

An application for Reconsideration

- by -

Martin Vasil
("Vasil")

- 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: Shafik Bhalloo

FILE No.: 2007A/143

DATE OF DECISION: January 15, 2008

DECISION

OVERVIEW

1. Martin Vasil (“Vasil”) seeks a reconsideration under Section 116 of the *Employment Standards Act* (the “Act”) of the Decision of the Employment Standards Tribunal BC EST #098/07 dated October 18, 2007 (the “Original Decision”). The Original Decision confirmed the Determination made by a Delegate of the Director of Employment Standards (the “Director”) on June 21, 2007 wherein the Director determined that Vasil’s former employer, 528716 B.C. Ltd. carrying on business as Rawn’s Buy and Sell Network, was liable for the amount of \$4,342.90 in wages to Mr. Vasil comprised of regular wages, annual vacation pay, statutory vacation pay and accrued interest pursuant to Section 88 of the Act. The Original Decision also left undisturbed the three administrative penalties against the Employer for contraventions of Sections 28, 45 and 58 of the Act.
2. In the reconsideration application, Vasil has requested for an extension “to get further witness information” without naming the witnesses he is referring to or the information the witnesses will provide. Vasil has also filed 5-page email submission and numerous emails in support thereof, all of which pre-date the Original Decision and some also pre-date the Determination. In the email submission, Vasil disputes the same findings of facts in the Determination that he already disputed previously in his appeal to the Tribunal and adduces evidence in support thereof, most of which he previously adduced in the investigation of his complaint and is referred to in the Determination.
3. Vasil’s application for reconsideration has been filed in a timely fashion and it will be considered without a hearing, on the basis of the written submissions of the parties, the record of the Director and the Determination.

ISSUES

4. This Tribunal has previously indicated that in an application for reconsideration there is a preliminary or a threshold issue of whether the Tribunal will exercise its discretion under section 116 of the *Act* to reconsider the Original Decision. Only if the Tribunal is satisfied that the case is appropriate for reconsideration, the substantive issues raised in the reconsideration application will be considered. In this case, the substantive issues are whether the Original Decision wrongly concluded that: (1) there was ample evidence to support the Delegate’s decision that Vasil was employed for two separate and distinct periods of employment; (2) the Director did not act without any evidence or on a view of facts that could not be reasonably entertained in concluding that Mr. Vasil’s rate of pay was \$8.00 per hour from September 16, 2005 to January 8, 2006 and \$15.00 per hour from January 9 to March 15, 2006 and that during this period, Vasil worked an average of 27.5 hours per week; (3) the Director did not act without any evidence or on a view of facts that could not be reasonably entertained to conclude that the termination of Vasil’s employment was justified; and (4) Vasil failed to establish that the Delegate failed to observe the principles of natural justice in making the Determination.

DISCUSSION AND ANALYSIS

5. Section 116 of the Act sets out the statutory authority of the Tribunal to reconsider any order or decision of the Tribunal:

Reconsideration of orders and decisions

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.*

(2) The director or a person named in a decision or order of the tribunal may make an application under this section.

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

6. Reconsideration is not an automatic right of any party dissatisfied with an order or a decision of the Tribunal. It is within the sole discretion of the Tribunal whether or not it will reconsider an order or a decision of the Tribunal, as section 116 uses permissive (and not mandatory) language in employing the word “may” in describing the authority of the Tribunal to consider reconsideration applications.

7. In exercising its discretionary power in section 116, the Tribunal is to be very cautious and mindful of the objects of the Act as indicated in *Re Eckman Land Surveying Ltd.* BC EST #RD413/02:

Reconsideration is not a right to which a party is automatically entitled, rather it is undertaken at the discretion of the Tribunal. The Tribunal uses its discretion with caution in order to ensure: finality of its decisions; efficiency and fairness of the appeal system and fair treatment of employers and employees.

8. In *Re British Columbia (Director of Employment Standards) (sub nom. Milan Holdings Ltd.)*, BC EST #D313/98 the Tribunal delineated a two-stage process governing its decision to exercise the reconsideration power. First, 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 such factors as: (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.

9. Having delineated the guidelines, both statutory and in the Tribunal’s own decisions, governing reconsideration applications, in my view this is not a case where the Tribunal should exercise its discretion in favour of reconsidering the Original Decision, as Vasil’s application fails on the preliminary issue for the reasons that follow.

10. First, Vasil has not raised any significant questions of law, fact, principle or procedure or any arguable case of sufficient merit to warrant a reconsideration of the Original Decision.

11. Secondly, Vasil's reconsideration application is transparently an attempt on his part to re-weigh evidence that was provided to the Delegate during the investigation which to a large extent the Director references in the Determination and the Tribunal subsequently reviews in the Original Decision. More specifically, in my review of the Original Decision, it is clearly evident that while Vasil's stated grounds of appeal are that the Director erred in law and failed to observe the principles of natural justice in making the Determination, his submissions in support are almost exclusively based on his dispute with the Director's following findings of fact which influenced the calculations in the Director's award in the Determination: (i) Vasil's rate of pay was \$8.00 per hour from September 16, 2005 to January 8, 2006 and \$15.00 per hour from January 9 to March 15, 2006 and that during this period, Vasil worked an average of 27.5 hours per week; and (iii) the termination of Vasil's employment was justified. The Tribunal in the Original Decision correctly pointed out that Vasil's submissions largely contained "arguments regarding why the findings of fact made by the Delegate are incorrect, and how the evidence should have been weighed differently by the Delegate". The Tribunal also correctly relied on the decision in *Re Britco Structures Ltd.*, BC EST #D260/03 to reject Vasil's dispute with the Director's findings of fact, as Vasil failed to show either that there was no evidence to support the findings of fact made, or that the Director took a view of the facts that could not reasonably be entertained on the evidence before the Director. The Tribunal also correctly pointed out that the weight of evidence is a matter to be decided by the Delegate and it is a question of fact and not law. Vasil, understandably, is dissatisfied with the Original Decision for confirming the Determination, however, in his reconsideration application he is largely making the same arguments and reiterating the same evidence he adduced in the investigation of his complaint and subsequently in his appeal. As this Tribunal has indicated previously, it is neither appropriate in an appeal nor in a reconsideration application for a party to reargue or seek re-weighing of its case in the hope of finding a more sympathetic ear. In this case, it is also telling in Vasil's request for an extension of time to "get further witness information" that Vasil is expecting a re-hearing of his case. Reconsideration is not an opportunity for hearing de novo.

ORDER

12. Pursuant to Section 116 of the Act, I order the original decision, BC EST Decision No. D098/07, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal