An Application for Reconsideration

- by -

Viewpoint Developments Ltd.
("VDL")

- 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.: 2015A/177

DATE OF DECISION: January 29, 2016

DECISION

SUBMISSIONS

Attilio Fabbro on behalf of Viewpoint Developments Ltd.

OVERVIEW

1. Viewpoint Developments Ltd. ("VDL") seeks an extension of time for filing an application for reconsideration of a decision of the Tribunal, BC EST # D124/15 (the "original decision"), dated November 19, 2015. The request for an extension of time was received by the Tribunal on December 16, 2015.

2. A request for reconsideration of the original decision has been filed by VDL and was received by the Tribunal on January 6, 2016..

3. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on August 26, 2015. The Determination was made on a complaint filed by Wendy Fox (Ms. Fox"), who alleged VDL had contravened the *Employment Standards Act* (the "*Act*") by failing to pay all wages owed to her and had terminated her employment without notice or compensation in lieu of notice.

4. The Director found VDL had contravened several provisions of the *Act* and ordered VDL to pay Ms. Fox wages and interest in the amount of $884.79. The Director imposed administrative penalties on VDL in the amount of $2,000.00.

5. An appeal was filed by VDL alleging the Director had erred in law and failed to observe principles of natural justice in making the Determination. The appeal referenced several documents that were included in the section 112(5) record in support of the arguments made in the appeal; VDL also sought to introduce evidence with the appeal that had not been submitted to the Director when the Determination was being made.

6. The Tribunal Member making the original decision found no merit in any of the grounds of appeal and dismissed it under section 114(1)(f) of the *Act*.

7. On December 16, 2015, VDL indicated it wished to file an application for reconsideration of the original decision and requested an extension of the statutory reconsideration time period. The Tribunal acknowledged receipt of this request in correspondence dated December 18, 2015. In that correspondence, VDL was asked to provide written reasons and argument for requesting reconsideration. This request was met on January 6, 2016.

8. In correspondence dated January 18, 2016, the Tribunal advised the parties the Tribunal was assessing the requested extension of the reconsideration time period and the reconsideration application and that while that process was being conducted neither the Director nor Ms. Fox were being asked for submissions on either matter.

ISSUE

9. There are two issues being addressed in this decision: first, whether the Tribunal should extend the time period for filing the application for reconsideration; and second, if the first request is granted, whether reconsideration is warranted.

10. In respect of the second issue, the Tribunal has discretionary authority to allow an application for reconsideration and may, in doing so, assess the merits of the application before imposing the time and expense of responding on the other parties.

ARGUMENT

11. I will set out the arguments made by VDL on each of the issues I have identified above.

12. On the requested extension of the reconsideration appeal period, VDL submits its sole director and officer and its representative throughout the complaint process, Attilio Fabbro ("Mr. Fabbro") is the sole care-giver for his wife, who suffers from conditions described in a letter from her physician, and requires full-time care. In such circumstances, VDL says it has been difficult for Mr. Fabbro to attend to a reconsideration application with the degree of attention such application requires and asks for an extension of the reconsideration time period to accommodate his personal obligations and give the necessary attention to the application.

13. On the application itself, VDL continues to express disagreement with the Determination and with the original decision to the extent it did not accept the submissions made in its appeal. I shall summarize the areas of disagreement.

14. VDL revisits challenges made to findings of fact in the Determination relating to their position that Ms. Fox gave just cause for termination by engaging in conduct that was alleged to be "wilful and deliberate and inconsistent with the continuation of [her] employment" with VDL in her dealing with Suite #7 of the apartment building she managed for VDL. The Director had found VDL had not established Ms. Fox's conduct was "wilful and deliberate and inconsistent with the continuation of the employment contract" and, as a result, had not established just cause based on those allegations. The Tribunal Member making the original decision found it was open to the Director to reach that conclusion from the evidence presented and found no reason to interfere with the finding.

15. VDL asks this panel to review, and give effect to, a submission presented in the appeal of the Determination, saying this document was prepared for VDL and expresses its views. This submission was presented in the appeal and the arguments contained in it were considered in the original decision but not sufficiently persuasive to compel the result sought in the appeal.

16. VDL continues to argue the Director erred in law in finding Ms. Fox was a "resident caretaker" because the building she managed was not "an apartment building". The Tribunal Member of the original decision found the Director's interpretation of "resident caretaker" in the *Employment Standards Regulation* was correct and the Director's finding that Ms. Fox met the definition of "resident caretaker" was reasonably grounded in the evidence and was persuasive.

17. VDL questions why amounts in a monetary order issued by the Residential Tenancy Branch against Ms. Fox cannot be deducted from amounts found owing under the *Act*. This question was never raised in the appeal, but the short answer is that it is prohibited by section 21 of *Act*.

18. Finally, VDL refers to elements of the evidence it presented in the appeal of the Determination, re-submitting its relevance and its efficacy. While not specifically saying this evidence should have been allowed in the appeal and accepted as just cause for the termination of Ms. Fox, it says this information was, variously, "ignored", "disregarded", "discounted" and "not considered". VDL says all of this evidence ought to have led to a finding of just cause and seeks to have all of it reviewed on this application. The Tribunal Member making the original decision disagreed, and stated his reasons for doing so.

ANALYSIS

19. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally. As a result of amendments to the *Act* made in the *Administrative Tribunals Statutes Amendment Act, 2015*, parts of which came into effect on May 14, 2015, section 116 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.*
>
> *(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.*

20. Except for the inclusion of statutory time limits for filing an application for reconsideration and for the Tribunal reconsidering its own orders and decisions, the amendments have not altered the Tribunal's approach to reconsiderations.

21. In respect of the now-imposed statutory time limits for reconsideration applications, the Tribunal has decided the approach to extensions of the reconsideration time period will be consistent with the approach taken to extensions of time in appeals. In *Serendipity Winery Ltd.*, BC EST # RD108/15, the Tribunal stated:

> I see no reason to deviate from the criteria [set out in *Re Niemisto*, BC EST # D099/96] when considering requests for an extension of the time period for filing reconsideration applications. However, the question of whether there is a strong *prima facie* case must take into account that the Tribunal's discretionary authority to reconsider under section 116 of the *Act* is exercised with restraint – see *The Director of Employment Standards (Re Giovanni (John) and Carmen Valoroso*, BC EST # RD046/01 – and must remain consistent with the approach taken by the Tribunal in deciding whether reconsideration is warranted. (at para 21)

22. In respect to deciding whether reconsideration is warranted, the Tribunal has developed and applied a principled approach to the exercise of its discretion. 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). In *The Director of Employment Standards (Re Giovanno (John) and Carmen Valoroso)*, *supra*, the Tribunal explained the reasons for its restrained approach:

> . . . 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.

23. In deciding whether to reconsider, the Tribunal considers such factors as timeliness, the nature of the issue and its importance both to the parties and the system generally. Undue delay in filing for reconsideration will mitigate against, and 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.

24. Applying the above considerations, I am not persuaded there should be an extension of the reconsideration time period in this case. While I find the explanation for the delay to be sufficiently credible and reasonable to satisfy the first criteria and the second and third criterion are also satisfied, the absence of a strong *prima facie* case is fatal to the request.

25. This application adds nothing to what was raised in the appeal. It essentially ignores the original decision, refocussing instead on the Determination and the submissions made in the appeal of that Determination. All of the arguments made in this application are, with minor and irrelevant additions, the same arguments made in the appeal. In effect, this panel is simply being asked to come to different conclusions than were reached by the Tribunal Member in the original decision and change the result of the appeal. This application does not satisfy the first stage of the two-step analysis applied by the Tribunal when considering applications for reconsideration, which assesses whether the matters raised in the application meet any of the circumstances where the Tribunal might exercise its discretion in favour of reconsideration. These circumstances 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.

26. None of these circumstances have been established as applying to this application.

27. More particularly, it weighs heavily against this application that I find its primary focus is to have the reconsideration panel effectively re-visit the original decision and come to a different conclusion.

28. Even if I were to grant an extension of the reconsideration appeal period, I would still reach the conclusion this application does not warrant reconsideration. I am completely satisfied, based on the material before the Tribunal Member in the appeal and considering the allowable scope of review under section 112 of the *Act*, there was no error made in the original decision.

29. In sum, the reconsideration has no merit. Applying principles for extending the reconsideration time period found in the *Act* and consistent with the Tribunal's approach to applications for reconsideration, the request is denied and the application dismissed.

ORDER

30. Pursuant to section 116 of the *Act*, the original decision, BC EST # D124/15, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal