

An Application for Reconsideration

- by -

George Dumitrache  
("Mr. Dumitrache")

- 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/67

**DATE OF DECISION:** June 10, 2015

## DECISION

### SUBMISSIONS

George Dumitrache on his own behalf

### OVERVIEW

1. George Dumitrache (“Mr. Dumitrache”) seeks reconsideration of a decision of the Tribunal, BC EST # D035/15 (the “original decision”), dated April 16, 2015.
2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on January 5, 2015.
3. The Determination was made by the Director on a complaint filed by Mr. Dumitrache who alleged Dynamic Raincity Facility Services Ltd. (“Dynamic”), had contravened section 8 of the *Employment Standards Act* (“the *Act*”) by “inducing, influencing and persuading” Mr. Dumitrache to be available for work by “misrepresenting the availability of work”.
4. The Determination found the *Act* had not been contravened and, accordingly, no wages were outstanding.
5. An appeal was filed by Mr. Dumitrache alleging the Director erred in law, failed to observe principles of natural justice in making the Determination and that new evidence had come available that was not available when the Determination was being made.
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. Dumitrache argued the Director had erred in law by not providing a valid reason for rejecting his evidence. He submitted the Director failed to observe principles of natural justice in making the Determination by cancelling a scheduled hearing and by the excessive delay in making a decision on his complaint. He also questioned the impartiality of each delegate involved with his complaint.
8. Mr. Dumitrache submitted new evidence with his appeal which, he argued, was evidence of a lie made by the representative of Dynamic in a submission to the Director.
9. In the original decision, the Tribunal Member found the Director had not erred in law, finding the Director had given sufficient justification for preferring the evidence provided by Dynamic over that provided by Mr. Dumitrache and noting the Director was entitled to weigh evidence, make credibility findings and reach conclusions of fact that, of necessity, will prefer the evidence of one party over the other.
10. The Tribunal Member making the original decision found, notwithstanding concerns with the delay and the process adopted by the Employment Standards Branch, that Mr. Dumitrache had not shown there was any prejudice to him as a result and, consequently, had not shown there was a failure by the Director to observe principles of natural justice in making the Determination. The Tribunal Member found Mr. Dumitrache had not discharged the onus on him to show an impartiality, or bias, against him by the delegates involved in administering and deciding his complaint.

11. The Tribunal Member making the original decision found the “new evidence” submitted by Mr. Dumitrache did not meet the requirements for admitting new evidence in an appeal, deciding the evidence submitted was neither “new” nor probative of the issue raised in the appeal.

## ISSUE

12. 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 either vary or cancel the original decision and refer the matter back to the Director.

## ARGUMENT

13. In this application, Mr. Dumitrache does no more than re-state his appeal submissions and provide a summary version of his complaint to the Director.
14. There is nothing in the reconsideration application that identifies or argues any specific error in the original decision, rather the inference from the application submissions is that the original decision was incorrect in its entirety because it confirmed the Determination.

## ANALYSIS

15. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally. As a result of amendments to the *Act* made in the *Administrative Tribunal Statutes Amendment Act, 2015*, parts of which came into effect on May 14, 2015, section 116 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 served with an order or a decision of the tribunal may make an application under this section.*
- (2.1) *The application may not be made more than 30 days after the date of the order or decision.*
  - (2.2) *The tribunal may not reconsider an order or decision on the tribunal's own motion made more than 30 days after the date of the order or decision.*
- (3) *An application may be made only once with respect to the same order or decision.*
- (4) *The director and a person served with an order or decision of the tribunal are parties to a reconsideration of the order or decision.*

16. Except for the inclusion of statutory time limits for filing a reconsideration application or for the Tribunal reconsidering its own orders and decisions, the amendments are unlikely to significantly alter the Tribunal’s approach to reconsiderations.

17. In that respect, 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 Inc.*, 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” 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 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.

18. 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.
19. 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.
20. 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.
21. 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.
22. I am not persuaded this application warrants reconsideration.
23. As I have stated above, this application at its core does nothing more than re-assert challenges made in the appeal that were not accepted in the original decision. The focus of this application is not the original decision but the Determination, which includes those matters which formed the basis for his complaint and matters that were raised in his appeal. These were considered in the original decision and dismissed. Raising the same challenges to the Determination in an application for reconsideration that were raised and dismissed

in an appeal is not an appropriate use of the reconsideration process. As indicated above, it weighs against an application for reconsideration if its objective is to have the Tribunal effectively re-examine the appeal and come to a different conclusion than was made in the original decision. That is the case here.

24. Mr. Dumitrache has not shown there was any error in the original decision in any of the circumstances that would cause the Tribunal to exercise its discretion in favour of reconsideration.
25. In sum, there is nothing in this application that would justify the Tribunal using its authority to allow reconsideration of the original decision and accordingly it is denied.

### **ORDER**

26. Pursuant to section 116 of the *Act*, the original decision, BC EST # D035/15, is confirmed.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**