An Application for Reconsideration

- by -

Deepthi Angela A. Perera
("Ms. Perera")

- 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/60

DATE OF DECISION: September 10, 2013

DECISION

SUBMISSIONS

Deepthi Angela A. Perera — on her own behalf

OVERVIEW

1. Deepthi Angela A. Perera ("Ms. Perera") seeks reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision, BC EST # D125/12, made by the Tribunal on November 22, 2012 (amended under section 53 of the *Administrative Tribunals Act* and Rules 14(4) and 14(5) of the Tribunal's *Rules of Practice and Procedure* (the *"Rules"*) in decision BC EST # D125a/12 on December 14, 2012). I shall refer to both decisions together as the "original decision".

2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on August 31, 2012.

3. The Determination was made by the Director on a complaint filed by Ms. Perera, who alleged her former employer, Corelogic MLS Solutions Canada, ULC ("Corelogic"), had contravened the *Act* by failing to pay wages for hours worked in excess of forty hours in a week, for requiring her to work hours detrimental to her health and safety and failing to pay compensation for length of service upon her termination. The Determination found that, while Corelogic had contravened Part 3, section 28 of the *Act* – a contravention that warranted the imposition of an administrative penalty under section 29(1) of the *Employment Standards Regulation* in the amount of $500.00 – no other contraventions were found to have been committed by Corelogic, no wages were found to be owing to Ms. Perera and no further action would be taken on her complaint.

4. An appeal was filed by Ms. Perera seeking to have the Tribunal vary the Determination to pay her the additional hours she had claimed and to compensate her for the "effects" the "hazardous" extra hours had on her "heart health".

5. The Tribunal Member of the original decision dismissed the appeal in BC EST # D125/12 under section 114(1)(f) of the *Act* and confirmed the Determination.

6. On November 23, 2012, Ms. Perera filed an application under Rule 14(4)(b) of the Tribunal's *Rules*, asserting the Tribunal Member making the original decision had failed to consider a document, Corelogic's employee policy, that had been submitted by Ms. Perera during the appeal process. The application was placed before the Tribunal Member of the original decision, who acknowledged that, while he reviewed the document when considering the appeal, he had, inadvertently, not specifically addressed it or made any specific disposition on it in the appeal decision. As a result of this inadvertent omission, he chose to amend the November 22, 2012, decision, using the authority of the Tribunal found in Rule 14 of the *Rules* and section 53 of the *Administrative Tribunals Act* (which is incorporated into the *Act* in section 103).

7. The Tribunal Member found the document did not satisfy the criteria for admissibility as "new evidence" because, in his view it could, with the reasonable exercise of diligence, have been presented to the Director during the complaint process and was not of such a "high potential probative value" that it could have led to a different conclusion than was made in the Determination.

8. On December 17, 2012, Ms. Perera requested the Tribunal, relying once again on Rule 14, to have the original decision "amended". In her correspondence, she submitted the Tribunal Member of the original decision had erred by not considering Corelogic's employee policy as "new evidence" and by failing to consider what she contended were relevant parts of the employee policy. She also returned to her challenge of the Determination, alleging the Director had ignored her closing argument in making the Determination.

9. The Tribunal acknowledged receipt of the above correspondence on the same day as it was received.

10. On January 7 and January 9, 2013, Ms. Perera asked for an update on her December 17, 2012, submission.

11. On January 9, 2013, the Tribunal, through Marcella Gordon ("Ms. Gordon"), the Registrar of the Tribunal, wrote to Ms. Perera, noting her December 17, 2012, request appeared to seek a different outcome rather than an amendment of the original decision. The correspondence outlined for Ms. Perera the requirements for filing an application for reconsideration.

12. On January 9, 2013, Ms. Perera e-mailed the Tribunal, expressing her view that her December 17, 2012, correspondence was merely seeking an amendment to correct errors/omissions in the original decision.

13. On January 10, 2013, the Tribunal notified Ms. Perera that the request contained in her December 17, 2012, correspondence did not fall within the scope of Rule 14(4)(b) of the *Rules* and that no further action would be taken on that request. Ms. Perera was referred again to the reconsideration requirements of the *Act*.

14. On January 11, 2013, Ms. Perera responded to the January 10, 2013, communication from the Tribunal, "standing by" her December 17, 2012, application to amend and reiterating the arguments she made in that correspondence.

15. On January 31, 2013, Ms. Perera communicated with the Tribunal, asking what steps were being taken by the Tribunal to correct the errors/omissions in the original decision. She asked for timely clarification, indicating she may wish to take the matter to another body to address the errors/irregularities in the process.

16. On January 31, 2013, the Tribunal reiterated the contents of the January 10, 2013, correspondence and referred Ms. Perera once more to the reconsideration requirements of the *Act*.

17. On February 8, 2013, the Tribunal received an e-mail from Ms. Perera in which she advised the Tribunal that she had spoken with the Court of Appeal about her case, "as it has errors/omissions which have not been corrected and has been notified to the Tribunal within the applicable timeframe." She asked the Tribunal whether it was the Supreme Court or the Court of Appeal in which she had to file. Ms. Perera also indicated in the e-mail that she did not want a reconsideration done

18. On February 12, 2013, Ms. Gordon responded, indicating the Tribunal could not give Ms. Perera legal advice and referred her to the Tribunal's January 9, 10, and 31, 2013, correspondence that indicated the proper recourse for seeking a review of a Tribunal decision is an application for reconsideration under section 116 of the *Act*.

19. On February 12, 2013, Ms. Perera sent another e-mail to the Tribunal, repeating her request for the Tribunal to tell her whether she had to file papers with the Supreme Court or the Court of Appeal.

20. In correspondence dated February 14, 2013, Ms. Gordon restated that the Tribunal could not provide her with legal advice, specifically, that the Tribunal could not provide advice concerning which Court she had to file papers with.

21. On February 25, 2013, Ms. Perera communicated with the Tribunal. The correspondence noted that a different lawyer within the law firm representing Corelogic during the complaint process was copied in the e-mail from the Tribunal attaching the February 14, 2013, letter. She indicated she was never copied with any correspondence indicating the change and expressed her view that the Tribunal was obligated to get submissions on all of her "numerous complaints regarding the errors" from the lawyer representing Corelogic during the complaint process. This correspondence contains the first reference to the two witnesses presented by Corelogic at the complaint hearing to give evidence on their behalf as giving "false evidence" leading the Director to make a "false decision". Ms. Perera requested the Tribunal send her copies of all correspondence with Corelogic and its lawyer that pertain to her.

22. On February 26, 2013, the Tribunal responded to above correspondence, indicating the Tribunal was notified of the change of lawyer on February 12, 2013, updated its file accordingly and, as that communication dealt solely with contact information concerning one of the parties, was not required to be disclosed to the other parties. The Tribunal also outlined for Ms. Perera the correspondence that was and was not disclosed to the other parties and that no submissions had been received from Corelogic or its lawyers on Tribunal File Number 2012A/108.

23. On February 27, 2013, Ms. Perera delivered an e-mail to the Tribunal in which she summarized, from her perspective, the steps she had taken to have the errors/omissions in original decision corrected and the steps she intended to take if the matter was not resolved. In the correspondence she proposed terms for settling her employment standards complaint and gave permission for the Tribunal to forward the proposal to Corelogic.

24. On March 1, 2013, the Tribunal informed Ms. Perera of earlier correspondence notifying her that the file was closed and that her February 27, 2013, correspondence would not be forwarded to Corelogic.

25. On June 11, 2013, the Tribunal received a request from Ms. Perera to be provided with copies of the transcripts covering two specific aspects of the Director's complaint hearing and a pre-hearing conference that took place on June 14, 2012.

26. On the same day, the Tribunal responded, noting Ms. Perera had been provided with a copy of the section 112(5) "record" when she filed her appeal of the Determination and it included the "will say" statement of a witness she referred to in her request. The Tribunal also advised Ms. Perera that her request related to aspects of the complaint process that occurred before the matter was brought to the Tribunal and, as such, related to matters for which the Tribunal had no records. It was suggested Ms. Perera contact the Employment Standards Branch with her request.

27. On August 6, 2013, the Tribunal received an e-mail from Ms. Perera. The e-mail contained a submission and attached documents. The subject of the submission is "Perjury - Tribunal File #: 2012A/108". The submission alleges two individuals who gave evidence on behalf of Corelogic at the complaint hearing and Corelogic's legal counsel committed perjury. The attachments included Corelogic's employee policy, which is the document submitted by Ms. Perera in her appeal and analyzed in the original decision in the context of "new evidence".

28. On the same day, the Tribunal advised Ms. Perera it would be taking no action regarding the e-mail, referring again to the Tribunal's correspondence of January 9, 10, and 31, 2013, informing her that the proper recourse for seeking a review of a decision of the Tribunal was to request reconsideration under section 116 of the *Act*.

29. On August 7, 2013, the Tribunal received an e-mail from Ms. Perera. In that communication she noted the January 9, 10, and 31, 2013, communications from the Tribunal were with regard to her complaint about errors/omissions in the original decision, and not with reference to the perjury she reported in the e-mail received by the Tribunal August 6, 2013. She asserted that, as perjury is a serious offence, the Tribunal had a responsibility to address it. This e-mail was supplemented by another, received August 9, 2013, in which Ms. Perera suggested the Tribunal ought to have charged Corelogic with committing perjury and promptly corrected the situation when it was found their employee policy had not been provided to the Director although it had been demanded. She then asserted it was clear that she has "won this matter" and suggested that result has only been avoided because the Tribunal "conveniently" forgot to mention the employee policy document in the appeal decision and then, in the amended decision, would not consider it as they should have.

30. On August 9, 2013, the Tribunal responded to the August 7 and 9, 2013, e-mails.

31. On August 19, 2013, Ms. Perera filed the application for reconsideration being considered in this decision.

32. In this application, Ms. Perera alleges two persons who gave evidence on behalf of Corelogic at the Director's complaint hearing and legal counsel for Corelogic committed perjury and requests the Tribunal address that perjury and vary the original decision to "correct" the error created by the perjury. Alternatively, Ms. Perera asks that the matter be referred back to the Tribunal Member of the original decision for correction.

33. This application for reconsideration is made almost nine months from the date of the appeal decision and almost eight months from the date of the amendment.

ISSUE

34. 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 vary the original decision or refer the matter back, either to the Tribunal Member of the original decision or to a new panel.

ARGUMENT

35. Ms. Perera submits the reason for this application is to report perjury committed by Corelogic at the Director's complaint hearing and to have the Tribunal correct the error caused by the perjury. It is her contention that the perjury committed at the complaint hearing "proves her overtime and the requirement made by Corelogic for [her] to work from 8:30 am – 5:30 pm in addition to putting in extra morning hours". She says both the Determination and the original decision were affected by the perjury committed.

36. Ms. Perera also takes issue with the finding by the Director that, "the only evidence [she] has to establish her case regarding additional hours worked is her oral testimony" and the decision of the Director to give her estimation of extra hours worked little weight. The Director had found the estimations Ms. Perera gave of the number of extra hours worked were not supported by any other evidence and, "lack a sufficient amount of detail to convince [him] the evidence is reliable".

37. In response to the delay in filing this application, Ms. Perera says:

> "The Reconsideration application is made to report perjury committed by Corelogic which took place at the Employment Standards and to get the decision changed as it proves my overtime with more weight. Within the first 30 days of the original decision and beyond, the decision amendment process was in place. I have complained many times about the errors and omissions in the decision thereafter to the Tribunal and have been trying to get the decision corrected for omissions/errors made at the Employment Standards Branch & Appeal stage prior to Reconsidering. The decision was not corrected through the Tribunal's amendment process. I'm within the statute of limitations for reporting perjury at the Reconsideration process."

38. Ms. Perera submits the matter should either be referred back and decided by the Tribunal Member who made the original decision or, alternatively, to another panel.

ANALYSIS

39. Section 116 of the *Act* 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.

40. 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 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 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 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" is not 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.

41. 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.

42. 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.

43. 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.

44. 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.

45. The first matter that must be addressed in respect of this application is its timeliness. The Tribunal's approach to the timeliness of applications for reconsideration has been extensively examined in three decisions: *The Director of Employment Standards (Re Unisource Canada Inc.)*, BC EST # D122/98 (Reconsideration of BC EST # D172/97), *The Director of Employment Standards (Re MacMillan Bloedel Limited*, BC EST # D279/00 (Reconsideration of BC EST # D214/99) and *The Director of Employment Standards (Re Giovanno (John) and Carmen Valoroso)*, *supra*.

46. In *MacMillan Bloedel*, the Tribunal affirmed what it said in *Unisource*, at pages 5-7, that while there is no time limit provided in the *Act* with respect to applications for reconsideration, the Tribunal has the power to determine its own procedure, including the power to make and enforce rules governing the timeliness of applications for reconsideration.

47. The Tribunal has established rules for reconsideration, see Rule 25, which instructs potential applicants for reconsideration, in Rule 25(2), that the time limits for such applications is 30 days after the date of the decision for which reconsideration is being sought.

48. In *MacMillan Bloedel*, the Tribunal recognized that the time limit for filing for reconsideration may be extended, but once again affirmed the view expressed in *Unisource*, that any application must be filed within a "reasonable time" and that what is a "reasonable time" will depend on the circumstances, including the length of the delay, the reasons for the delay, the conduct of the applicant and, most importantly, the purposes of the *Act*, as expressed in section 2 and through sections 110 and 115.

49. In *Valorosa*, the Tribunal, at page 10, summarized the principles that operate in the context of a delay in filing for reconsideration:

a. The Tribunal will properly consider delay in deciding to exercise the reconsideration discretion;

b. Where delay is significant, an applicant should offer an explanation for the delay. A delay which is not explained will mitigate against reconsideration

c. Delay combined with demonstrated prejudice to a party will weigh even stronger against reconsideration. In some cases, the Tribunal may presume prejudice based on a lengthy unexplained delay alone;

d. Even in cases of unreasonable delay, the Tribunal ought to consider the merits, and retains the discretion to entertain and grant a reconsideration remedy where a clear and compelling case on the merits is made out.

50. With the above considerations and principles in mind, I shall address the delay in this case.

51. The delay in this case is unreasonably lengthy. Ms. Perera's explanation for the delay, viewed in the context of the January 9, 10, and 31, 2013, correspondence she received from the Tribunal and her February 8, 2013, e-mail, is disingenuous. This application has been filed more than seven months after the Tribunal first informed her that no action would be taken on her December 2012 "amendment" request and directed her to the reconsideration provisions of the *Act*.

52. The delay in this case mitigates strongly against reconsideration for reason of both the length of delay and an absence of reasonable explanation for the delay. I do not consider it necessary to reach any conclusion concerning prejudice.

53. The principles expressed in *Valoroso* indicate I ought to also consider the merits of the application to determine whether there is such a clear and compelling case that I should exercise my discretion to entertain and grant a reconsideration remedy. Accordingly, I will assess the case presented by Ms. Perera in this application.

54. There are, in substance, two aspects to Ms. Perera's application. The first is the perjury allegation. The second is what can only be described as an expression of disagreement with, and a challenge to, findings of fact made in the Determination.

55. I shall first consider the perjury allegation.

56. An allegation of perjury is, as Ms. Perera has indicated, a serious matter. Perjury is an indictable offence under the *Criminal Code of Canada*, potentially punishable by imprisonment. A conviction on a charge of perjury would require proof beyond a reasonable doubt.

57. The Tribunal, however, is not a court of criminal jurisdiction; it has no authority to prosecute or punish perjury. Notwithstanding, the Tribunal does have the authority to control its own processes and ensure no fraud or deception has been committed on the process (see *Director of Employment Standards (Re Rhandawa Farm Contractors Ltd.)*, BC EST # D475/98 (Reconsideration of BC EST # D037/98)).

58. I shall therefore address the merits of Ms. Perera's allegations on the basis that she is alleging a fraud or deceit on the process.

59. There is a heavy evidentiary burden on a party alleging the conduct of another party has, through fraud or deceit, undermined the integrity of the process. The burden is commensurate with the seriousness of such an accusation, which is not significantly lessened because it cannot be found to be a criminal offence. As stated by the Tribunal in *Insulpro Industries Inc. and Insulpro (Hub City) Ltd.*, BC EST #D405/98, at page 8:

> The evidence must point clearly to the conclusion that the process was tainted to such a degree that to allow the Determination to stand would be an affront to the fundamental principles of justice that

> underlie a reasonable person's sense of decency and fair play (see *R. v. Conway* [1989 1 S.C.R. 1659 at 1667).

60. Ms. Perera's allegations hang by the slimmest of threads. She grounds her accusation that one of the witnesses lied on her disagreement with the evidence that his position with Corelogic, which he performed at a different location than did of Ms. Perera, was the same as hers. She grounds her accusation against another witness on her opinion that his evidence was directly contradictory to parts of Corelogic's employee policy.

61. There are several problems with each of these accusations.

62. In respect of the accusations against the first witness, the basis for her allegations requires the Tribunal to accept assertions of fact that are not found in the section 112(5) "record" or the Determination. Ms. Perera has not provided any affidavit or statutory declaration to support her assertions. The factual basis for her argument is not otherwise confirmed by any objective evidence. The fact that her job title was different than that of the witness does not confirm their respective positions were not the same. Simply put, her arguments do not prove this witness lied at the complaint hearing. It is accordingly unnecessary to even consider whether the alleged lie impacted the Tribunal's appeal process.

63. In respect of the accusations made against the other witness, the same concerns arise. Ms. Perera's position relies substantially on a document that was not allowed to be introduced into the appeal as "new evidence." In any event, the Tribunal Member deciding the original decision found the document not to have such a "high potential probative value" that, even if accepted and believed, would have altered the outcome of the Determination. I accept, and agree, with the following analysis, found at page 4 of the amendment, of the evidentiary value of the employee policy:

> Having said this, I also want to point out that while the Policy may, arguably, be material and credible, it is not of such "high potential probative value , in the sense that, if believed, it could on its own or when considered with other evidence have led the Director to a different conclusion on the material issue". The material issue is whether Ms. Perera worked hours in excess of 40 per week. While Ms. Perera relies on the passage in the Policy that says "[t]he normal workday for regular full-time employees is from 8:30 a.m. until 5:30 p.m., eight work hours" to argue that the Policy "proves that [she has] worked over 40 hours in a week" and to challenge the evidence of the witnesses of Corelogic whose evidence the Delegate preferred on the subject, Ms. Perera fails to point out that the Policy also states that "[w]ork schedules may vary according to business and customer expectations." The Policy, in my view, does not, absent other supporting evidence before the Director at the time the Determination was made, satisfy the last criterion in the *Re Merilus Technologies* decision to warrant consideration on appeal.

64. Ms. Perera's continued and singular reliance on her selected wording in the policy, to the apparent exclusion of any other considerations that compelled the Director's findings, highlights the inadequacy of her position.

65. More particularly, even if accepted as "new evidence", the selected provisions of the employment policy do not "prove" the witness was being deceitful in respect of his evidence concerning Ms. Perera's hours of work.

66. To be clear, to the extent it has been challenged in this application, I find there was no error in the original decision relating to the disposition of any of the "new evidence" that Ms. Perera sought to introduce into the appeal.

67. Overall, I view the allegations made against the two witnesses as representing nothing more than an attempt by Ms. Perera to have this panel alter findings of fact she has been foreclosed from challenging by the limited

grounds of appeal found in section 112 of the *Act* and by the conclusion in the original decision in respect of her attempt to introduce "new evidence".

68. I have not yet commented on Ms. Perera's allegations against legal counsel for Corelogic and I will do so now. I find these allegations to be misconceived and unfounded. At best they demonstrate a very limited amount of understanding, analysis and reflection of the role of legal counsel for Corelogic. Even a rudimentary assessment of the Determination would reveal the passage in the Determination upon which Ms. Perera bases her allegations appears in the closing argument made by counsel at the complaint hearing. Legal counsel does not, as asserted by Ms. Perera, make closing argument "under oath" and it is certainly not "sworn testimony". At their worst, the allegations are a spurious attempt to discredit or embarrass legal counsel and, in such case, are entirely inappropriate.

69. The second aspect of this application simply reiterates Ms. Perera's disagreement with findings of fact made by the Director in the Determination and does not warrant reconsideration.

70. In sum, the application for reconsideration is untimely; no compelling explanation for the lengthy delay is provided; and there is no clear and compelling case on the merits made out that would justify or warrant exercising my discretion to entertain this application. The Tribunal will not revisit Ms. Perera's claim.

71. The application for reconsideration is denied.

ORDER

72. Pursuant to section 116 of the *Act*, the original decision is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal