Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Onison (Canada) Corporation
("Onison")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2016A/32

DATE OF DECISION: March 22, 2016

DECISION

SUBMISSIONS

Sophia Nourozi on behalf of Onison (Canada) Corporation

INTRODUCTION & BACKGROUND FACTS

1. This is an application by Onison (Canada) Corporation ("Onison") to have an appeal decision reconsidered. The application is made pursuant to section 116 of the *Employment Standards Act* (the "*Act*") and it concerns appeal decision BC EST # D009/16 issued by Tribunal Member Roberts on January 13, 2016 (the "Appeal Decision").

2. By way of the Appeal Decision, Member Roberts confirmed a Determination issued against Onison on October 22, 2015, pursuant to which it was ordered to pay its former employee, Lorenzo Aguilar ("Mr. Aguilar"), the sum of $6,079.39 on account of unpaid wages and section 88 interest. This latter award predominantly consisted of regular wages ($5,013.85 calculated at the applicable minimum wage rate) but also included some overtime pay, vacation pay and statutory holiday pay. Further, and also by way of the Determination, Onison was assessed $1,000 on account of two separate $500 monetary penalties (see section 98 of the *Act*) based on its contraventions of sections 17 and 18 of the *Act*. Thus, the total amount of the Determination was $7,079.39. The Determination was issued following an oral complaint hearing conducted before a delegate of the Director of Employment Standards (the "delegate") on June 1, 2015.

3. Onison appealed the Determination on the sole ground that the delegate failed to observe the principles of natural justice in making the Determination (see subsection 112(1)(b) of the *Act*). However, Tribunal Member Roberts also turned her mind to whether Onison's appeal submissions raised a meritorious "error of law" argument (see subsection 112(1)(a) of the *Act*). Tribunal Member Roberts found that Onison's appeal arguments were "entirely without merit" and, accordingly, dismissed the appeal and confirmed the Determination (see Appeal Decision, paras. 34 – 39):

> Although Onison alleges a failure to comply with principles of natural justice as the ground of appeal, the appeal submissions are, in essence, an assertion that the delegate's conclusion is wrong.
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> The Tribunal recognizes that parties without legal training often do not appreciate what natural justice means. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. Natural justice does not mean that the delegate accepts one party's notion of "fairness."
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> I am satisfied that Onison had a fair hearing. There is no suggestion that Onison did not have full opportunity to present its case and to respond to the evidence presented by Mr. Aguilar. I find no merit to this ground of appeal.
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> I understand Onison's argument to be that the Determination is wrong and that it was deceived in some way by Mr. Aguilar. Having reviewed the Determination, the submissions and the record, I find the appeal submissions to consist of nothing more than a repetition of the position Onison advanced, or ought to have advanced, before the delegate.
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> Although Onison has not suggested that the delegate erred in law, I would find no basis to arrive at such a conclusion on the evidence in any event. In my view, the delegate properly considered the evidence and arguments before him and concluded that Mr. Aguilar was entitled to wages. I find his conclusions to be well-founded and have no basis to interfere with them.

> In my view, Onison's arguments are entirely without merit. The appeal is dismissed.

4. Having unsuccessfully appealed the Determination, Onison then applied for reconsideration of the Appeal Decision. Onison's reconsideration application was filed on March 3, 2016. An application for reconsideration must be filed within the following subsection 116(2.1) time limit: "The application may not be made more than 30 days after the date of the order or decision." Accordingly, this application was filed outside the statutory time limit. However, subsection 109(1)(b) of the *Act* enables the Tribunal to extend this statutory time limit: "In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following: ...(b) extend the time period for requesting an appeal or applying for reconsideration even though the period has expired".

5. Although Onison did not did seek an extension of the application time period on its Reconsideration Application Form (Form 2; section 6 of the form), it did provide the following explanation for its late filing in a 1-paragraph note appended to its Form 2:

> Onison (Canada) Corporation did not receive any paperwork or email of any sort in terms of the Tribunal decision. From my understanding, the paperwork was sent via regular mail with no registration or signature request. I recently contacted the Tribunal office to inquire in regards [*sic*] to a bailiff that was at the business property. The representative did state that the decision was sent via email and mail, which was never originally received. She did, at that time, re-send the documents to me directly via email and mail. The email attachments were successfully received. I am, at first notice, appealing the decision based on concrete supportive documents.

THE ISSUES RAISED BY THIS APPLICATION

6. The first issue I must address is whether or not to extend the time period for filing this reconsideration application. Second, and predicated on my decision with respect to the application to extend the reconsideration application period, I must consider whether this application passes the first stage of the two-stage *Milan Holdings* test; *i.e.*, does it raise a presumptively meritorious argument (see *Director of Employment Standards (Milan Holdings Inc.)*, BC EST # D313/98). If the application is not otherwise summarily dismissed based on one or both of the first two considerations, the respondent parties will be notified and requested to file submissions regarding the merits of the application (and Onison will be given a right of reply) following which I will issue written reasons with respect to the merits of the application.

7. I now turn to Onison's application to extend the reconsideration application period.

APPLICATION TO EXTEND THE RECONSIDERATION PERIOD

8. Although the Tribunal's *Rules of Practice and Procedure* have long provided for a 30-day time limit regarding applications for reconsideration (see Rule 27), the incorporation of this time limit into the *Act* itself was accomplished via section 59 the *Administrative Tribunals Statutes Amendment Act, 2015*, S.B.C. 2015, c. 10. The Tribunal's authority to extend the 30-day reconsideration application period is set out in section 57 of the same statute. These latter two provisions came into force when the amendment statute was given Royal Assent on May 14, 2015.

9. In *Niemisto* (BC EST # D099/96), the Tribunal identified several criteria that should be evaluated when considering an application to extend the appeal period (similarly, a 30-day period when a determination is served by registered mail – see subsection 112(3)(a) of the *Act*) including whether: i) there is a reasonable and credible explanation for failing to appeal within the statutory time limit; ii) there has been a genuine and on-going *bona fide* intention to appeal; iii) the respondent parties were made aware of this intention; iv) one or

more respondent parties will be unduly prejudiced by extending the appeal period; and v) there is a strong *prima facie* case in favour of the appellant.

10. In *Serendipity Winery Ltd.*, BC EST # RD108/15, Tribunal Member Stevenson made the following observations with respect to the application of these criteria in an application to extend the time to apply for reconsideration (para. 21):

> I see no reason to deviate from the criteria listed above when considering requests for an extension of the time period for filing reconsideration applications. However, the question of whether there is a strong *prima facie* case must take into account that the Tribunal's discretionary authority to reconsider under section 116 of the *Act* is exercised with restraint – see *The Director of Employment Standards (Re Giovanni (John) and Carment Valaroso)*, BC EST # RD046/01 – and must remain consistent with the approach taken by the Tribunal in deciding whether reconsideration is warranted.

(See also *Viewpoint Developments Ltd.*, BC EST # RD021/16).

11. I wholly endorse Member Stevenson's comments as reflecting the proper adjudicative approach when dealing with an application to extend the reconsideration application period. It should be remembered that an application for reconsideration constitutes an application to have the original section 74 complaint reviewed for a third time (the original complaint determination, the appeal and then the reconsideration), and thus the Tribunal must be careful to strike the appropriate balance between ensuring that a correct result is ultimately obtained against the statutory purposes of ensuring that matters proceed fairly and expeditiously (see subsections 2(b) and (d) of the *Act*). Reconsideration applications only proceed to the second stage of the *Milan Holdings* test if there is a very strong argument that the appeal decision should be set aside. In my view, *late* section 116 applications should be carefully scrutinized to ensure that there is a very strong and compelling reason for the applicant's failure to file a timely application.

12. In this case, and as noted above, the Appeal Decision was issued on January 13, 2016, but Onison's reconsideration application was not filed until March 3, 2016 – after the expiry of 30-day period within which the reconsideration application was required to be filed. Onison apparently says that it did not receive the original communications from the Tribunal enclosing the Appeal Decision (it was sent out by both regular mail and e-mail on January 13, 2016), and further states that it filed its reconsideration application "at first notice".

13. I am unable to accept Onison's explanation for its late filing to be credible or persuasive. The record before me shows that the Appeal Decision was mailed to the very same address that all documents to Onison were mailed throughout the appeal process and, indeed, it is the same address that Onison recorded on its Reconsideration Form. Further, the Tribunal's internal records indicate that the e-mail (with attached Appeal Decision) sent to Onison c/o the same e-mail address that it used throughout the entire appeal process (and that is recorded on its Reconsideration Form) was successfully delivered on January 13, 2016. Onison has not produced any evidence (for example, server records) that affirmatively shows that the Tribunal's January 13 e-mail communication was never received. It is an easy thing to say "I never received your letter or e-mail" but, especially when this statement can be confirmed or refuted by documentary records, I am of the view that something more than a mere statement of non-receipt is called for when seeking a dispensation from the Tribunal.

14. The Tribunal's internal records indicate that Ms. Nourozi (an Onison director and the person who has represented Onison throughout this entire matter) spoke with the Tribunal's Appeals Manager, by telephone, on February 16, 2016, after apparently having received the Appeal Decision. At this time, she was given information about the reconsideration process and the need to apply for an extension of the reconsideration

application period. Ms. Nourozi contacted the Tribunal by telephone, once again, on March 1, 2016, stating that she had just been in conversation with a bailiff who was effecting enforcement proceedings with respect to the Determination (as confirmed by the Appeal Decision). Ms. Nourozi was again provided with information about the reconsideration process. Rather than applying for reconsideration "at first notice" (as Onison asserts), Onison's reconsideration application was not filed until March 3, 2016. I am satisfied that Onison was aware of the Appeal Decision by no later than February 16, 2016 (and likely earlier), and it has wholly failed to explain why there was a further delay of about 2 ½ weeks before the application was filed. Indeed, Onison has endevoured to obfuscate the fact that it first learned about the Appeal Decision by no later than February 16, 2016. I should also add, simply for the sake of completeness, that I do not accept that Onison did not learn about the Appeal Decision until February 16, 2016. Given the records before me, I am satisfied that the Appeal Decision was actually delivered to Onison by e-mail on January 13, 2016.

15. In light of the foregoing facts, coupled with my view that this application is entirely without merit (discussed in greater detail, below), I am not prepared to extend the reconsideration period and, on that basis alone, this application must be dismissed.

DOES THE APPLICATION PASS THE FIRST STAGE OF *MILAN HOLDINGS* TEST?

16. Even if I were persuaded that the reconsideration period should be extended, I am not satisfied that this application passes the first stage of the *Milan Holdings* test. At the first stage, the Tribunal will consider whether the application raises a serious issue that justifies a more comprehensive review of the application on its merits. For example, does the application suggest that there was a serious natural justice failing; that the original appeal decision is tainted by a critical legal error; that there is significant (and admissible) new evidence; or that reconsideration is necessary to address conflicting Tribunal jurisprudence.

17. In this case, Onison raises an entirely new argument and says that it is a complete answer to its liability under the Determination, as confirmed by the Appeal Decision. Specifically, Onison says that "Lorenzo Aguilar is an engineer … [and] therefore … is not governed by the Employment Standards Act". Onison relies on subsection 31(f) of the *Employment Standards Regulation*: "The Act does not apply to an employee who is...(f) a professional engineer, as defined in the *Engineers and Geoscientists Act*, or a person who is enrolled as an engineer in training under the bylaws of the council of the Association of Professional Engineers and Geoscientists of the Province of British Columbia".

18. The complainant, Mr. Aguilar, worked for Onison, a software development company, under a limited term "internship" commencing in mid-June 2014. As recorded in the Appeal Decision (paras. 10 and 11): "The parties entered into a written 'internship agreement' which provided that Mr. Aguilar would work as an 'Intern Software Developer' from June 16, 2014, until September 16, 2014. During his employment with Onison, Mr. Aguilar worked on a project designing mechanical parts under the supervision of two engineers, for which he was paid $100 per week." The relevant facts continue as follows (Appeal Decision, paras. 13 – 16):

> On or about September 8, 2014, the parties entered into an employment agreement which provided that Mr. Aguilar was to be paid $70,000 per year commencing November 1, 2014. On or about September 15, 2014, the parties also entered into an employment agreement in which Mr. Aguilar was to work as an Energy Research Officer on a full-time basis from November 1, 2014, until November 1, 2016 at a rate of $35 per hour.
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> Mr. Aguilar received a work permit valid until November 1, 2016, to work as a mechanical engineer with Onison.

> On November 17, 2014, Onison notified Mr. Aguilar that, since it had lost his engineering supervisors, it was unable to offer him employment under the terms of the original agreement. However, given that Mr. Aguilar's visa restricted Mr. Aguilar's employment to Onison, Onison indicated that it would extend his internship until it replaced the supervisors. Onison stated that it would continue to pay Mr. Aguilar $250 per week commencing November 15, 2014.
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> On November 28, 2014, Mr. Aguilar quit his employment with Onison. Onison paid Mr. Aguilar $360 for his final three weeks of work.

19. The delegate found that there was no firm agreement between the parties regarding the actual wage rate to be paid and that the reference to a $70,000 salary was not an actual agreed wage rate but rather a subterfuge to assist with Mr. Aguilar's work permit application. The delegate further determined that there was no "meeting of the minds" regarding a lesser $40,000 salary or any other salary figure. Thus, the delegate based his unpaid wage award on the applicable minimum wage.

20. With respect to the actual work undertaken by Mr. Aguilar, the delegate held (at page R6 of his reasons):

> Onison claimed that Mr. Aguilar was training to obtain his Canadian engineering licence and argued that training to obtain a permit, licence or ticket is not considered "work". Although time an employee spends to receive training from third parties which results in a transferable permit, licence or ticket (e.g. driver's licence or first aid certificate) may not, in specific circumstances, be considered "work", that is not the case here. Onison is not claiming that it is being asked to pay Mr. Aguilar for training he received from a third party. *Onison claimed that Mr. Aguilar was training with Onison in order to obtain his Canadian engineering licence.* Mr. Aguilar specifically denied this allegation. *Onison provided no evidence of the requirements of such a licence or how Mr. Aguilar's work with Onison would contribute to meeting those requirements.* In any event, this argument does not assist Onison as *there is no evidence that Mr. Aguilar was an engineer in training under the bylaws of the council of the Association of Professional Engineers and Geoscientists, which would exclude him from the Act per section 31(f) of the Regulation.* Accordingly, Onison's argument is without merit. (my *italics*).

21. In its appeal submissions Onison made the following assertions and arguments:

> It is evident from the hearing that Mr. Aguilar joined Onison for different reasons other than for his job qualifications. Onison had been seeking for very specialized mechanical engineers to work on an intensive project and successfully hired two specialists with doctoral degrees. Both of those individuals hold years of university studies and extensive experience in their fields. *Mr. Aguilar not only had an unrelated bachelor's degree of three years in robotics from Mexico, but also no experience in engineering whatsoever.* Also, he did not obtain an engineering position after leaving Onison. Obviously, *he neither has the qualifications nor the necessary engineering licenses.* He was in a dire need of a practicum oppurtinity [*sic*] to complete his English school but was unable to obtain one elsewhere.
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> Evidently, Mr. Aguilar was given "a chance of his lifetime" not only to complete his English program at ILSC but also to participate in a research project whereof *he could only learn as his contribution would not be adequate in any form or way. His education and experience marked Mr. Aguilar solely as student in engineering.* [*sic*]
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> *...Mr. Aguilar did not hold an engineering licence to practice engineering in Canada.*
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> (my *italics*)

22. As is clear from Onison's submissions on appeal, it maintained that it did not hire Mr. Aguilar to work, and that he was not in any qualified to act as, a professional engineer. It is uncontroverted that Mr. Aguilar never held a "professional engineer" licence, registration or certificate to practice in British Columbia. Thus, in the language of subsection 31(f) of the *Regulation*, Mr. Aguilar was not a "professional engineer". Further, there is absolutely no evidence that Mr. Aguilar was ever "enrolled as an engineer in training under the bylaws of the council of the Association of Professional Engineers and Geoscientists of the Province of British Columbia".

23. With respect to the latter, the governing regulatory body, The Association of Professional Engineers and Geoscientists of the Province of British Columbia, requires a formal application, along with an application fee, from a person holding a university degree earned in 4-year full-time bachelors program in applied science, engineering, geoscience, science or technology. In addition, the applicant must submit evidence of citizenship or permanent resident status as well as several other documents and must also satisfy a "good character" requirement. It is only after the Association approves the application that the individual becomes an "engineer in training" for purposes of the subsection 31(f) regulatory exclusion. There is no evidence before me that Mr. Aguilar ever applied for such status, let alone evidence that his application was approved and he was enrolled as an "engineer in training" with the Association.

24. I should add that Onison's present position that Mr. Aguilar "is an engineer" is a complete reversal from its position on appeal and, apart from that major failing, as I previously noted, is not supported by *any evidence*. Onison's position stands as a bald assertion totally devoid of any factual underpinning. Finally, this is the sort of argument that should have been made before the delegate or, at the very latest, on appeal; it is simply too late to raise it – without any corroborating evidence – for the very first time on a section 116 application. This application, in my view, is entirely without merit and does not pass the first stage of the *Milan Holdings* test given that it does not raise an issue that is, even on a *prima facie* basis, meritorious.

25. To summarize, Onison's application to extend the reconsideration period is refused and, in any event, the application should be summarily dismissed since it is entirely devoid of merit.

ORDER

26. Onison's application under subsection 109(1)(b) of the *Act* to extend the time period for applying for reconsideration is refused. In accordance with subsection 116(1)(b) of the *Act*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal