

An Application for Reconsideration

- by -

James Brian McGillis
("McGillis")

- 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.: **2009A/008**

DATE OF DECISION: **May 1, 2009**

DECISION

SUBMISSIONS

James McGillis	on his own behalf
Barry Hyman	on behalf of B. & C. List (1982) Ltd.
Chantal Martel	on behalf of the Director of Employment Standards

OVERVIEW

1. James Brian McGillis (“McGillis”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of a decision, BC EST #D001/09, made by the Tribunal on January 6, 2009 (the “original decision”). The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 29, 2008. The Determination considered a complaint filed by McGillis alleging B. & C. List (1982) Ltd. (“B&C List”) had contravened several provisions and requirements of the *Act* in respect of his employment.
2. The Determination found that Johnson was not owed wages under the *Act*, but that B&C List had contravened Section 27 of the *Act* and imposed an administrative penalty for the contravention.
3. Both McGillis and B&C List appealed the Determination. The original decision dismissed both appeals. B&C List has not sought a reconsideration of the original decision as it relates to the dismissal of their appeal. In the appeal McGillis alleged the Director had made errors of law and sought to introduce new evidence. The original decision also indicates there was a hint of an alleged failure by the Director to observe principles of natural justice, which was considered in the original decision under the rubric of error of law.
4. The original decision canvassed the arguments made by McGillis in the context of the discretion given to the Director under Sections 76 and 85 of the *Act* and decided there was no basis shown for concluding the Director had improperly exercised the discretion provided in subsections 85 (c) and (f). The original decision does not speak specifically to the natural justice question.
5. The original decision notes that the new documents and natural justice aspects of McGillis’ appeal arose from the allegation that the Director had failed to ensure a number of documents which were said to be relevant to his claim were produced. The original decision describes these documents as including “sales summaries turned in each Monday and Friday for remuneration; phone records for December 7, 2007; sales sheets; payroll summaries; and cancellations and proof of banked sales”.
6. The original decision refused to accept any of the “new evidence” which McGillis sought to introduce with the appeal, finding all of the documents could, with the exercise of “due diligence” by McGillis, have been provided to the Director during the complaint process.
7. In this application for reconsideration, McGillis has refocused on the Determination and the complaint process, alleging one of the delegates involved in that process was biased and improperly exercised his discretion in administering the complaint hearing.

ISSUE

8. In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case is appropriate for reconsideration, the substantive issue raised in this application, as it was in the appeal, is whether the Director committed errors of law in administering the complaint hearing process generally and in particular in the handling of McGillis' requests for document production.

ANALYSIS OF THE PRELIMINARY ISSUE

9. The legislature has conferred a reconsideration power on the Tribunal under Section 116 of the *Act*, which reads as follows:

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.*

10. Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's 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 general approach to reconsideration is set out 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 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 the original decision.
11. Consistent with the above considerations, 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.

12. 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.
13. 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.

ARGUMENT AND ANALYSIS

14. McGillis has framed this application in three ways. First, he asserts the Determination was under-inclusive in its conclusion that B&C List contravened subsection 27(f) of the *Act*. McGillis asserts that B&C List contravened other parts of Section 27 and the Director failed to consider these breaches. Second, McGillis revisits the allegation that the Director improperly exercised discretion by the “failure to demand all pertinent payroll documents in spite of a formal request to do so before the hearing”. Third, he says the Director failed to consider material factors and evidence in making certain findings of fact that ultimately led to the conclusion he was not entitled to wages under the *Act*.
15. It is unnecessary to set out all of the arguments in detail. It suffices to say the arguments advanced in this application are substantially a restatement of the submissions made in the appeal.
16. The arguments relating to the failure of the Director to address “all of the omissions’ [sic] by the employer in failure to provide accurate wage statements” are simply a restatement of the allegation made by McGillis in the complaint process that the wage statements provided by B&C List to the Director were inaccurate. That allegation was addressed by the Director in the Determination. It was raised again in the appeal, without success.
17. The allegation of bias is nothing more than another way for McGillis to describe his disagreement with the alleged failure of the Director to require broader document disclosure and to consider all “material” factors.
18. The evidence which was not accepted in the appeal process is resubmitted in this application, along with some additional evidence relating to the complaint and complaint hearing process. The resubmission of this evidence is not accompanied by any argument going to how the Tribunal Member deciding the original decision was wrong in refusing to accept this material on the appeal or why it should be allowed on this application.
19. Argument is then made by McGillis on those additional documents, and allegations of fact arising from them, without reference to the conclusion made in the original decision that the Tribunal has no authority to consider arguments in an appeal that seek to alter findings of fact made in the Determination or to re-assess a complaint on different facts than were found by the Director in the Determination.
20. There are also elements of this application that are not specifically raised in the appeal which relate to the conduct of the delegate conducting the complaint hearing. McGillis alleges bias on the part of the Director in the “use of his discretion”. There are also general allegations of fact made in the submissions filed on this element of the application that are not supported by any material in the file or by any accompanying affidavit material. The submissions in support of this application do not explain why these elements were not raised in the appeal. There are also allegations of procedural irregularities by the Director in the complaint hearing that are not apparent on the face of the material in the file and are otherwise unsupported.
21. Essentially, the argument of McGillis in this application is that if the Director had required a more expansive disclosure of documents, had taken a stricter view on some of the evidence presented by B&C List and had taken a different analysis of some of the evidence presented by both parties, the Determination might be different.

22. B&C List has not provided a substantive response to the application for reconsideration.
23. The response of the Director to the application for reconsideration, as well as addressing some of the specific allegations raised, understandably notes that the essence of the arguments made by McGillis is grounded in his disagreement with findings of fact made in the determination which were in turn based on the material provided by the parties during the complaint process.
24. The Director also submits there is no error of law in respect of the imposition of the administrative penalty on B&C List and, if McGillis is allowed to raise a bias allegation on reconsideration, no evidence has been shown or provided to support that allegation.
25. After review of the Determination, the original decision and the submissions of the parties on this application, I have decided this application does not warrant reconsideration.
26. As indicated above, the focus of a reconsideration application is the original decision. In this application, McGillis has not addressed potential errors in the original decision, but has refocused on the Determination and the complaint process, rearguing allegations made in the appeal, which were not accepted in the original decision, and raising additional allegations against the complaint process and the conduct of the Director in that process, without explaining why those matters were not raised in the appeal and without establishing a factual basis for them. The objective of this application is the same as the objective of the appeal: to secure another hearing on the complaint in an effort to change the findings of fact made by the Director during the complaint process and, consequently, change the result of the Determination.
27. I can find no error of law in the conclusion made in the original decision: that the Tribunal lacks authority to consider an appeal based on a disagreement with findings of fact which do not raise a question of law. Nor do I find any error of law in the conclusion in the original decision that the Tribunal will not interfere with the Director's exercise of discretion except in the circumstances described in cases such as *Takarabe*, BC EST #D160/98 and *Jody L. Goudreau*, BC EST #D066/98 and that, in the circumstances of this case, the scope of the demand for employer records made by the Director was not an improper exercise of discretion. Finally, I find no error with the decision that the "new" evidence presented by McGillis with the appeal should not be accepted. I should also note this last decision was an exercise of discretion by the Tribunal Member deciding the appeal and was based on an assessment of those factors set out by the Tribunal in *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03. There is no argument that the application of those factors to the evidence sought to be introduced was an error of law and no basis shown in this application for interfering with that exercise of discretion.
28. There is no basis in fact or law for the allegation of bias.
29. It weighs against this application that I view it as an attempt to have another panel of the Tribunal review the Determination and come to a different conclusion than the Director and the Tribunal in the original decision.
30. In sum, I can find no circumstances arising from the original decision which justify the Tribunal exercising its discretion under Section 116 of the *Act*. The application is accordingly dismissed.

ORDER

31. Pursuan to Section 116 of the *Act*, I order the original decision be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal