An Application for Reconsideration

- by -

Thomas C. Moore
("Mr. Moore")

- 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: David B. Stevenson

FILE No.: 2016A/169

DATE OF DECISION: January 26, 2017

DECISION

SUBMISSIONS

Thomas C. Moore — on his own behalf

OVERVIEW

1. Thomas C. Moore ("Mr. Moore") seeks reconsideration of a decision of the Tribunal, BC EST # D150/16 (the "original decision") dated November 22, 2016.

2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on April 27, 2016.

3. The Determination was made by the Director on a complaint filed by Mr. Moore who alleged his former employer, Skinner Bros. Transport Ltd. ("Skinner"), had contravened section 83 of the *Act*.

4. In the Determination, the Director found Skinner had not contravened the *Act* and that no further action would be taken.

5. An appeal of the Determination was filed by Mr. Moore on all of the available grounds listed in section 112(1) of the *Act*.

6. In the appeal, Mr. Moore sought to have the Determination cancelled and his claim referred back to the Director.

7. The Tribunal Member making the original decision dismissed the appeal, finding Mr. Moore had not met the burden of establishing there was any error in the Determination on the statutory grounds of appeal relied upon.

8. In this application, Mr. Moore seeks to have the original decision cancelled and the matter referred back to the Director for a fresh hearing. In effect, he is seeking to have his appeal of the Determination granted and the Determination cancelled.

9. The Tribunal received a supplementary submission from Mr. Moore, on December 28, 2016, on the subject of "Employee Privacy in the workplace". I will not be addressing this submission for three reasons. First it has been filed outside of the statutory time limit for filing an application for reconsideration. It raises a matter that was not identified in the application filed on December 19, 2016. Second, the subject matter of the submission – the legal and factual considerations that attend an assessment of the propriety of installing video surveillance in the workplace – was never raised in the complaint process, was never the subject of any submission to the Director or the Tribunal Member deciding the appeal and was not considered in either the Determination or the original decision. In all his submissions, it was the *fact* that video surveillance was installed by Skinner in the workplace, regardless of whether it was appropriate. If Mr. Moore considered this question to be important, he should have raised it at the outset. Third, the submission, and the question it raises, are irrelevant to whether Skinner contravened section 83 of the *Act*. The Director was presented with the *fact* video surveillance had been installed at Mr. Moore's workplace and was not persuaded it supported his claim against Skinner.

ISSUE

10. 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 *Act* to reconsider the original decision. If satisfied the case warrants reconsideration, the issue raised in this application is whether the Tribunal should cancel the original decision and refer the matter back to the original panel or, if more appropriate, to the Director.

ARGUMENT

11. Mr. Moore provides several reasons for his view that the original decision warrants reconsideration; I shall summarize them in the order they appear in the reconsideration application submission:

- the Tribunal Member making the original decision ignored relevant evidence, "[by] his not ruling on the contents of the video clip" and by failing to do so, made "a patently unreasonable decision" impacting the fairness of the proceeding;
- the Tribunal Member "makes a reviewable error and a Breach of Natural Justice [sic]" by considering the small claims court Notice of Claim when Mr. Moore contends he never received "the claim forms as part of the submission from the employer" and by failing to appreciate that "Natural Justice [sic] requires full disclosure of statements and a full opportunity to respond";
- the Tribunal Member erred by failing to require documents to be included in the section 112(5) record that the Director had declined to order Skinner produce (on the ground of irrelevance) during the complaint process;
- the Tribunal Member's decision (see immediately above) not to have "full disclosure and the complete record before him" was "patently unreasonable", inconsistent with other Tribunal decisions that are indistinguishable on their facts and compromised his ability to properly decide the appeal;
- the Tribunal Member erred in law and breached principles of natural justice by failing to acknowledge Mr. Moore's request for the invocation of Rule 11 of the Tribunal's *Practices and Procedures* in respect of his application for document disclosure, which Mr. Moore asserts was "absolutely essential in order to further the merits of my argument as to the conduct of my former employer";
- the Tribunal Member adopted a method of assessment that is wrong in principle by "seeming to make light" of counsel for Skinner producing documents two days before the complaint hearing, when, according to the Notice of Complaint Hearing, they should have been produced at least ten days earlier and in finding Mr. Moore was not prejudiced by the delay as the material had been disclosed to him in the context of an earlier complaint made by him against Skinner;
- the Tribunal Member's decision on Mr. Moore's error of law ground of appeal is "patently unreasonable" as the Tribunal Member, if he had read all of the material in its entirety, should have been drawn to "the many discrepancies in testimony and evidence" at the proceedings relating to the complaints he had filed;
- the Tribunal Member made "an assessment that is wrong in principle and a breach of natural justice" in respect of his analysis of Mr. Moore's submitting his examination, or cross-examination, was "unjustly hampered" by "numerous" outside interruptions and by his analysis of the natural justice argument relating to the "muting" of telephones;

- the Tribunal Member committed a reviewable error – one which was patently unreasonable and a breach of principles of natural justice – by siding with the Director on the absence of relevance to his section 83 claim of a refusal by Skinner to provide Mr. Skinner with a reference letter and by ending continued examination of witnesses on that matter;
- the Tribunal Member ignored the relevance of Mr. Skinner being the only witness for the employer, while Mr. Moore provided evidence from one other witness in addition to his own; and
- the Tribunal Member committed a reviewable error in finding the first determination was not "new evidence".

12. The reconsideration application submission extensively revisits matters arising from the Determination. Some are referenced as a reiteration of allegations of error and arguments that were made in the appeal; most are referenced in the context of alleging an error by the Tribunal Member in the original decision for adopting the conclusions made in the Determination relating to both the substantive aspects of the claim and the myriad of procedural matters invoked by Mr. Moore. I do not feel compelled to repeat all of these arguments.

ANALYSIS

13. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally.

14. Section 116 of the *Act* 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, or*
>
> *(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.*

15. 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 *Act*. One of the purposes of the *Act*, 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 *The Director of Employment Standards (Re Giovanno (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.

16. 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. Delay in filing for reconsideration will likely lead to a denial of an application. 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.

17. 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.

18. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively re-visit the original decision and come to a different conclusion.

19. 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.

20. I find this application does not warrant reconsideration; it is a monumental waste of time and resources. Its primary focus is nothing more than to have this panel of the Tribunal revisit the appeal and reach a different conclusion from the original decision.

21. It broadly comprises two types of argument. Both reflect an unrealistic perception of the purpose and objectives of the *Act* in resolving disputes arising under its provisions.

22. The first refuses to accept the Director finding the complaint, and all of the processes relating to the complaint, was limited to Mr. Moore's claim under section 83 of the *Act*. The second, which is predominantly grounded in submissions of a failure to provide due process and fairness, is premised on a completely untenable view by Mr. Moore of the scope of his claim and some misguided perception that the Tribunal should have accepted his efforts to expand it.

23. I shall address each of the two types of arguments.

24. The first continues Mr. Moore's efforts to maintain whatever processes he deems potentially useful in prosecuting the deterioration and termination of his employment relationship with Skinner. In this respect, I adopt the thoughts expressed in the original decision, at para. 34, that one of the overarching purposes of the *Act* is to ensure fair and efficient procedures for resolving disputes and "a multiplicity of proceedings is neither fair nor efficient".

25. The totality of this argument does nothing more than express disagreement with the conclusion in the original decision that the Director's decision to limit the scope of his claim was an element of the statutory discretion set out in section 76 of the *Act* and was not exercised in any way that would justify the Tribunal interfering with it. All of the submissions made in this argument are directed to the end of nullifying the original decision.

26. Regardless, however, of the exaggerated descriptive terms used in reference to the findings made by the Tribunal Member in the original decision, there is not an iota of support, rationally, factually or legally, that such findings were "patently unreasonable", "wrong in principle", a "breach of natural justice", inconsistent with other Tribunal decisions or reflecting any other error that would result in the original decision being cancelled. Mr. Moore has not identified and provided a reasoned analysis for a single one of the errors he alleges was made in the original decision. His entire submission comprises bald assertions alleging legal error and statements of opinion, unrelated to any specific consequence that might warrant a closer examination by this panel.

27. While both types of argument made by Mr. Moore in this application are guilty of re-casting facts or asserting facts not found in the material to suit a point, the second type of argument much more frequently seeks to invoke and rely on facts for which there is no evidence or which contradict findings of fact in the Determination; findings that are expressed in the Determination in terms of the scope of the claim, the evidence presented by the parties in the complaint process, accepted by the Director and not disturbed in the appeal. As noted in the original decision, the *Act* does not authorize the Tribunal to reach different factual conclusions than was made by the Director in a Determination unless such findings are shown to raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03. There is no error in this statement of law and Mr. Moore has not shown any error in its application.

28. The Tribunal has also noted in *Britco Structures Ltd.*, *supra*, that the test for establishing findings of fact constitute an error of law is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or that they are without any rational foundation. Unless an error of law is shown, the Tribunal must defer to findings of fact made by the Director. The Tribunal Member was not persuaded there was any error of law in the findings made by the Director in the Determination. Mr. Moore has not shown the Tribunal Member was wrong in that regard.

29. Mr. Moore does not, apparently, appreciate that both the appeal and reconsideration processes are error correction processes, not *de novo* proceedings, and the burden of showing a reviewable error in the Determination on one of the statutory grounds of appeal and to show an error in the original decision rests with him. It is not the function or responsibility of the Tribunal to engage in the sort of pro-active discovery and disclosure Mr. Moore effectively advocates for the appeal process and in this application. As well, I categorically reject Mr. Moore's contention that there was any error or omission in the Tribunal's handling of his "Rule 11" application. It is difficult to fathom how the Tribunal Member could have been more clear in the original decision in responding to the "six different submissions" made by Mr. Moore for inclusion or production of documents than when he states, at para. 20: "I accept, as complete, the remainder of the Record as supplemented by the Director, and I decline to make any further order regarding the same."

30. Whether Mr. Moore accepts it or not, he did not meet the burden resting on him to show an error in the Determination and he has not met the burden of showing an error in the original decision. Stating there is an error, no matter how many times that is stated, does not equate to it showing an error on the facts and the law.

31. I will make one final comment, which relates to the video clip, only because Mr. Moore seems fixated on it. I disagree with Mr. Moore's view of the video clip as being "relevant evidence". On any view of that information, it was irrelevant to any aspect of his appeal and Mr. Moore did not show it was otherwise. In my view, the Tribunal Member alerted any reasonable reader to the possible fate of the video clip in para. 19, where he states, having ordered the video clip be included in the record, "whether or not I consider it to be relevant to my deliberations". It is trite that a decision maker is not required to make reference to and analyze every piece of information that is part of the proceedings; this is particularly so where the information said to have been ignored is clearly irrelevant to any issue arising in the case, as the video clip was in this case.

32. In sum, there is nothing in this application which demonstrates any error in the original decision nor is there any other reason that would justify the Tribunal exercising its discretion to order a reconsideration of that decision.

33. This application is denied.

ORDER

34. Pursuant to section 116 of the *Act*, the original decision, BC EST # D150/16, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal