Employment Standards TRIBUNAL

An Application for Reconsideration

\- by -

K.M.S. Tools & Equipment Ltd.
("K.M.S.")

\- 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/68

DATE OF DECISION: June 10, 2015

British Columbia

DECISION

SUBMISSIONS

Stanley Pridham on behalf of K.M.S. Tools & Equipment Ltd.

OVERVIEW

1. K.M.S. Tools & Equipment Ltd. ("K.M.S.") seeks reconsideration of a decision of the Tribunal, BC EST # D036/15 (the "original decision"), dated April 20, 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 21, 2015.

3. The Determination was made by the Director on a complaint filed by Mark Brennenstuhl ("Mr. Brennenstuhl") who alleged K.M.S. contravened sections 58 and 63 of the *Employment Standards Act* (the "*Act*") in respect of the termination of his employment.

4. The Determination found K.M.S. had contravened sections 58 and 63 of the *Act*, and ordered Mr. Brennenstuhl be paid wages and interest in the amount of $3,539.32 and imposed an administrative penalty on K.M.S. in the amount of $500.00.

5. An appeal was filed by K.M.S. alleging the Director erred in law by finding Mr. Brennenstuhl was entitled to length of service compensation. K.M.S. submitted Mr. Brennenstuhl was not entitled to length of service compensation as he had quit his employment. The appeal also included a written statement from Regan Funk, the Human Resources Manager for K.M.S., describing a meeting that took place with Mr. Brennenstuhl on July 28, 2014.

6. The Tribunal Member making the original decision dismissed the appeal and confirmed the Determination.

7. In the original decision, the Tribunal Member found the Director had not erred in law, as K.M.S. had not met the burden of showing the Director was wrong in finding Mr. Brennenstuhl had not quit his employment.

8. Also, the Tribunal Member found the "new evidence" submitted by K.M.S. did not meet the requirements for admitting new evidence in an appeal, concluding the evidence submitted was not "new"; that Ms. Funk had attended the complaint hearing and appeared to have given evidence at that hearing. Consequently, Ms. Funk either had the opportunity to provide the evidence contained in the written statement at the complaint hearing and did not to do so or had failed to convince the Director that her version of the July 28th meeting was sufficient to discharge the obligation on K.M.S. to show Mr. Brennenstuhl had quit. In either case, the written statement was not accepted or considered in the appeal.

ISSUE

9. 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.

ARGUMENT

10. In this application, K.M.S. does no more than submit there were "errors made' and re-state its position that Mr. Brennenstuhl quit his employment.

ANALYSIS

11. 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.*

12. 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.

13. 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 Giovanno (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.

14. 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.

15. 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.

16. 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.

17. 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.

18. I am not persuaded this application warrants reconsideration. I am satisfied, based on the material that was before the Tribunal Member in the appeal and considering the scope of review under section 112 of the *Act*, there was no error made in the original decision.

19. As I have indicated 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 rejection by the Director of the position taken by K.M.S. in response to the complaint. This position was raised in the appeal, considered in the original decision and dismissed in that decision. Raising the same challenges to the Determination in an application for reconsideration that were raised and dismissed in an appeal decision, without showing an error in that decision, 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.

20. K.M.S. has not shown there was any error in the original decision and has not identified any other circumstance that would cause the Tribunal to exercise its discretion in favour of reconsideration.

21. 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 the application is denied.

ORDER

22. Pursuant to section 116 of the *Act*, the original decision, BC EST # D036/15, is confirmed.

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David B. Stevenson
Member
Employment Standards Tribunal