST # D107/16, is confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal