

An Application for Reconsideration

- by -

Daniel Alberto de Buen
("de Buen")

- 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.: 2013A/49

DATE OF DECISION: August 13, 2013

10. In this application, de Buen seeks to have the Tribunal vary the referral back decision to conform to a set of facts that he has asserted, but not established, through the complaint process. More particularly, de Buen wishes the Tribunal to find he was employed by Ecodrive for the period from June 9, 2009, until November 9, 2009, without being paid.

ISSUE

11. 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 decision made under section 112 of the *Act*. If satisfied this case warrants reconsideration, the issue raised is whether the Tribunal should grant the request to vary the referral back decision.

ARGUMENT

12. de Buen argues the Tribunal Member erred in the referral back decision by “accepting the Delegate’s flawed assessment of the ‘facts’, taking them as a ‘logical explanation’ by barring incriminating evidence provided by the employer”. The submission of de Buen criticizes the Director for accepting the explanation of Ecodrive that some of the assertions made in the September 10, 2010, e-mail were “the result of human error” and for then accepting that his employment period with Ecodrive was November 10, 2009, to April 30, 2010, rather than June 9, 2009, to April 30, 2010, as he has claimed.

ANALYSIS

13. 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 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.*

14. As 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 Ltd.*, 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 a 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

favour 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.

15. 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 decision for which reconsideration is being sought. The focus of a reconsideration application is, generally, the correctness of that decision.
16. 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.
17. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively re-visit the decision being challenged and come to a different conclusion.
18. 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.
19. Having reviewed the referral back decision, the material in the file and the submission of de Buen on this reconsideration request, I am not persuaded this matter warrants reconsideration.
20. In this application, de Buen has done nothing more than challenge findings of fact made by the Director in the referral back report and the acceptance of those findings by the Tribunal Member in the referral back decision.
21. Having reviewed the referral back report and de Buen's challenge to it, I agree completely with, and find no error in, the comments and findings made in the referral back decision: that there was a burden on de Buen to show the referral back report was incorrect, which he failed to meet, that the findings made in the report were well grounded in the evidence and a reasonable assessment by the Director of the reliability of that evidence and that his arguments on the referral back report substantially echoed arguments made in the initial appeal which were rejected in the original decision.
22. In other words, nothing in this application shows any error in the referral back decision.
23. Having failed to demonstrate the referral back decision was wrong in any aspect, this application does not meet the threshold test and, as a result, does not warrant reconsideration.
24. The application is denied.

ORDER

25. Pursuant to section 116 of the *Act*, the referral back decision, BC EST # D052/13, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal