

An Application for Reconsideration

- by -

0839907 B.C. Ltd. carrying on business as Tournament Inn & Suites
(“Tournament Inn”)

- 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.: 2010A/47

DATE OF DECISION: June 2, 2010

DECISION

SUBMISSIONS

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| 839907 B.C. Ltd. | on behalf of 0839907 B.C. Ltd. carrying on business as Tournament Inn & suites |
| Colin Williams | on his own behalf |
| Hans Suhr | on behalf of the Director of Employment Standards |

OVERVIEW

1. 0839907 B.C. Ltd. carrying on business as Tournament Inn & Suites (“Tournament Inn”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of a decision, BC EST # D031/10, made by the Tribunal on March 23, 2010 (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 November 24, 2009. The Determination considered a complaint filed by Colin Williams (“Williams”), alleging Tournament Inn had contravened requirements of the *Act* in respect of his employment by failing to pay him wages.
2. The Determination found that Tournament Inn had contravened sections 17, 18 and 28 the *Act* and ordered the payment of regular wages, annual vacation pay and interest under section 88 of the *Act* in the amount of \$498.74 and imposed administrative penalties on Tournament Inn for contraventions of the *Act* in the amount of \$1500.00.
3. Tournament Inn appealed the Determination on the ground the Director failed to observe principles of natural justice in making the Determination.
4. The appeal was filed outside of the time limit for filing an appeal under subsection 112(3) of the *Act*. The Tribunal Member of the original decision declined to exercise discretion under section 109 of the *Act* and dismissed the appeal.
5. Tournament Inn disagrees with the result, submitting the original decision was “totally wrong” and sends the wrong message to people like Williams, who they allege has “conned” the system.

ISSUE

6. 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 is whether the Tribunal committed any error in the original decision that justifies intervention on reconsideration.

ANALYSIS OF THE PRELIMINARY ISSUE

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.*

7. 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.
8. 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
9. 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.
10. 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

11. Tournament Inn disagrees with the Determination and with the original decision. Tournament Inn says the appeal was filed late “due to a family emergency”. While the reconsideration does not specifically identify the

family emergency, presumably it is the matter that was identified to the Tribunal Member considering the timeliness issue in the appeal. That matter was considered and discussed in the original decision.

12. In addition to providing the above explanation for the delay, Tournament Inn reiterates the position it made in the appeal – that Williams was never hired as an employee and is just trying to scam the system and Tournament Inn’s business by making a false claim.
13. In responding to this application, the Director says there is nothing in the reconsideration that adds anything to the appeal or raises any question of law, fact, policy or procedure which has significance or importance to the parties and the system generally.
14. Williams has filed a response, but it does not address the issue that has to be considered in this decision.

ANALYSIS

15. As indicated above, the appeal by Tournament Inn was late. The original decision considered whether the time for filing the appeal should be extended and concluded Tournament Inn had not shown there was a compelling reason for extending the appeal period. The Tribunal Member in the original decision considered each of the criteria the Tribunal has typically applied when deciding whether to grant an extension of the appeal period: was there a reasonable and credible explanation for failing to request an appeal within the statutory limit; has there been a genuine and ongoing *bona fide* intention to appeal the Determination; if so, has the respondent party and the Director have been made aware of the intention; will the respondent party be unduly prejudiced by the granting of an extension; and is there a strong *prima facie* case in favour of the appellant.
16. The Tribunal has said there may be circumstances in the appeal that require a consideration of additional criteria other than those typically considered, but there were none in this case.
17. The original decision found none of the criteria supported an exercise of the Tribunal’s discretion under section 109 and dismissed the appeal. Of particular note are the findings in the original decision that Tournament Inn had not provided a “reasonable and credible” explanation for the delay and the conclusion that the appeal did not show a strong *prima facie* case on the merits.
18. On the first point, the original decision referred to the complete absence of corroborating evidence to support the “family emergency” explanation and to the admission by Tournament Inn that none of the persons to whom the Determination had been sent – three directors of the company – had read and noted the due date for appeal that was included on the Determination.
19. In this application, Tournament Inn has not identified any potential error in the original decision. It bears noting that the decision in the original decision not to extend the appeal period was a discretionary one and a reconsideration of such a decision requires the applicant to show a legal basis for setting aside that exercise of discretion. That will normally require the applicant to show an abuse of power, a mistake in construing the limits of his authority or some procedural irregularity by the Tribunal Member in the original decision. None of that has either been alleged or shown. In my view, the original decision considered all of the criteria that were relevant. There was ample basis for exercising discretion against extending the appeal period.
20. Rather than focussing on the original decision, the focus of Tournament Inn’s submissions continues to be the Determination, which it says sends the wrong message to “criminals and con artists”. The clear objective of this application is to have another panel of the Tribunal overlook the timeliness concerns, reverse the

original decision on that issue, allow the appeal and consider the objections Tournament Inn has raised to Williams being found by the Director to be an employee and entitled to wages.

21. That objective weighs strongly against this application and is not an appropriate use of the power given to the Tribunal under section 116. Accordingly, Tournament Inn has not established any basis upon which I should exercise my discretion to reconsider the original decision.

ORDER

22. Pursuant to section 116 of the *Act*, this application for reconsideration is dismissed.

David B. Stevenson
Member
Employment Standards Tribunal