

An Application for Reconsideration

- by -

Guy Claude Brisebois carrying on business as Tune Town Childcare Centre
(“Mr. Brisebois”)

- 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/160

DATE OF DECISION: January 26, 2017

DECISION

SUBMISSIONS

Guy Claude Brisebois on his own behalf and on behalf of Tune Town Childcare Centre

OVERVIEW

1. Guy Claude Brisebois carrying on business as Tune Town Childcare Centre (“Mr. Brisebois”) seeks reconsideration of a decision of the Tribunal, BC EST # D135/16 (the “original decision”), dated October 19, 2016. Mr. Brisebois also seeks an extension of the statutory time period for filing this reconsideration application
2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 13, 2016.
3. The Determination was made by the Director on a complaint filed by Iris Twidale (“Ms. Twidale”) who had alleged Mr. Brisebois had contravened the *Act* by failing to pay compensation for length of service.
4. In the Determination, the Director found Mr. Brisebois had contravened section 63 of the *Act* and was ordered to pay Ms. Twidale wages in the amount of \$2,236.01, an amount which included annual vacation pay and interest under section 88 of the *Act*, and to pay administrative penalties in the amount of \$500.00.
5. An appeal of the Determination was filed by Mr. Brisebois alleging the Director had erred in law by misunderstanding the effect of the *Child Care Licencing Regulation* in finding Mr. Brisebois had not established there was just cause to terminate Ms. Twidale and in finding Ms. Twidale’s impending medical absence did not engage section 65(1) (d) of the *Act*.
6. In the appeal, Mr. Brisebois sought to have the Determination cancelled.
7. The Tribunal Member making the original decision concluded Mr. Brisebois had not met the burden of establishing there was an error of law in the Determination or any other error on the statutory grounds of appeal found in section 112(1) of the *Act*, found the appeal had no reasonable prospect of succeeding and dismissed it under section 114 of the *Act*.
8. Although not expressed in his application, it is apparent Mr. Brisebois seeks to have the original decision varied to cancel the Determination.
9. A Reconsideration Application Form was delivered to the Tribunal on November 14, 2016. The application did not meet the requirements of the Tribunal’s *Rules of Practice and Procedure* (the “Rules”). Mr. Brisebois sought a three-week extension of the reconsideration time period. The reason given for the request to extend the time period was “to get affidavits and possible subpoenas in place for the reconsideration.”
10. The application was not perfected until January 10, 2017, more than seven weeks after the reconsideration time period, when Mr. Brisebois’ submission and supporting documents were received by the Tribunal. The additional delay from what was requested is explained as being a change in legal counsel “based on lawyer’s indication of conflict of interests”.

ISSUE

11. 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

12. The submissions made by Mr. Brisebois reiterate the same arguments he made to the Director and in the appeal: that Ms. Twidale was medically unfit for employment as an early childhood educator which, under the *Child Care Licencing Regulation*, had the effect of making her not employable and he was therefore justified in terminating her employment either because there was cause or because the employment contract had been “frustrated” through no fault of his.
13. He has provided three documents which he argues supports his assertion he was justified in terminating Ms. Twidale the day after she provided him with a note indicating she was taking medical leave. All are dated after the issuance of the original decision. Mr. Brisebois submits these documents support his interpretation of the *Child Care Licencing Regulation* and provide justification for his terminating Ms. Twidale.

ANALYSIS

14. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally.
15. 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.*
16. 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 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.

17. 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.
18. 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.
19. 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.
20. 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.
21. I find this application does not warrant reconsideration.
22. There are three difficulties for Mr. Brisebois in this application: first, it was filed late by a significant period of time; second, it contains nothing new; and third, it does not present any of the circumstances where the Tribunal might be inclined to exercise its discretion in favour of reconsideration. It substantially recycles the position of Mr. Brisebois, expressed, unsuccessfully, in both the complaint hearing and the appeal.
23. The application has been filed well outside of the time period allowed for making reconsideration applications. I do not find the reason given provides a reasonable explanation for a delay of more than seven weeks. Even the basis on which a three-week extension was sought – to get affidavits – has not materialized. The delay weighs against the application.

24. For a number of reasons, the three attachments to the application submission can have no influence on this application. The attachments contain nothing new; they do nothing more than provide a different mouth from which Mr. Brisebois can restate his arguments respecting Ms. Twidale's termination. The attachments are not "evidence". They are opinion and all appear to be grounded in an assumption of facts for which there was no evidence before the Director: see para. 36 of the original decision. If any of the authors of the attachments read either the Determination or the original decision, and there is no indication they have, they have entirely missed the point of those decisions. In that sense, these opinions are quite irrelevant to the decision made by the Director on the complaint and by the Tribunal Member on the appeal. Finally, it is in any event inappropriate for an applicant for reconsideration to seek to supplement the record with material that was not provided at any other point in the process without demonstrating that material is significant *new evidence* that was not available to the original panel. The focus of reconsideration application is the correctness of the original decision. New or additional evidence was not a ground of appeal that was raised in the appeal of this case. Mr. Brisebois sought unsuccessfully to include a statement with the appeal that is virtually identical in content to attachment 1 in the reconsideration application. The Tribunal Member did not assess that statement against considerations for allowing new evidence, but in any event found it was not persuasive on the argument for which it was provided.
25. In sum, there is nothing in this application that 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. The Tribunal Member making the original decision has more than adequately addressed the arguments made by Mr. Brisebois in this application and I adopt and endorse her analysis in its entirety.
26. The application is denied.

ORDER

27. Pursuant to section 116 of the *Act*, the original decision, BC EST # D135/16, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal