

An Application for Reconsideration

- by -

Eyad Al Ali
("Mr. Ali")

- 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/33

DATE OF DECISION: April 22, 2015

DECISION

SUBMISSIONS

Eyad Al Ali	on his own behalf
Grant K. Turnbull	on behalf of Turnbull Construction Services Ltd.
Amanda Clark Welder	on behalf of the Director of Employment Standards

OVERVIEW

1. Eyad Al Ali. (“Mr. Ali”) seeks reconsideration of a decision of the Tribunal, BC EST # D134/14 (the “original decision”), dated December 23, 2014.
2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on October 1, 2014.
3. The Determination was made by the Director on a complaint filed by Mr. Ali who alleged his former employer, Turnbull Construction Services Ltd. (“Turnbull”), had contravened the *Employment Standards Act* (the “*Act*”) by failing to pay regular wages earned.
4. The Determination found the *Act* had not been contravened and, accordingly, no wages were outstanding.
5. An appeal was filed by Mr. Ali alleging the Director erred in law and failed to observe principles of natural justice in making the Determination.
6. The Tribunal Member making the original decision dismissed the appeal under section 114(1)(f) of the *Act* and confirmed the Determination.
7. In the appeal, Mr. Ali argued the Director had erred in law and failed to observe principles of natural justice in making the Determination by failing to conclude he was entitled to extra remuneration for surpassing a threshold number of billable hours in a year which, he submitted, should be calculated by pro-rating the number of billable hours he worked in his final partial year of employment over a full year. Mr. Ali also alleged the Director erred in law and failed to observe principles of natural justice in making the Determination by not considering whether wages were owed for extra billable hours for the year August 2012 to July 2013.
8. In the original decision, the Tribunal Member found the Director had not erred in finding Mr. Ali was not entitled to be paid additional compensation for his final partial year of employment, that he was not entitled to raise an issue that was neither “squarely raised” in his complaint nor before the delegate during the complaint process and he had not shown there was a failure by the Director to observe principles of natural justice in making the Determination.
9. In making the original decision, the Tribunal Member considered several salient provisions of the Employment Contract, rejected the argument by Mr. Ali that the contents of an e-mail written in February 2010 (4 months before the employment relationship commenced) and another written in March 2014 (3 months after the employment relationship ended) altered clear provisions in the Employment Contract and,

according to Mr. Ali, established entitlement to the compensation he claimed. The Tribunal Member found, on a reading of the Employment Contract and applying its salient provisions to the claim being made, that supplementary compensation was a matter within the sole discretion of Turnbull, the terms of Mr. Ali's compensation arrangements were set out in the Employment Contract, which according to its terms contained the entire agreement between Mr. Ali and Turnbull, and, as of the date Mr. Ali quit his employment, he had no outstanding entitlement to any additional compensation based on exceeding the threshold of 1650 billable hours.

10. The Tribunal Member making the original decision also found Mr. Ali could not raise an issue he had not put before the Director during the complaint process.

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 grant the request to reconsider and cancel the original decision and refer the matter back to the Director.

ARGUMENT

12. In his application for reconsideration, Mr. Ali says the Tribunal Member making the original decision erred by dismissing his appeal on the basis that the remuneration claimed by him was not "wages" under the *Act*. He submits his appeal was about the method of calculating wages, not whether the disputed remuneration was wages. He says the Director found his claim was wages and that finding was altered in the original decision without providing any clear statement of disagreement with the Director or reasons.
13. Mr. Ali argues the statement in the original decision regarding an entitlement to additional compensation for the August 2012 to July 2013 period, that the issue had not been squarely raised with the Director, was incorrect. He submits a claim for outstanding wages for that period was advanced but that "the first opportunity to present an accurate calculation of outstanding wages was in the Appeal form".
14. The Director has filed a communication on the application, indicating no submission will be made.
15. Turnbull has filed a response to the application, supporting the original decision.
16. Mr. Ali has filed a final response, but it adds nothing more to the arguments made in his initial submission on this application, reiterating the points made in that submission and providing gratuitous comments that are not relevant or pertinent to the issue raised here.

ANALYSIS

17. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally. Section 116 of the *Act* states:

- 116 (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.

- (2) *The director or a person named in a decision or order of the tribunal may make an application under this section*
- (3) *An application may be made only once with respect to the same order or decision.*

18. As the Tribunal has stated in numerous reconsideration decisions, the authority of the Tribunal under section 116 is discretionary. A principled approach to the exercise of this discretion has been developed. The rationale for this approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 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 subsection 2(b), is to “promote the fair treatment of employees and employers”. The approach is fully described in *Milan Holdings Ltd.*, 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 best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

19. In deciding whether to reconsider, the Tribunal considers factors such 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 the 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.
20. The Tribunal has accepted an approach to applications for reconsideration that resolves 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 reasonably 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.
21. It will weigh against the 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.
22. 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 by the reconsideration.
23. I am not persuaded this application warrants reconsideration.

24. Mr. Ali has focussed the basis for this application on the statement in the original decision that the remuneration he claims is in the nature of a discretionary payment that is not wages under the *Act*. I do accept that finding was incorrect. However, it is only one aspect of the reasons for dismissing the appeal. That statement was contained in one of the five reasons supporting the finding in the original decision that Mr. Ali had not persuaded the Tribunal Member to Mr. Ali's view of his contractual entitlements.
25. The Tribunal Member making the original decision found, quite correctly in my view, that contractually Mr. Ali was not entitled to any additional compensation except at the sole discretion of Turnbull; that the compensation contemplated by paragraph 7 of the Employment Contract constituted "the full and exclusive monetary compensation" for Mr. Ali absent a written amendment to the contract signed by each party: see paragraph 46 of the Employment Contract. Mr. Ali could show no such amendment. The conclusion reached in the original decision was obvious and was analytically correct.
26. Further, whether the monies claimed by Mr. Ali is or is not wages under the *Act* is largely irrelevant to either the Determination or the original decision. Contrary to Mr. Ali's submission, the issue for both the Director and the Tribunal Member making the original decision was not whether the additional compensation claimed was wages, but whether the Employment Contract could be interpreted to provide Mr. Ali with an entitlement to additional compensation when he quit his employment in December 2013. Both found it did not and Mr. Ali has not convinced me a further examination of his claim is warranted.
27. The summary dismissal in the original decision of the issue of a claim for additional compensation for the August 2012 to July 2013 period was completely justified on an examination of the Determination, the reasons for Determination and the section 112(5) "record". There is no indication in any of that material the issue was raised by Mr. Ali in the complaint hearing or that he sought to establish his claim for additional compensation for this period. I do not accept his assertion that the claim was advanced in any meaningful way before the Director or that the appeal was the "first opportunity" to present an accurate calculation of the claim. It is clear from communications between Mr. Ali and Turnbull about the additional compensation paid to Mr. Ali over this period that there were several factors which affected that payment. By not raising that matter directly, Mr. Ali denied Turnbull any opportunity to inform the Director of the basis for the calculation of the amount paid. It was inappropriate to raise that issue on appeal when no evidence or argument was put to the Director on that issue in the complaint process. It is also inappropriate to seek to raise it for consideration in this application.
28. Overall, there is nothing in this application that would justify the Tribunal using its authority to allow reconsideration of the original decision and accordingly the application is denied.

ORDER

29. Pursuant to section 116 of the *Act*, the original decision, BC EST # D134/14, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal