

An Application for Reconsideration

- by -

Peter Turgeon
("Turgeon")

- 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

ADJUDICATOR: David B. Stevenson

FILE No.: 2002/590

DATE OF DECISION: February 18, 2003

DECISION

OVERVIEW

Peter Turgeon (“Turgeon”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of a decision of the Tribunal, BC EST #D505/02, dated November 13, 2002 (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 12, 2002 and which concluded Turgeon’s former employer, Ikor Enterprises Ltd. (“Ikor”), had contravened Sections 58 and 63 of the *Act* in respect of the termination of his employment and ordered Ikor to cease contravening, and to comply with, the *Act* and to pay Turgeon an amount of \$670.751.

Turgeon seeks a reconsideration of the original decision on the basis that he feels his complaint against another former employer, Nakor Lumber Products Inc. (“Nakor”), was not properly addressed, either in the Determination issued against Ikor or in the original decision.

ISSUE

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 issues raised in this application is whether the decision to decide the appeal on written submissions only was a failure to comply with principles of natural justice.

ANALYSIS OF THRESHOLD ISSUE

The legislature has conferred an express reconsideration power on the Tribunal in Section 116 which provides:

- 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) cancel or vary the order or decision or refer the matter back to the original 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.*

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 be made of the merits of the Adjudicator’s decision. 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.

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

I commence my analysis by noting that the appeal of the Determination was framed around the following statement from Turgeon's appeal submission:

I would like to appeal the Determination because it does not Account [sic] for all the time that I had worked for the original owner "Istvan Kordelyos".

Turgeon had been employed with Nakor, which was owned by Mr Kordelyos and his wife, from July 5, 1993 to October 6, 2000. Upon his termination from Nakor, he had filed a complaint with the Director. That complaint was received and reviewed by a delegate of the Director in November, 2000 and, based on events which transpired and were recorded in a letter from the delegate to Turgeon dated November 30, 2000, the file was closed. The letter stated:

This will confirm our telephone conversation, yesterday, regarding the Employment Standards complaint that you filed against Nakor Lumber Products Inc.

Since you advised that you have accepted an offer of employment from Istvan Kordelyos, owner of Nakor, to work at another business and that you do not wish to pursue this complaint any longer, I have closed the file and will take no further action on your behalf.

If you have any questions regarding this matter, please call me at . . .

The 'other business' was Ikor.

The objective of the appeal was to have the ‘severance pay’ Turgeon felt he was owed from his employment with Nakor included in the Determination and ordered to be paid either by Ikor or by Mr. Kordelyos. On the appeal form, in response to the question “what do you want the Tribunal to do about the Determination?”, Turgeon put:

get Istvan Kordelyos to pay me my 7 years severance pay from Nakor Lumber Products + Interest
+ holiday pay

The appeal suggested a possible connection between Nakor and Ikor through the person of Mr. Kordelyos. That turned out not to be the case.

The original decision considered whether the facts supported the application of either Section 95 or 97 of the *Act* to make Ikor liable for length of service compensation based on Turgeon’s term of employment with both Nakor and Ikor, but found it did not. As a result, the original decision confirmed the Determination, which found Ikor liable for length of service compensation in an amount equivalent to one weeks’ wages. There is nothing in this application that suggests the original decision was wrong *vis.* Ikor.

Rather, the focus of this application is that the Tribunal should resurrect and adjudicate the complaint against Nakor and find that company, or Mr. Kordelyos, liable for seven weeks ‘severance pay’. In the final paragraph of the request submission, the representative for Turgeon says:

I believe I have given sufficient cause and reason not only to grant a Reconsideration of Appeal, but for you to launch an investigation into the dealings of Kordelyos, Nakor, and Kord Enterprises. It is well within your power to pursue this matter, without regard to time constraints. Mr. Turgeon would very much appreciate the Employment Standards Branch and its Tribunal to finally address the issue of his severance pay owing from Nakor (NLP) without misdirecting its efforts toward Ikor (IEL).

In this application, and possibly in the appeal, Turgeon is operating under a serious misapprehension about the scope and nature of the process that was initiated by him following the termination of his employment from Ikor. The process has been about determining the liability of Ikor under the *Act*. It is not about deciding the liability of either Nakor or Mr. Kordelyos for length of service compensation arising from a separate employment relationship nor is it about whether the earlier complaint, made in the context of the termination of Turgeon’s employment from Nakor, should be re-opened and investigated. Contrary to the belief expressed in the above excerpt, the Tribunal does not have the authority, in the context of the proceedings before it, to launch an investigation on the complaint made by Turgeon against Nakor.

There is nothing in this application that warrants reconsideration and the Tribunal will not exercise its discretion under Section 116 of the *Act*.

The application is denied.

ORDER

Pursuant to Section 116 of the *Act*, I order the original decision, BC EST #D505/02, dated November 13, 2002, be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal