

An Application for Reconsideration

- by -

Nyomi Enterprises Ltd. carrying on business as Select Hair Design
(“Select”)

- 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.: 2013A/18

DATE OF DECISION: April 4, 2013

DECISION

SUBMISSIONS

Khanh (Kim) Le on behalf of Nyomi Enterprises Ltd. carrying on business as Select Hair Design

OVERVIEW

1. Nyomi Enterprises Ltd. carrying on business as Select Hair Design (“Select”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of a decision, BC EST # D019/13, made by the Tribunal on February 14, 2013 (the “original decision”).
2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 28, 2012.
3. The Determination was made by the Director on a complaint filed by Sheila Sharifrazi (“Ms. Sharifrazi”), who alleged Select had contravened the *Act* by failing to pay compensation for length of service. The Determination found that Select had contravened Part 8, section 63 of the *Act* and ordered Select to pay Ms. Sharifrazi \$855.30, an amount which included both wages and interest.
4. The Director also imposed an administrative penalty on Select under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$500.00.
5. The appeal filed by Select sought to have the Determination cancelled.
6. The Tribunal Member of the original decision dismissed the appeal and confirmed the Determination.
7. In this application, Select requests the Tribunal to refer the matter back to another panel of the Tribunal and have the appeal considered again by that panel.

ISSUE

8. 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 the original decision and refer the appeal back to another panel of the Tribunal.

ARGUMENT

9. Select has submitted six arguments in support of its reconsideration request:
 - a. Ms. Khanh Le’s charter rights were not observed or protected;
 - b. There was a mis-transcription and/or mis-quoting in the original decision of the evidence provided at the Director’s complaint hearing;
 - c. There has been evidence tampering;
 - d. There are “mistakes in common law”;

- e. There was a failure to adhere to principles of natural justice; and
 - f. There is new evidence showing “systemic prejudicial discrimination.
10. Briefly, I will outline the essential elements of each of the arguments. Prior to setting these out, however, I should clarify one aspect of the reconsideration application submission, as it may be helpful in assisting persons reading this decision without having the benefit of reading the submission. While the application submission has been provided to the Tribunal over the name of Ms. Khanh Le (“Ms. Le”), the principal of Select, the actual submission was prepared by another person. This, of course does not affect the substance of the submission, but it may help avoid any confusion for a reader of this decision when specific aspects of that submission, identifying Ms. Le in the third person, are referenced or quoted.
11. On the first argument, the submission asserts Ms. Le’s rights, as described in sections 14 and 24 of the *Canadian Charter of Rights and Freedoms*, were not observed or protected because English is not her first language and she was not provided with the assistance of an interpreter in the Director’s complaint hearing. The same argument is also applied to Ms. Le’s sister, who was presented as a witness for Select at the complaint hearing.
12. The second argument examines nearly every paragraph of the original decision: accepting, disputing or commenting on each of them. Within that examination, the submission alleges discrimination, breach of principles of natural justice, and error in law.
13. The assertion of “evidence tampering” refers to what is alleged to have been a letter provided by an unnamed “third witness” to the Director during the complaint hearing but which was not referred to in the Determination. There was also reference to this document in the appeal. Neither its existence nor its potential relevance has ever been established.

ANALYSIS

14. 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.*
15. 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 interpretation and application” 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 the 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” 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 favor 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.

16. 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. 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.
17. 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.
18. 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.
19. 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.
20. Having reviewed the original decision, the material in the appeal file and the submission of Select on the reconsideration request, I am not persuaded this matter warrants reconsideration.
21. I find no basis to the charter argument. As a preliminary observation, this application is the first time the ability of Ms. Le to effectively communicate in the English language in respect of the complaint has been raised.
22. At no point in the process has there been any indication that Ms. Le did not understand it or that she (or her sister) was unable to communicate with respect to the claim made by Ms. Sharifrazi or in the processes generally. In all relevant discussions and communications during the complaint process and complaint hearing, Ms. Le was communicating the position of Select in English. If Ms. Le felt she did not understand the complaint or the process and felt she was unable to adequately communicate Select’s position, she could have said so. She did not.

23. A less than perfect understanding of the provisions of the *Act* and the process did not, apparently, interfere with Ms. Le's ability to participate in the complaint processes and, more specifically, to know the complaint being made by Ms. Sharifrazi and to respond to that complaint. Even if Ms. Le did not completely understand the process, I can find no resulting unfairness to her, either in the context of principles of natural justice or the statutory requirement found in Section 77 of the *Act*.
24. The burden of establishing the factual basis for the "right" claimed is on Ms. Le; there are no objective facts which demonstrate that an interpreter was a necessary element to ensuring an understanding of the complaint process for Ms. Le or her witness. In the circumstances present here, I can see no basis for finding Ms. Le did not speak or understand the language in which the complaint process was being conducted or that she has in any other way established she had a "right" to an interpreter. Nor do I see any basis on the facts for finding the Director was obligated to provide the assistance of an interpreter to Ms. Le (or her sister) and ought to have been pro-active in that regard.
25. From the perspective of the Tribunal, the only communications that were made to the Tribunal were in English and nothing in the communications to the Tribunal indicated Ms. Le could not adequately communicate in English. The appeal process was conducted by the Tribunal, as it frequently is, on the written submissions made to the Tribunal by the parties involved and the Record filed by the Director under subsection 112(5) of the *Act*. There is provision in the Tribunal's *Rules of Practice and Procedure* (the "Rules") to communicate or submit documents in a language other than English provided they are accompanied by a translation. There was never any request by Ms. Le to communicate with the Tribunal in any language other than English; she was able to express the position of Select in the appeal in communications and written submissions to the Tribunal.
26. The argument that there has been mis-transcription and mis-quoting of the evidence does nothing more than raise the same disagreements with the Determination that were raised in the appeal, disputing findings made by the Director – and addressed in the appeal, rearguing a version of the facts advanced before the Director and in the appeal and using statements made in the original decision as a springboard to re-argue the case that was unsuccessfully argued to the Director and the Tribunal Member of the original decision.
27. This argument does not raise an appropriate basis for reconsideration.
28. More particularly, the assertions made in this argument – alleging discrimination, breach of principles of natural justice, and error of law – are bald assertions, made without reference to the correctness of the original decision in those areas identified within the arguments. Because of the seriousness of the allegations, the burden on Select in these matters is to provide facts that objectively demonstrate discrimination and a breach of natural justice. The assertions made in the reconsideration submission do not satisfy that burden. They appear to do nothing more than suggest the conclusions in the original decision in these areas are wrong and should be revisited. That kind of submission does not provide a basis for reconsideration.
29. In respect of the error of law argument, that Select should have been able to raise and assert "just cause" in the appeal when it was never advanced during the complaint process, the original decision correctly states the approach to such an argument in para. 35:

As the Tribunal has repeatedly stated, an appeal is not an opportunity for an appellant to present evidence or make an argument that ought to have been provided to the delegate at the hearing. Furthermore, as the Tribunal stated in its reconsideration decision *Mt. Rocky Investment Ltd.* (BC EST# RD 457/01) the power of the Tribunal is limited to those matters dealt with in the Determination.

30. The third argument also contains a serious allegation and requires considerably more than the bald assertion made in the reconsideration application submission to support it. The application contains no statutory declaration, no copy or summary of the evidence allegedly provided and “tampered with” nor even the identification of the person alleged to have provided the purported letter. It provides no basis at all for finding reconsideration is warranted or for cancelling the original decision and referring the appeal to a new panel of the Tribunal.
31. In sum, Select has not shown the original decision was wrong in any respect. The Tribunal does not consider there to be any merit in the new arguments raised for the first time in this application and will not revisit the arguments made by Select in its appeal as this application does not show any error was made in the original decision on those matters. The application for reconsideration is denied.

ORDER

32. Pursuant to section 116 of the *Act*, the original decision is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal