

An application for Reconsideration

- by -

Mark Bridge

- 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: Carol L. Roberts

FILE No.: 2007A/140

DATE OF DECISION: February 26, 2008

DECISION

SUBMISSIONS

Mark Bridge	on his own behalf
Robert (Scotty) Morrison	on behalf of the Director of Employment Standards
Patrick Gilligen-Hackett	on behalf of the Friends of UVic Law Society and the University of Victoria

OVERVIEW

1. This is an application by Mark Bridge for a reconsideration of Tribunal Decision BC EST #D091/07 (the "Original Decision"), issued by the Tribunal on September 25, 2007.
2. Mr. Bridge taught law at the University of Victoria. On August 28, 2004, he filed a complaint alleging that the Friends of UVic Law Society and the University of Victoria (collectively, "the Respondents") had contravened the *Act* in failing to pay him "contract remuneration", "administrative pay" and vacation pay. Mr. Bridge subsequently alleged that the Respondents had also failed to pay him compensation for length of service. The delegate dismissed Mr. Bridge's complaint on the grounds that it was not filed within the time period set out in s. 74 of the *Act*.
3. Mr. Bridge appealed the decision on the grounds that the delegate had erred in law and failed to observe the principles of natural justice. In his appeal submission, Mr. Bridge set out several purported errors of law, including failing to address the issue of *issue estoppel*, incorrectly interpreting the contract of employment, incorrectly applying the definition of "work" to the claim for unpaid wages, failing to address the claim for liability for length of service and failing to address the claim for liability for vacation pay. Mr. Bridge also contended that the Director failed to observe the principles of natural justice by breaching mediation privilege and not providing him the same opportunity to make submissions and clarify evidence that was given to the Respondents. Finally, Mr. Bridge alleged that evidence had become available that was not available at the time the Determination was made; specifically, University payroll records and further unspecified evidence.
4. The delegate argued that Mr. Bridge had not addressed the issues of whether he had performed any work in his capacity as Director of the Business Law Clinic for the Society in the six months preceding the filing of his complaint (s. 80(1)) and whether or not he had filed the complaint out of time (s. 74(3)).
5. The Respondents contended that the appeal was without merit. They argued that the issue before the delegate was a factual one; that is, when Mr. Bridge ceased to be employed by the Society, and that factual finding supported the delegate's conclusion that the appeal had been filed outside the time period for filing a complaint under the *Act*. The Respondents also responded to each of the grounds of appeal raised by Mr. Bridge.
6. The Member reviewed the extensive submissions of the parties, including Mr. Bridge's questions to the Tribunal about procedure and issues relating to "mediation privilege". He concluded that Mr.

Bridge had not met the burden of demonstrating an error of law in the Determination. The Member upheld the Director's conclusion that Mr. Bridge's complaint was filed out of time. The Member also concluded that Mr. Bridge had demonstrated no error in the delegate's conclusion that Mr. Bridge had not performed work for the Society between March 1, 2004 and August 28, 2004, the date on which the complaint was filed.

7. The Member considered, and dismissed, the remainder of Mr. Bridge's arguments that the delegate erred in law. He addressed the specific issues raised by Mr. Bridge including that of "*issue-estoppel*", the "misapplication" of section 74, incorrect interpretations of various sections of the *Act*, "inconsistent" conclusions and "mediation privilege", and found them to lack merit. The Member also decided that the delegate had not erred in deciding that the Respondents were not associated for the purposes of section 95.
8. The Member rejected Mr. Bridge's assertion that the delegate had failed to observe the principles of natural justice. He found no evidence Mr. Bridge was denied the opportunity to present his case and respond to the position taken by the respondents.
9. Finally, the Member also found that Mr. Bridge had failed to meet the test for the introduction of new or additional evidence on appeal and confirmed the Determination.

ISSUE

10. There are two issues on reconsideration:
 1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?
 2. If so, should the decision be cancelled, varied, or sent back to the member?

ARGUMENT

11. Mr. Bridge seeks reconsideration of the Original Decision as well as on the "seven unadjudicated requests made to the Tribunal for production of documents for use in an appeal filed with the Tribunal on June 24, 2007".
12. In support of the reconsideration application, Mr. Bridge also seeks "an application for the Tribunal to inspect, and order production of, documents for use in this reconsideration request" and "an application for the Tribunal to require the attendance of a witness". Mr. Bridge contends that the documents, which he originally sought for use on appeal, are relevant to the issues raised in his appeal and their absence made it impossible for him to refer to them in his submission or explain their relevance. This, he argues, "was prejudicial to the natural justice right to be heard in the appeal". Mr. Bridge relies on a number of Tribunal cases in support of his argument that the Tribunal erred in law in not adjudicating matters that were put before it and breached the principles of natural justice in failing to adjudicate the request for the production of documents.
13. In support of his application, Mr. Bridge cites one of the Tribunal's stated objectives in deciding whether to allow a request for reconsideration; that of ensuring consistency in decision making. He relies on *World Project Management* (BC EST #RD134/97 (sic)) for the proposition that the Tribunal can order production of documents pursuant to Section 109 of the *Act* and Rule 19 where

that information is in the possession of a party other than the applicant. He submits that his request for the adjudication of the question has gone “unheard” and seeks to have his request for production of documents reconsidered.

14. Mr. Bridge contends that he ought to have been permitted to make written submissions after the Respondents’ reply was received. He argues that Rule 16 suggests that after filing the appeal form, filing a response and after filing a reply, written submissions are the method of deciding the appeal. He submits that “neither the Tribunal nor the Adjudicator permitted me to make a written submission in support of my appeal after the processes in Parts 5 to 7 were completed.” In particular, he argues, the Member reached his decision based on

the pleaded grounds of appeal in the Appeal Form and would not accept a written submission which addressed the legal and factual support for the grounds of appeal. In other words, the Adjudicator decided the appeal based on the stated grounds of appeal rather than on the application of law and facts to those grounds of appeal which would have been available to him had submissions been permitted.”

15. He says that he attempted to make submissions but was prevented from doing so and that, as a result, the Tribunal “decided the case on the basis of the content of the Appeal Form rather than on the basis of written submission from the parties.” He contends that had written submissions been permitted, the Member “would not have fallen into the error of reaching conclusions of fact contradicted by the actual facts before the Director’s delegate”. Attached to Mr. Bridges’ application for Reconsideration are the documents he filed with his appeal and letters he sent to the Tribunal.
16. The Director contends that Mr. Bridge is attempting to re-argue the points he raised on appeal, all of which were addressed by the Member. The Director submits that Mr. Bridge has never provided any evidence to prove he performed work during the period in question, and that without such evidence, the procedural matters he raises do not change the conclusion that the appeal was not filed within the statutory time period. The Director seeks to have the reconsideration application dismissed.
17. The Respondents say that the Reconsideration application is without merit as Mr. Bridge has raised no questions of law, fact, principle or procedure that are so significant they should be reviewed because of their importance to the parties. They say that Mr. Bridge had the opportunity to make submissions regarding the matters that are the subject of the Application on numerous occasions and did so. The Respondents also say that Mr. Bridge has not made out an arguable case of sufficient merit to warrant reconsideration. It submits that the Tribunal did, in fact, adjudicate the seven allegedly “unadjudicated” requests and that the Member determined that the documents sought by Mr. Bridges did not meet the test for submission of new evidence.
18. Further, the Respondents contend, Mr. Bridge’s application relies on “an untenable” interpretation of the Tribunal’s Rules, and that in any event, the Appeal Form advised Mr. Bridges that he was to provide “detailed submission” for the basis of his appeal when he filed the Appeal Form. It says that Mr. Bridges had, and exercised, his right to file a Reply to the other parties’ submissions.
19. In reply, Mr. Bridge sought “leave” to make a “further reply after January 10, 2008 on the merits of the witness evidence and the, so far, undisclosed documents for which applications for production orders were made by me..”.

20. On November 30, 2007, the Vice Chair provided Mr. Bridge with the responses of the Director and the Respondents, and asked that, if he wished to make a reply, that he do so on or before December 14, 2007. On January 20, 2007, the Tribunal received an additional letter from Mr. Bridge. In light of the fact that this letter was sent well past the deadline provided by the Tribunal, I have not considered it.

ANALYSIS

21. The *Employment Standards Act*, R.S.B.C. 1996 c. 113 (“Act”) confers an express reconsideration power on the Tribunal. Section 116 provides
- (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.

1. The Threshold Test

22. The Tribunal reconsiders a Decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *Act* detailed in Section 2 “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act.”
23. In *Milan Holdings* (BCEST # D313/98) the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the Tribunal to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. The primary factor weighing in favour of reconsideration is 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. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.
24. The Tribunal may agree to reconsider a Decision for a number of reasons, including:
- The member fails to comply with the principles of natural justice;
 - There is some mistake in stating the facts;
 - The Decision is not consistent with other Decisions based on similar facts;
 - Some significant and serious new evidence has become available that would have led the member to a different decision;
 - Some serious mistake was made in applying the law;
 - Some significant issue in the appeal was misunderstood or overlooked; and
 - The Decision contains a serious clerical error.
- (*Zoltan Kiss* BC EST#D122/96)

25. While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.
26. After weighing these and other factors, the Tribunal may determine that the application is not appropriate for reconsideration. Should the Tribunal determine that one or more of the issues raised in the application is appropriate for reconsideration, the Tribunal will then review the matter and make a decision. The focus of the reconsideration member will in general be with the correctness of the decision being reconsidered.
27. In *Voloroso* (BC EST #RD046/01), the Tribunal emphasized that restraint is necessary in the exercise of the reconsideration power:
- ... the Act creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute...
28. 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” is not 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 best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.
29. I find that nothing Mr. Bridge has raised meets the threshold test.
30. The issue before the delegate was whether Mr. Bridge had filed his complaint in the time frame provided in the *Act*. The delegate concluded that he had not. On appeal, the Member found that Mr. Bridge had failed to discharge the onus of establishing that this conclusion was in error. Mr. Bridge also raised a number of other issues unrelated to the issue of whether or not the complaint was timely. The Member addressed these issues thoroughly. In my view, Mr. Bridge’s reconsideration request has not raised questions of law, fact, principle or procedure that are so significant that they ought to be reviewed. Rather, his request is an attempt to re-argue the matters addressed in the Original Decision.
31. There is no evidence the Member failed to comply with the principles of natural justice. Although Mr. Bridge asserts that he was unable to make submissions on appeal, the record suggests otherwise. Mr. Bridge’s appeal was filed June 25, 2007. Mr. Bridge checked the following box on the appeal form: *7. Check List Attach any other documents or information that supports your appeal and your detailed submission on why your appeal should be allowed.* Attached to the appeal form were 6 pages expanding on the grounds for appeal and the remedy sought.
32. On July 23, 2007, the Vice Chair provided Mr. Bridge with the Respondents’ response, the section 112 record, and submission of the Director’s delegate. Mr. Bridge sought, and was granted, an extension to file a reply, which he did on July 29, 2007. The reply sought information on how to proceed to “assert mediation privilege and how to request disclosure of the investigation record”. He asserted that the section 112 “record” contained confidential information over which he had not

waived privilege and that the record did not contain any record of an investigation after the conclusion of the mediation.

33. On August 6, 2007, Mr. Bridge wrote to the Tribunal stating “I am writing to provide further details” in response to the Vice Chair’s letter of July 31, 2007 requesting details as to the material he was asserting mediation privilege over as well as documents and materials Mr. Bridge believed the Director was required to produce. Mr. Bridge commented on documents he believed he had not had the opportunity to respond to and on the “investigation record” and “additional material”.

34. On August 13, 2007, Mr. Bridge wrote to the Tribunal indicating that the documents constituted his “reply” to the responses of the Respondents and the delegate and continued to seek University of Victoria payroll records. His letter states

As of writing I have not seen the payroll records of the respondent University of Victoria which I would like to request be produced to the Tribunal. In order to make a submission respecting their significance, I request the Tribunal to permit me liberty to provide a reply in respect of the records if they are produced.

Similarly, I have requested that the investigation record and additional (sic) material before the Director be produced to the Tribunal. For the same reasons as above I would like to request the Tribunal to permit me liberty to provide a further reply if that further information is produced.

35. Attached to the letter are responses to the Director’s submission. In that response Mr. Bridge says he “wishes to make a submission” on the issues of Natural Justice, Payroll Records and the “record”.

36. The Tribunal provided these letters to the Respondents and the delegate on August 22, 2007, noting that these constituted Mr. Bridge’s final submissions.

37. On August 27, 2007, Mr. Bridge sent yet another letter to the Tribunal stating, in part:

I am wondering whether you are telling me that the opportunity to be heard in full on the appeal issues is now over.

As of today, I have not heard from the Tribunal about my request to make submissions about the relevance of the undisclosed payroll records, my request to make a submission upon release of the total record before the Director of Employment Standards nor about my request to be told how to assert mediation privilege in respect of material before the Tribunal.

These preliminary matters are obviously quite important to me and I am concerned because I do not understand the process that will be followed in this case, particularly to respect the mediation privilege, and am concerned that I may not be fully heard on the issues.

I would be grateful if you could assure me, if it is the case, that I will have the opportunity to be heard fully on these important issues and possibly to explain to me in advance how the process will unfold from this point.

38. On September 12, 2007, Mr. Bridge wrote again to the Tribunal requesting “information about the process for making submissions on new evidence and other matters in my appeal” and seeking guidance on, among other things, seeking the disclosure of payroll records and additional material that was before the Director.

39. In a letter dated September 20, 2007, the Vice Chair stated that Mr. Bridge's letters
- ...repeat certain earlier requests regarding production of payroll records and the Director's Record and how to assert mediation privilege.

In my August 22, 2007 letter to the parties I advised that a Tribunal Member would be making a decision regarding the appeal. I did not ask for further submission from the parties. Nevertheless, since then you have sent the above two letters to the Tribunal. Your latest two letters, as with all your previous letters and submissions, along with the submissions of the Director and Respondents have been forwarded to a Tribunal Member for his consideration.

40. The Original Decision said the following about Mr. Bridge's letters:

Bridge has filed numerous responses to the reply submission of the Director and the respondents. Some of these responses address issues in the appeal, while other correspondence relates to procedural questions for the Tribunal. He raises a concern that the Section 112(5) record provided to the Tribunal includes material which he contends is protected by "mediation privilege", including virtually all of the documents supporting his claim. He has asked the Tribunal to provide him with some direction how to assert "mediation privilege" in this appeal. Without finally deciding whether there is any merit to his "mediation privilege" argument, the Tribunal does not consider it necessary to address his request. The central question in respect of the claim of "mediation privilege" is whether Bridge has show any notion of "mediation privilege" is applicable to the evidence relied on to decide the issues in this appeal. The Tribunal has asked Bridge to identify the specific material that he considers is subject to "mediation privilege" and he has purported to do that. More will be said on this later in this decision.

He has also requested the Tribunal to tell him how to ask for orders requiring disclosure of payroll records for the University and disclosure of additional material that was before the Director when the Determination was made. In respect of the latter point, Bridge has not identified any additional material which might have been before the Director when the Determination was made and which might not have been disclosed, nor does the appeal contain any reference to such material. The request for advice on how to compel the payroll records of the University is an aspect of the "new evidence" ground of appeal. That ground of appeal is considered below.

In any event, this request has been pre-empted by an application by Bridge under section 109 of the *Act* asking the Tribunal to order production of payroll records of the University and the "whole record... of the Director of Employment Standards" at the time the Determination was issued. I will address this application later in this decision.

41. Later in the Original Decision, the Member addressed not only the grounds of appeal on which Mr. Bridge made submissions, but the requests for document production and mediation privilege. He found that Mr. Bridge's arguments fell "far short of showing an error of law". The Member addressed Mr. Bridge's assertions about "mediation privilege" in paragraphs 65 to 67, concluding that "nothing that has been considered in making this decision involves a consideration of "evidence" that could even remotely be included within Bridge's claim of "mediation privilege"."
42. With respect to Mr. Bridge's allegation that the delegate breached the principles of natural justice, the Member found no basis in the evidence for the allegation:

There is nothing in the file indicating the investigation was not carried out in a manner that was entirely consistent with the obligation on the Director to ensure the level of procedural protection

provided to the parties was appropriate to the circumstances. Bridge's argument in this matter also ignores the fact that from December 2006 until May 2007, Bridge failed, or refused, to provide the Director with any additional information or submission relating to his claims, even after assuring the Director he would do so.

43. With respect to Mr. Bridge's requests for the disclosure of payroll and other records, the Member concluded that Mr. Bridge had failed to show how the payroll records were relevant to the issue on appeal:

As I have indicated several times already in this decision, the University is not, and cannot, be associated with the Society as one employer under the Act. The Director did not err in deciding the issues that were addressed in the Determination without reference to Bridge's employment with the University.

44. He also found that Mr. Bridge had established no basis for the request to have the Tribunal order production of the "whole record": *In the absence of any evidence to the contrary, I accept that the "whole record" has been provided by the Director, as required by section 112(5). Also, in light of my disposition of the appeal, such order would be irrelevant and abusive.*

45. Finally, the Member noted Mr. Bridge's letter to the Tribunal of September 12 in which he asked whether he would "receive an invitation from the Tribunal to make submissions on matters noted on the Appeal form": *The short answer is that he has already received such an invitation, and referred to the Vice Chair's July 23, 2007 letter.*

46. Although Mr. Bridge alleges that the Member "failed to adjudicate" certain issues, the Original Decision demonstrates that the Member dealt with each of Mr. Bridge's arguments thoroughly, including ones made well past the deadline provided by the Tribunal. Much of Mr. Bridge's arguments focus on an alleged misinterpretation of the Tribunal's Rules. Mr. Bridge is legally trained. As such, he is aware that when appeals are filed, they are accompanied by submissions to support the grounds of such appeal. Indeed, Mr. Bridge acknowledged as much when he filed his appeal document. His arguments about procedure and his inability to file submissions have, in my view, no merit.

47. The decision relied upon by Mr. Bridge to support his assertion that the Member made a decision inconsistent with other Decisions is not based on similar facts. The decision referred to deals with consistency of decisions of the Director's delegates in similar circumstances. There is no evidence that the Tribunal has not treated Mr. Bridge similarly as other appellants in similar circumstances.

SUMMARY

48. I am not persuaded that Mr. Bridge has made out an arguable case of sufficient merit to warrant the exercise of the reconsideration power.

NEW ISSUE

49. Since the Original Decision was issued, the British Columbia Court of Appeal has released *Karbalaeiali v. British Columbia (Employment Standards)*, 2007 BCCAT 533 ("*Karbalaeiali*") (copy attached). In that decision, the Court found that the *Act* grants a discretion to accept a

complaint delivered more than six months after the date of termination of employment. At the time the Determination and Original Decision were made, the Director and the Tribunal interpreted the *Act* as not granting such a discretion.

50. I am, of the view that the question of the Director's discretion to accept a complaint delivered more than six months after the date of termination of employment is a fundamental question that must be resolved before I issue a final decision on this appeal.
51. I invite submissions from the parties on what relevance, if any, the Court's clarification of the law in *Karbalaeiali* has to Mr. Bridge's application for reconsideration.
1. If the Appellant wishes to file a written submission with the Tribunal regarding the issue noted above, that submission must be filed with the Tribunal on or before Tuesday, March 11th, 2008;
 2. If the Director or Respondent wish to file a submission responding to that filed by the Appellant, that submission must be filed with the Tribunal on or before Thursday, March 27th, 2008;
 3. If the Appellant wish to file a final written reply to that filed by the Director or the Respondent, that submission must be filed on or before Monday, April 14th, 2008.
 4. The Tribunal will arrange for all submissions received pursuant to this Order to be disclosed to all other parties.
52. After receiving all submissions filed regarding this issue, I shall issue a decision.

C. L. Roberts
Member
Employment Standards Tribunal