

An Application for Reconsideration

- by -

Rochella Norman and Guy Norman

- 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

ADJUDICATOR: M. Gwendolynne Taylor

FILE No.: 2003/35

DATE OF DECISION: March 3, 2004

DECISION

BACKGROUND

This is an application for reconsideration under Section 116 of the Employment Standards Act (the “Act”) of a decision of the Tribunal, BC EST # D121/03, dated April 8, 2003, and of an earlier decision of the Tribunal, BC EST #D279/02, dated June 25, 2002. The application is filed by Guy and Rochella Norman (the “Normans”). The respondent is their former employer, Nacel Properties Ltd. (“Nacel”).

A chronology of significant events in the decision making process follows:

- August 16, 1999 - the Normans filed a complaint with the Director of Employment Standards (the “Director”)
- October 31, 2001 - Determination by the Director
- Both the Normans and Nacel appealed to the Tribunal
- May 7, 2002 - Tribunal Adjudicator Roberts conducted an oral hearing
- June 25, 2002 - Adjudicator Roberts’ decision, partial referral back to the Director
- September 4, 2002 - Director reported back to the Tribunal
- Nacel appealed to the Tribunal
- December 2, 2002 - Adjudicator Roberts’ decision, partial referral back to the Director
- January 10, 2003 - Director reported back to the Tribunal; Director’s calculations of compensation was: for G. Norman \$80,684.35; for R. Norman \$17,921.31
- Nacel appealed to the Tribunal
- April 8, 2003 - Adjudicator Roberts’ decision, confirming the Director’s determination, subject only to confirmation that Mr. Norman would not be recovering double wages
- Nacel applied for Reconsideration
- July 10, 2003 - Adjudicator Stevenson dismissed the application for reconsideration
- July 14, 2003 - The Normans applied for reconsideration

I was appointed to consider this application based on written submission. Ideally, my decision would have been rendered in September 2003. Unfortunately, once I started reviewing the material I found that the process was much more involved than anticipated. There are, literally, hundreds of pages of submission, mainly from the Normans, over the many years that this complaint has been before the Employment Standards Branch and the Tribunal.

I sincerely regret the length of time it has taken to finalize this decision for the parties and I apologize for the obvious inconvenience that a delay of this nature causes. I have wanted to ensure that I fully understand the Normans’ issues and their arguments. In their submissions, I see that they had at one time considered having legal counsel represent them but, obviously, decided against that course. It can be difficult for lay litigants to present evidence in these proceedings, particularly when the events span years,

and the litigation spans years. Having acknowledged that difficulty, I nonetheless note that the Normans have demonstrated a relatively high level of sophistication in presenting their submissions, in this forum and in many others to which they referred.

I have been troubled from the outset by the Normans' time delay in filing the application for reconsideration. Before making a decision on that issue, I had to fully familiarize myself with the other issues, because part of their claim and, therefore, the time issue, relates back to the first Tribunal decision of June 25, 2002 and the delegate's decision of October 31, 2001.

A difficulty in fully understanding the Normans' issues is the sheer volume of material and the fact that they have presented so many submissions, most of which contain repeated submissions and cross references to other submissions. The material has at times been overwhelming and confusing. Mr. Norman acknowledged the dilemma as long ago as July 21, 2002, when he wrote to the delegate: "I am going to be the first one to admit that you can get lost in the evidence material that we have submitted on this appeal because it happens to me." The Normans filed over 100 documents with their original complaint in August 1999. Since then, the materials have increased, albeit not so much in evidence as in the written word.

Most of the materials in the file were submitted by the Normans. My comments on the breadth of the material is not intended as a criticism - I appreciate that they have presented a thorough case, at each stage of the process. This may be their last opportunity to make their arguments and it has been incumbent on me to ensure I have understood.

I will not set out in detail all of the submissions and arguments raised by the parties. I have decided that this application must be denied on the threshold ground that it is not timely. I have considered other arguments and comment on them.

ISSUES

1. Does the application meet the threshold tests for the Tribunal to exercise its discretion under Section 116 of the Act to reconsider the original decisions.
2. If the application meets the threshold tests, the substantive issues outlined by the Normans are whether the adjudicator
 - breached the principles of natural justice
 - ignored evidence and issues that should have been referred back to the Director for both Rochella and Guy Norman
 - did not provide a decision that was consistent with the Drazic case #D055/02, related to the No-Relief Management.

RECONSIDERATION ISSUES

Section 116 does not set out the grounds on which the Tribunal may reconsider a decision. The Tribunal uses its discretion to reconsider with caution, 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."

In *Milan Holdings* (BC EST # D313/98) the Tribunal set out a principled approach in determining when to exercise its discretion to reconsider:

At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration: *Re British Columbia (Director of Employment Standards)*, BCEST #D122/98. In deciding this question, the Tribunal will consider and weigh a number of factors. For example, the following factors have been held to weigh against a reconsideration:

- (a) Where the application has not been filed in a timely fashion and there is no valid cause for the delay: *Re British Columbia (Director of Employment Standards)*, BCEST #D122/98. In this context, the Tribunal will consider the prejudice to either party in proceeding with or refusing the reconsideration: *Re Rescan Environmental Services Ltd.* BC EST #D522/97 (Reconsideration of BCEST #D007/97).
- (b) Where the application's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): *Re Image House Inc.*, BCEST #D075/98 (Reconsideration of BCEST #D418/97); *Alexander (c.o.b. Pereguine Consulting)* BCEST #D095/98 (Reconsideration of BCEST #D574/97); *323573 BC Ltd. (c.o.b. Saltair Neighbourhood Pub)*, BC EST #D478/97 (Reconsideration of BCEST #D186/97);
- (c) Where the application arises out of a preliminary ruling made in the course of an appeal. "The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid multiplicity of proceedings, confusion or delay": *World Project Management Inc.*, BCEST #D134/97 (Reconsideration of BCEST #D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.

If the Tribunal finds that the request for reconsideration passes those threshold tests, the second stage is a consideration of whether to grant the request to vary or cancel the adjudicator's decision. The primary factor weighing in favour of varying or cancelling 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.

In *Zoltan Kiss* (BC EST # D122/96), the Tribunal set out a number of grounds for varying or cancelling a decision:

- The adjudicator failed 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 Adjudicator 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 some serious clerical error.

While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.

The Tribunal has advised the public through publications and website that

- reconsideration is not a right, but is at the discretion of the Tribunal,
- the Tribunal will not normally reconsider a Decision if the applicant's intent is simply to have the Tribunal "re-weigh" evidence previously considered or dismissed by the Adjudicator or to seek a "second opinion" when a party simply does not agree with the Adjudicator's Decision.
- the reconsideration process was not meant to allow parties another opportunity to re-argue their case.
- the Tribunal may reconsider a Decision if the Adjudicator failed to comply with the principles of natural justice or made a serious mistake in applying the law, or some significant new evidence has become available that would have led the Adjudicator to a different decision.
- while there is no specific time limit for making a reconsideration request, the Tribunal expects that a request will be made in a timely manner following the Adjudicator's Decision.
- unless there is a compelling explanation for the delay, the Tribunal is unlikely to reconsider its Decision.

THRESHOLD ISSUES

Timeliness

Both the Respondent and the Director object to the application for reconsideration on the grounds that it is not timely, having been filed months after the Adjudicator's decisions – the original decision of June 25, 2002 and the last decision of April 8, 2003.

I have reviewed all of the submissions from the parties and the Director. I find that the Normans have not presented a compelling explanation for the delay in filing the application for reconsideration. They raise a number of arguments against the timeliness objections:

1. The Normans submit that they told the delegate by correspondence dated July 21, 2002, that they were intending to apply for reconsideration of the adjudicator's decision of June 25, 2002. In that letter they state:

We expect with this submission that the Adjudicator can uphold or modify the Delegate's decision for Mr. Norman and allow us to proceed to the reconsideration stage of this process.

We want to address the other issues of contravention under separate cover.

In a follow up letter, dated July 24, 2002, they state:

The adjudicator has already affirmed the Delegate's Determination for Ms. Norman so we are at the stage of only reconsideration to change the decision. The Adjudicator has already set the

parameters for the decision to be made for Mr. Norman so additional evidence will not be considered for Mr. Norman either.

I have reached the conclusion that I am way over my head in dealing with the complications in our cases. Legal advice so far has indicated that the legal investment to make the additional concerns right may be more than the derived compensation. I will participate in clarification of the evidence of the Adjudicator to complete her decision on Mr. Norman.

An investigation on the Nacel contraventions listed by the Adjudicator, by themselves, is not expected to impact the decision for Mr. Norman. In light of our submitted evidence, the extent and content of the investigation required is a matter of tough judgment for the Delegate.

Reconsideration for Mr. and Mr. (*sic*) may already be impractical but we will be leaving it up to the legal profession to deal with the legal profession.

2. The Normans state in their application for reconsideration that “confusion about appealing Ms. Norman’s decision separately has resulted in both appealed now for reconsideration.”
3. The Normans raise a third possible explanation for the delay in filing for reconsideration on Ms. Norman’s claim, that because the delegate issued a confirming determination on January 10, 2003, which was upheld by Adjudicator Roberts, Ms. Norman’s decision was not completed until April 8, 2003.

Analysis on Timeliness

The Normans have not provided an explanation for why they did not alert the Tribunal and Nacel of their intention to seek reconsideration when the decision was released in June 2002, or again when the decision was released in April 2003. Likewise, they have not provided an explanation for why they did not file this application for reconsideration at the same time as Nacel applied to reconsider. The Normans’ notification to the delegate of an intention to file for reconsideration is not adequate. I appreciate that this may be seen as one arm of the bureaucracy not knowing what the other is doing but, in fact, the offices are much more distinct than that. The Branch and the Tribunal are separate entities and I think it is not reasonable to suggest that notification to one amounts to notification to the other. From reviewing the submissions, I believe that the Normans had a sufficient degree of sophistication and knowledge about the processes to appreciate the division between the offices. I also find it is not reasonable to suggest that the delegate would assume responsibility of notifying the Tribunal and Nacel of the Norman’s intention to apply for reconsideration. I appreciate that the Normans have not suggested this is so many words, but the implication is there.

The Normans submitted the letter of July 24, 2002, to the Tribunal with their August 21, 2003 documents on the reconsideration application. They note it was not included in the package of material attached to the Director’s September 4, 2002 report back to the Tribunal. As far as I can tell, this is the first time that document has been presented to the Tribunal. Neither Nacel nor the Director has made any mention of it their submissions, so I assume they have seen it before, or do not object to it being presented as part of the explanation for the timing of the reconsideration application.

In their correspondence of July 24, 2002, the Normans specifically refer to retaining legal counsel. In the August 21, 2003 submission, referring to the July – September 2002 time frame, the Normans state:

The last statement of the letter [July 24, 2002] indicates that we were going to have both Mr. and Ms. Norman’s appeals reviewed by a lawyer to determine if reconsideration was practical. We

state: "Reconsideration for Mr. and Mr. (should be Mr. and Ms.) may already be impractical but we will be leaving it up to the legal profession to deal with the legal profession.

There is some question about why the Normans have waited so long for reconsideration of Ms. Norman's appeal decision. Well, the Director knew from this letter that the Normans were going to apply for reconsideration on both Mr. and Ms. Norman appeal decisions once the final decision was made on Mr. Norman. Besides, if the adjudicator decided to review the issues including the NO Relief Management aspect for Mr. Norman, it would have impacted and changed the decision for Ms. Norman. We were not given the option from the delegate to appeal Ms. Norman's decision separately.

Concerning the latter statement, I find nothing in the file or submissions to suggest that the Normans asked the delegate to sever the claims.

In reviewing the sequence of events and submissions, I note that Adjudicator Roberts in her April 8, 2003 decision states that the delegate and Mr. Norman sought to have the Determination [January 10, 2003] upheld. Clearly, it was Nacel who appealed that Determination, but I have reviewed the submissions to see whether there is some justification for saying that the Normans also opposed that Determination. It seems apparent that if Nacel had not appealed to the Tribunal, that Determination would have been the end of these matters. As it is now, Adjudicator Roberts has confirmed that Determination subject only to confirmation of no double recovery by Mr. Norman.

The Normans made two submissions on the Nacel appeal of the January 10, 2003 Determination – January 17, 2003 and February 25, 2003. There is no succinct summary by the Normans of the substance of their submissions in those documents. It is apparent that the Normans believed the adjudicator, in the June 25, 2002 decision, had misunderstood some evidence and reached some incorrect conclusions. It also seems that the Normans continued with their view that the delegate had not investigated and made decisions on issues they had raised. However, overall, from the substance and tone of the two submissions, I find that the Normans were not intending to challenge the Determination. In the January 21 submission, they address the Nacel appeal points. They also refer to the ability to calculate vacation pay entitlement, but they say: "The process is intensive and time consuming so we are not willing to expend the time at this late stage to have any more delays in the Tribunal Decision for this 4% vacation pay entitlement."

The Normans' submission of February 25 is lengthy and goes into detail of various items, but it seems to me, as it must have seemed to Adjudicator Roberts, that it was directed to objecting to Nacel's grounds of appeal. In the final paragraph of that submission, the Normans note that Nacel continued to raise issues that they say were ignored, and that the Tribunal could respond to Nacel's arguments *ad infinitum*. The Normans submit that the delegate provided 'logic and insight that has not been covered before' and they state: "The Normans can certainly provide a parallel set of ignored questions and the process could continue on until the next century. We respectfully suggest, Madame Adjudicator, that you ignore the distractions of Clark, Wilson and focus on the last part of your decision."

The January 10, 2003 Determination was in response to the referral back for the starting date of Mr. Norman's employment. The delegate answered that question, provided calculations of the amounts owing, and asked the Tribunal to confirm the Order against Nacel in those amounts. Until Nacel filed an appeal, the only 'last part' left for the Tribunal was issuing the Orders.

Based on the Normans submissions of January 21 and February 25, I find that the intent and the tone was to accept the delegate's Determination and to get on with the business of collecting the money owed.

Accordingly, I find that there was no indication of an intention to continue the claim at that point and no notice given of the intention to file for reconsideration of the June 25, 2002 decision.

The result of the April 8, 2003 decision was in the Normans' favour. Nacel applied for reconsideration and the Normans made detailed submissions to the Tribunal opposing Nacel's application. In their submission, they reviewed and quoted from a number of points in the previous decisions. In summary, they noted that the application was nothing more than a request for a second opinion. Adjudicator Stevenson denied the application for reconsideration.

Within a couple of days, the Normans filed their application for reconsideration asking, in effect, to re-hear the whole case. This, however, is not entirely clear as the Normans indicate that they are asking for hearing only of that part of the case that has not been heard.

The Substantive Issues

The result of the April 8, 2003 decision was in the Normans' favour. Their application for reconsideration does not go to the substance of that decision, but to the May 7, 2002 hearing and the June 25, 2002 decision. The Normans allege that Adjudicator Roberts breached their natural justice rights by limiting their evidence and submissions. Similarly, they allege that the Adjudicator ignored evidence and issues that she should have referred back to the delegate, and that she erred in law by arriving at a conclusion that is contrary to a decision in a similar case. However, this is the first time they have raised these issues.

I have carefully considered the Normans' allegations and reviewed various submissions and evidence to trace the chronology of events and the development of their arguments in submissions. I have considered the various proceedings before the delegate and the Tribunal and the parties' submissions at each stage. It is apparent that the Normans believe that their issues and causes have not been fully investigated by the branch. They also launched complaints in other government departments, including the Premier's Office, and with the RCMP. The Normans' quest has been for a complete overhaul of the employment situation for residential caretakers. They acknowledge that the labour standards legislation does not address the unique working conditions of resident caretakers. This is apparent, in part, from the Determinations, in which delegates found differing definitions for their employment.

When Adjudicator Roberts referred back to the Director in June 2002, the Normans had another opportunity to raise their issues and causes, which they did. In the September 2002 Determination, the delegate made an additional finding about Ms. Norman's entitlement, which Adjudicator Roberts, on December 2, 2002, ruled was made without jurisdiction because it had not been the subject of the referral. There was no application for reconsideration of the December 2, 2002 decision by either the Normans or Nacel.

It is apparent that the Normans knew of the reconsideration process in July 2002, as noted in their correspondence to the delegate. They did not file then, and they did not file after the adjudicator's December 2, 2002 decision. They did not put Nacel or the Tribunal on notice of their intention to seek reconsideration. In these circumstances, I find it difficult to accept that the Normans believed they had a serious natural justice problem arising out of the hearing process. The correspondence of July 2002 is the only reference I see to a concern that the hearing process had not been fair but even there they acknowledge the adjudicator was probably 'absolutely appropriate.' That is not determinative of the

fairness issue but, coupled with their failure to file for reconsideration or lodge any complaint document with the tribunal leads me to conclude that this aspect of their claim lacks credibility.

The Normans' other reason for asking for reconsideration is their contention that the Adjudicator was inconsistent in her findings in this case compared to her findings in the *Drazic* case. My understanding of the Normans' contention is that the Adjudicator relied on evidence concerning 'release forms' in both hearings but came to different conclusions. I find that this would not amount to an error of law. The Adjudicator must base her decision on the evidence in each hearing and is not at liberty to take account of evidence presented in another hearing.

Decision

I have concluded that the Normans application for reconsideration does not meet the threshold test for timeliness. In summary, I find that there was no reasonable explanation for waiting over a year to file for reconsideration of the June 25, 2002 decision. Further, to the extent the application refers to tribunal decisions rendered after that date, the Normans appeared to benefit from the decisions and did not indicate that they were displeased with the decisions. Instead, they objected to the appeals and applications for reconsideration filed by Nacel. In their submission to the Adjudicator in January and February 2003, they asked that the Determination be upheld, which is effectively what occurred.

Although I decided this on a threshold issue, I also considered the substantive issues in the appeal. I have determined that the Normans have not substantiated their claim that they were denied natural justice. Nor have they substantiated that the Adjudicator erred in not referring matters back to the Director. I find their submission on the *Drazic* case lacks substance.

Accordingly, I deny the application for reconsideration. The Tribunal will not exercise its discretion under Section 116 to reconsider the original decision.

ORDER

Pursuant to Section 116 of the Act, I order the decision, BC EST # D121/03 be confirmed.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal