An Application for Reconsideration

- by -

The Cambie Malone's Corporation
("Malone's")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2016A/168

DATE OF DECISION: January 26, 2017

DECISION

SUBMISSIONS

Gabriel Ducharme — counsel for The Cambie Malone's Corporation

OVERVIEW

1. This is an application under subsection 109(1)(b) of the *Employment Standards Act* (the "*Act*") to extend the time period for applying for reconsideration of an appeal decision. This late application for reconsideration concerns BC EST # D136/16 issued by Tribunal Member Roberts on October 26, 2016 (the "Appeal Decision"). The applicant is The Cambie Malone's Corporation ("Malone's).

2. Subsection 116(2.1) of the *Act* states that a reconsideration application "may not be made more than 30 days after the date of the order or decision". As noted above, the Appeal Decision was issued on October 26, 2016. However, Malone's reconsideration application – filed by its in-house legal counsel (who also represented Malone's in the appeal proceedings) – was not filed until December 16, 2016, approximately three weeks after the statutory application period expired.

3. In my view, this is not a proper case to grant an extension of the reconsideration application period. My reasons for so concluding are set out, below.

PRIOR PROCEEDINGS

4. Mr. Sam Yehia, Malone's sole director and officer, hired the complainant, Ms. Castillo (also known as Ms. Calagos), through an employment agency to care for his elderly and infirm mother. Ms. Castillo cooked and cleaned the mother's residence and also undertook other administrative tasks on her behalf. Although Ms. Castillo was not hired to work for, and did not provide any direct services to, Malone's, Mr. Yehia, as Malone's sole principal, nevertheless had Ms. Castillo placed on Malone's payroll. Following a dispute regarding her contractual wage rate, Ms. Castillo quit and subsequently filed an unpaid wage complaint.

5. Ms. Castillo's complaint was the subject of an oral hearing before a delegate of the Director of Employment Standards (the "delegate") held on June 20, 2015, and September 24, 2015. Mr. Yehia represented Malone's at the complaint hearing and Ms. Castillo appeared on her own behalf although a friend also assisted her at the hearing. Malone's principal position at the hearing was that Ms. Castillo was a "sitter" as defined in subsection 1(1) of the *Employment Standards Regulation* (the "*Regulation*") and, accordingly, by reason of subsection 32(1)(c) of the *Regulation*, the *Act* did not apply to her employment.

6. On July 15, 2016, the delegate issued a Determination and her accompanying "Reasons for the Determination" upholding the complaint and ordering Malone's to pay Ms. Castillo $23,154.42 on account of unpaid wages and section 88 interest. Further, and also by way of the Determination, the delegate levied four separate $500 monetary penalties against Malone's. Thus, the total amount payable under the Determination was $25,154.42.

7. Malone's, through its in-house legal counsel, appealed the Determination arguing that the delegate erred in law and failed to observe the principles of natural justice in making the Determination (see subsections

112(1)(a) and (b) of the *Act*). On October 26, 2016, Member Roberts summarily dismissed Malone's appeal as having no reasonable prospect of succeeding (subsection 114(1)(f) of the *Act*).

8. By letter dated October 26, 2016, the Tribunal's Administrator/Appeals Manager forwarded the Appeal Decision to Malone's, Ms. Castillo and to the delegate. This letter was sent by both electronic mail and regular mail to Malone's legal counsel. The following text box is set out at the bottom of the Tribunal's 1-page October 26 letter (**boldface** in original text):

> **Reconsideration Information**
> Should you wish to make an application for reconsideration of the Tribunal's decision in this matter, your application must be delivered to the Employment Standards Tribunal by **4:30 pm on November 25, 2016.** For information on the reconsideration process, please visit the Tribunal's website at www.bcest.bc.ca/recons/recons.htm or contact the Tribunal at 604-775-3512.

9. Notwithstanding this crystal clear direction regarding the reconsideration process, inexplicably, Malone's legal counsel by-passed the reconsideration process and on November 30, 2016, filed a petition in the B.C. Supreme Court seeking judicial review of the Appeal Decision. Curiously, Malone's counsel only named Ms. Castillo, Jennifer Calagos (each separately) and "The Employment Standards Branch" (rather than the Director of Employment Standards) as respondents – the Tribunal was not named as a respondent.

10. By way of the petition, Malone's sought the following orders: i) "the decision of delegate Roberts is vacated" [*sic*, Ms. Roberts is the Tribunal Member who issued the Appeal Decision; Ms. Shelley Chrest was the delegate who issued the Determination]; ii) "this matter is referred back to the appellate tribunal for a determination of this appeal on its merits"; iii) "Costs"; and iv) "Such further and other relief as this Honourable Court may deem just". The petition contained the following "notice": "On Notice To: Director of the Employment Standards Branch, Suite 650 Oceanic Plaza, 1066 West Hastings Street, Vancouver, British Columbia V6E 3X1 Attention: Jennifer Castillo or Calagos".

11. This latter address is the location of the Tribunal's offices. The Director of Employment Standards' office is located in Victoria and several other Employment Standards Branch offices are located in various cities throughout the province.

12. On December 8, 2016, the Tribunal's legal counsel wrote to Malone's legal counsel advising, among other things, that: i) the Tribunal's offices were not those of the Director of Employments Standards and that the Director and the Tribunal were two wholly independent administrative tribunals; ii) sending the petition to the Tribunal's offices was not proper personal service on the respondent, Ms. Castillo; iii) as a matter of law (subsection 16(1) of the *Judicial Review Procedure Act*), the petition must also be served on the provincial Attorney General; and, iv) in general, judicial review applications should not be filed if there is an alternative internal remedy and, in that regard, no section 116 reconsideration application had ever been filed. Accordingly, the petition was arguably premature since Malone's had "failed to exhaust its internal remedies".

13. On December 16, 2016, and by way of response to the Tribunal's counsel's December 8 letter, Malone's filed a late application for reconsideration of the Appeal Decision. Malone's application consisted of the following documents: i) the Tribunal's "Reconsideration Application Form" (Form 2); ii) a 1 ½ -page letter dated December 15, 2016, from Malone's legal counsel to the Tribunal; iii) a copy of the above-mentioned petition filed in the B.C. Supreme Court on November 30, 2016; iv) a copy of the Appeal Decision; and, lastly, v) a copy of the Tribunal's legal counsel's December 8 letter.

14. Although Malone's Form 2 application indicates that it has submitted "written reasons and argument on why your application should be allowed" (Part 7 of the form), in fact, there are no written reasons attached. Malone's reasons for seeking reconsideration are apparently identical to those set out in its petition for judicial review – in his December 15 letter, Malone's counsel states: "please accept the already filed Petition as our reasons and arguments for the attached request for reconsideration." However, reconsideration and judicial review applications are two separate processes and the legal principles governing each are rather different. Most particularly, there are no submissions in the petition regarding the two-stage *Milan Holding*s test (see BC EST # D313/98) – namely, the analytical framework used to assess section 116 reconsideration applications. Malone's counsel has never provided any argument regarding whether its application meets the *Milan Holdings* test.

15. It should also be noted that even if one were inclined (and I am not) to accept the petition as some sort of implied request for reconsideration, the petition was filed with the B.C. Supreme Court on November 30, 2016, and with the Tribunal on December 5, 2016, and thus it would still have been late (by about 10 days).

FINDINGS AND ANALYSIS

16. I think it important to stress that, at this stage, I am adjudicating an application to extend the time period for filing a reconsideration application and am *not* considering whether an otherwise timely application passes the first stage of the *Milan Holdings* test. That said, I agree with the approach taken by Member Stevenson in *Serendipity Winery Ltd.*, BC EST # RD108/15, that, at least on a preliminary basis, the Tribunal should turn its mind to the underlying merits of the application. Clearly, it makes no sense to extend the reconsideration application time period only to then summarily dismiss the application because it is wholly unmeritorious. However, there may be cases where by reason of the delay involved, or other considerations, the Tribunal will refuse to extend the reconsideration period even though the application may have some presumptive merit. I am of the view that the principal considerations when assessing a subsection 109(1)(b) application to extend the reconsideration period are:

- the delay involved;
- does the applicant have a reasonable and credible explanation for having failed to file a timely application?;
- has the applicant demonstrated an ongoing *bona fide* intention to seek reconsideration and was this intention communicated, in a timely way, to the respondent parties, including the Director of Employment Standards?;
- would any respondent party be unduly prejudiced if the reconsideration application period were extended?

17. Malone's legal counsel's explanation for failing to file a timely section 116 application is as follows:

- "…we chose to have the matter judicially reviewed as we felt that Delegate Roberts' [*sic*] findings and usage of the most extraordinary remedy of finding that the appeal had no reasonable prospect for success meant that judicial review as [*sic*] inevitable";
- "…we felt that this is an extraordinary circumstance to have this matter before the Supreme Court as it is bound by stare decisis yet administrative tribunals are not technically" [sic];

- "…the Supreme Court is better to hear such a matter considering the appellate tribunal in the form of Delegate Roberts [*sic*] has chosen to not even have a formal hearing on the matter";
- "With that in mind, we were also respectful and cognizant of the resources of the tribunal and the parties, and felt that a judicial review was a better forum to have this matter heard with references to merit and expense" [*sic*];
- "With the greatest of respect, we also felt that there was an unfortunate 'reasonable apprehension of bias' and wished for the Supreme Court to hear such a judicial review";

Finally, counsel indicated that Malone's was now prepared to "bring this forward for a reconsideration", although he also stated Malone's does "feel [it] to be a fait accompli".

18. With respect to Malone's counsel's reference to "an unfortunate 'reasonable apprehension of bias'" assertion, I note that counsel did not particularize this bias allegation insofar as *who* appeared to be "biased" and no *factual basis* for the bias assertion was advanced. Further, I have reviewed the petition for judicial review and cannot find anything in that document that speaks to a bias allegation against anyone. I consider this unparticularized bias allegation to be wholly devoid of merit.

19. All of Malone's five above-noted bullet points are largely, if not entirely, fundamentally predicated on the contention that an immediate application for judicial review of the Appeal Decision would be a preferable course of action compared to a section 116 reconsideration application. In other words, it appears that Malone's counsel was well aware that there was statutory time limit governing reconsideration applications but nonetheless decided that Malone's would "by-pass" the section 116 reconsideration process in order to have the matter heard in the B.C. Supreme Court as soon as possible.

20. As noted by our Court of Appeal in *Timberwolf Log Trading Ltd. v. Commissioner (Pursuant to s. 142.11 of the Forest Act)*, 2011 BCCA 70 at para. 62:

> …barring compelling reasons to the contrary, the court will not exercise its discretion to grant judicial review of a statutory body's decision unless the applicant has first exhausted all internal remedies or the available internal remedy is not likely to be both adequate and effective.

21. Malone's counsel apparently believes that there is no point in pursuing a reconsideration application because the outcome of such a process would be "a fait accompli". However, in my view, that argument does not even remotely explain why Malone's failed to file a timely reconsideration application. There was nothing preventing Malone's from filing a timely application (in order to preserve its right to reconsideration) and then proceed directly to the Supreme Court and argue, in the circumstances, that there was no need for the Tribunal to adjudicate the reconsideration application. As noted above, I infer from counsel's arguments that he was well aware of the reconsideration process but considered it to be unnecessary and/or a waste of time and money and thus he decided to proceed directly to the B.C. Supreme Court via an application for judicial review of the Appeal Decision.

22. Certainly, Malone's counsel was well aware that there was a statutory reconsideration procedure (could the Tribunal's October 26 letter be any clearer?) and that there was fixed deadline for filing such an application. Whatever the reason, counsel decided that he would simply ignore the reconsideration process and proceed directly to judicial review. That was his choice, but that is not an adequate *explanation* for failing to file a timely section 116 application.

23. While the delay involved in filing the present application is not particularly lengthy, I am not satisfied that Malone's has provided a reasonable explanation for its failure to file a timely application. So far as I can tell, Malone's had no intention of filing a reconsideration application before December 8, 2016, when the Tribunal's counsel suggested in her December 8 letter that, in general, parties are expected to exhaust their internal remedies prior to seeking judicial review. It was only at that point Malone's decided to file an application, although it apparently still considers the reconsideration process to be a waste of time and money and that its outcome has been pre-determined. As for the matter of prejudice, the complainant's unpaid wages (over $23,000) date from June 6, 2014, and I fail to see why she should endure further delay before obtaining a final answer (at least from the Tribunal) with respect to her monetary entitlement. The purposes of the *Act* include ensuring that unpaid wage disputes are adjudicated fairly and efficiently (see section 2) and I am of the view that it is neither fair nor efficient to further delay this matter simply because Malone's consciously decided it did not wish to exhaust its internal remedies under the *Act*.

24. Finally, and very briefly with respect to the merits of the proposed application, it strikes me, on its face, as simply an undisguised effort to reargue the very same case that was before the Tribunal on appeal. This is not a proper basis for seeking reconsideration and such applications do not pass the first stage of the *Milan Holdings, supra* test. Member Roberts considered Malone's various arguments and rejected each one as lacking any presumptive merit; I endorse her analysis and ultimate findings. Accordingly, even if I were prepared to extend the time period for filing a reconsideration application, I consider Malone's application – as presently constituted – to be one without any presumptive merit.

ORDER

25. Malone's subsection 109(1)(b) application to extend the time period for applying for reconsideration is refused. It follows that Malone's application to cancel the Appeal Decision is similarly refused.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal