An Application for Reconsideration

- by -

Friends of Animals, Inc.
("FAI")

- 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.: 2015A/86

DATE OF DECISION: July 24, 2015

DECISION

SUBMISSIONS

Bob Orabona — on behalf of Friends of Animals, Inc.

OVERVIEW

1. Friends of Animals, Inc. ("FAI") seeks reconsideration of a decision of the Tribunal, BC EST # D058/15 (the "original decision"), dated June 18, 2015.

2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on March 13, 2015.

3. The Determination was made by the Director on a complaint filed by David Shishkoff ("Mr. Shishkoff") who alleged FAI had contravened the *Employment Standards Act* (the "*Act*") by failing to pay all wages owed to him.

4. The Determination found FAI had contravened several provisions of the *Act*, ordered Mr. Shishkoff be paid wages and interest in the amount of $7,669.52 and imposed administrative penalties on FAI in the amount of $2,000.00.

5. An appeal was filed by FAI alleging the Director erred in law by failing to dismiss the complaint because Mr. Shishkoff did not have "clean hands", by finding an employment relationship between Mr. Shishkoff and FAI under the *Act*, by finding a contravention of subsection 21(2) of the *Act* and, if there was an employment relationship, by finding FAI had not demonstrated there was just cause to terminate that relationship.

6. FAI also grounded the appeal in an assertion that the Director failed to observe principles of natural justice in making the Determination, but did not specifically identify any "natural justice" issue.

7. The Tribunal Member making the original decision dismissed the appeal and confirmed the Determination.

8. The Tribunal Member found no error of law in the Determination, concluding the Director did not err in finding Mr. Shishkoff to be an employee for the purposes of the *Act*, finding no merit in FAI's "clean hands" argument, endorsing the Director's conclusion that FAI did not have just cause to terminate Mr. Shishkoff and finding the business costs absorbed by Mr. Shishkoff were properly recoverable by him under subsection 21(2) of the *Act*.

9. The Tribunal Member found no merit in any possible "natural justice" argument made in the appeal, noting the "only conceivable" argument relating to this ground of appeal was first advanced, without notice, in FAI's reply submission.

10. The Tribunal Member also dealt with a request in the appeal from FAI's representative, Bob Orabona ("Mr. Orabona"), to carefully review "the transcript or recording of the hearing", noting in the original decision his understanding that complaint hearings conducted by delegates of the Director are not recorded, which the Tribunal Member indicated is typical of hearings before administrative tribunals in the province. Mr. Orabona also represented FAI at the complaint hearing.

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 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 cancel the original decision or refer the matter back to the Director.

ARGUMENT

12. There are two reconsideration application forms and submissions that have been received by the Tribunal from FAI, one received June 25, 2015, the other on July 7, 2015. The first specifically addresses what FAI believes to have been the consequences of the Tribunal not ordering the "transcript, recording or notes" of the complaint hearing. The latter reiterates elements of the former submission and adds arguments to the reconsideration application.

13. FAI submits the Tribunal and the Tribunal Member who decided the appeal failed to fully address the objection to the completeness of the record that is required to be submitted by the Director under subsection 112(5) of the *Act*. In that regard FAI alleges the failure of the Tribunal to order those things be delivered by the Director and included in the record was a breach of natural justice relating to the original decision.

14. For ease of reference, subsection 112(5) of the *Act* reads:

> *112 (5) On receiving a copy of the request under subsection (2) (b) or amended request under subsection (4) (b), the director must provide the tribunal with the record that was before the director at the time the determination, or variation of it, was made, including any witness statement and document considered by the director.*

15. FAI had objected in the appeal process to the absence of a "transcript, recording or notes" of the complaint hearing. The objection letter asked that the Tribunal require the Director to "provide the missing information". The objection letter also contained, as an alternative position, a request that if the "record of the hearing is missing or is in itself incomplete" the Tribunal ask for information set in three points in the objection letter.

16. The Director responded; FAI was not satisfied with the response and filed a reply on April 28, 2015, essentially reiterating its requests.

17. The Tribunal did not order production of the hearing notes made by the Director at the complaint hearing. FAI argues the failure of the Tribunal to order production of the notes calls into question the validity of the entire complaint process. FAI also questions other aspects of the complaint process, including whether the Director gave adequate notice of the claim made by Mr. Shishkoff and whether FAI had the opportunity to prepare and submits its case in response to Mr. Shishkoff's claims.

18. FAI submits if there is no "hearing record", it has been denied access to evidence it might have used to support its appeal and demonstrates an apparent bias in the Employment Standards Branch complaint resolution process.

19. FAI makes several other arguments addressing alleged deficiencies in the "hearing record", culminating in the assertion that the Director failed to notify FAI of the complaint against it.

20. FAI alleges that both the Determination and the original decision "show an apparent bias by both decision makers". The allegation of bias is broad and is directed against the Director, the Tribunal generally and the Tribunal Member who made the original decision. FAI argues the bias shown by the Tribunal and Tribunal Member is demonstrated in the following matters:

1. The absence of a response from the Tribunal to FAI'S objection to the completeness of the record;
2. A reference by the Tribunal Member in the original decision – repeating a conclusion made in the Determination and characterized in FAI's submission as a "misrepresentation" – that Mr. Shishkoff was economically dependent on FAI for his livelihood;
3. An "error of law" made by the Tribunal Member in giving any weight in the original decision to FAI statements that referenced "employee", "salary" or "working" in regards to Mr. Shishkoff;
4. A "series of statements" which FAI alleges were meant to deter their continued participation in the appeal and after-appeal processes and to "possibly" protect Mr. Shishkoff from the consequences of not filing his taxes; and
5. In the comment made by the Tribunal Member that he was "not aware of any legal obligation requiring the delegate to become, in essence, an informant for the Canada Revenue Agency".

21. For reasons that I will enunciate later in this decision, I need not record the basis for the allegations of bias against the Director in this decision.

ANALYSIS

22. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally. As a result of amendments to the *Act* made in the *Administrative Tribunal Statutes Amendment Act, 2015*, parts of which came into effect on May 14, 2015, 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 served with an order or a decision of the tribunal may make an application under this section.*
>
> *(2.1) The application may not be made more than 30 days after the date of the order or decision.*
>
> *(2.2) The tribunal may not reconsider an order or decision on the tribunal's own motion more than 30 days after the date of the order or decision.*
>
> *(3) An application may be made only once with respect to the same order or decision.*
>
> *(4) The director and a person served with an order or decision of the tribunal are parties to a reconsideration of the order or decision.*

23. Except for the inclusion of statutory time limits for filing a reconsideration application or for the Tribunal reconsidering its own orders and decisions, the amendments are unlikely to significantly alter the Tribunal's approach to reconsiderations.

24. In that respect, the Tribunal has stated in numerous reconsideration decisions that the authority of the Tribunal under section 116 is discretionary. A principled approach to the exercise of this discretion has been developed and applied. 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 Inc.*, 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 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 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.

25. 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, and likely lead to the denial of, 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.

26. 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.

27. 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.

28. 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.

29. I am not persuaded this application warrants reconsideration. I am satisfied, based on the material that was before the Tribunal Member in the appeal and considering the scope of review under section 112 of the *Act*, there was no error made in the original decision.

30. Much of this application is focussed on FAI not receiving the "transcript, recording or notes".

31. Those elements of this application not going to the above matter raise natural justice arguments relating to the complaint process and allegations of bias. In respect of the former, it is simply too late to complain about the complaint process before the Director. If FAI had legitimate arguments relating to the general fairness of the complaint process, and specifically to whether FAI was given proper notice and an opportunity to respond to Mr. Shishkoff's claims the place to raise those arguments was in the appeal. They were not and I will not address them in this application. I will state, however, that on an examination of the material in the subsection 112(5) record, there is no basis for any suggestion FAI was not accorded the procedural rights required by principles of natural justice and section 77 of the *Act*.

32. In respect of the arguments relating to FAI's request for a "transcript", the original decision correctly notes an understanding that complaint hearings held by the Director are not recorded. There is nothing in any submission or communication from FAI indicating this understanding is wrong or showing there was, in fact, a record or transcript made by the Director of the complaint hearing. In challenging the completeness of the subsection 112(5) record, in making and pursuing this request for a "transcript", it is incumbent on FAI to provide some legitimacy to the request. I note Mr. Orabona was present at the complaint hearing, yet none of his submissions on this point go beyond speculating that there "might" be a transcript. The Tribunal need not pursue speculation, but may operate on its own understanding of the complaint hearing process – an understanding acquired through more than twenty years of administering appeals under the *Act*. On the basis of this experience, the Tribunal is entitled to take "judicial notice" that there will be no transcript or other "record" of the complaint hearing.

33. As well, I find no error in the decision of the Tribunal to refrain from ordering production of the notes kept by the Director at the complaint hearing. That decision is consistent with the approach taken by the Tribunal to such requests. In *24/7 Excavating Ltd.*, BC EST # D066/15, the Tribunal stated the following, at para. 11:

> The Tribunal does not customarily order the production of the notes created by the director's delegate. In *United Specialty Products Ltd.*, BC EST # D057/12, (reconsideration denied BC EST # RD127/12), a panel of the Tribunal, substantially endorsing the Tribunal's decision in *Lockerbie & Hole Industrial Inc.*, BC EST # D071/05, indicated, at para. 18, that it would most certainly be a rare and very unique situation for the Tribunal to order the notes taken by a delegate during a complaint hearing. In *Lockerbie & Hole Industrial Inc.*, *supra*, the panel explained the concerns with the Tribunal endorsing an approach to ordering production of a delegate's hearing notes that would be anything other than "highly exceptional". The reasons are grounded in jurisdictional and practical considerations:
>
> > Without finally deciding whether The tribunal could ever lawfully order such notes to be produced, there are two reasons why it should be highly exceptional to do so. First, there is a reliability concern. Note-taking by a Delegate is not the same as note-taking by a court reporter or hearing secretary. This is because a decision-maker's notes are a personal *aide memoire* and as such are not created for the purpose of recording the entire proceeding for third parties. Second, there is a deliberative privilege concern, as such notes are closely linked with the deliberative process: see generally *Ellis-Don Ltd v. Ontario Labour Relations Board*, [2001] 1 S.C.R. 221. (at page 7)

34. There is nothing in the circumstances of this case showing it should be considered one of those "rare and very unique situation[s]" that would compel the Tribunal to require the personal notes of the delegate of the Director conducting the hearing to be produced. To repeat, I find FAI has not shown any error or failure to observe principles of natural justice on the part of the Tribunal or the Tribunal Member in the handling of the request for the delegate's personal hearing notes.

35. FAI alleges the Tribunal, including the Tribunal Member who decided the original decision, failed to observe principles of natural justice by demonstrating a bias. Such an allegation must be proven on the evidence. I find nothing in this application that satisfies the evidentiary requirements for establishing bias against the Tribunal or the Tribunal Member.

36. In responding to these allegations, I will not address the allegations of bias against the Director as those ought to have been raised in the appeal but were not. The focus of a reconsideration application is the decision of the Tribunal. It is neither appropriate nor consistent with the purposes of the *Act* to be raising new assertions and arguments in a reconsideration application that should have been raised in the appeal, where they could have been considered and addressed in the appeal decision.

37. In considering allegations of bias, the Tribunal noted in *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99 (Reconsideration of BC EST # D101/98), that the test for determining bias, either actual bias or a reasonable apprehension of bias, is an objective one and the evidence presented should allow for objective findings of fact:

> . . . because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: see *A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541.

38. This test has been consistently applied to allegations of bias raised in Tribunal proceedings.

39. An allegation of bias or reasonable apprehension of bias against a decision maker is serious and should not be made speculatively. The onus of demonstrating bias or reasonable apprehension of bias lies with the person who is alleging its existence. Furthermore, a "real likelihood" or probability of bias or reasonable apprehension of bias must be demonstrated. Mere suspicions, or impressions, are not enough.

40. In *R. v. S. (R.D.),* [1997] 3 S.C.R. 484, the Supreme Court added the following to the concern expressed above:

> Regardless of the precise words used to describe the test [of bias or apprehension of bias] the object of the different formulations is to emphasize that the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed, an allegation of reasonable apprehension of bias calls into question not simply the ***personal*** integrity of the judge, but the integrity of the entire administration of justice. (emphasis added)

41. It follows from all of the above that the burden of proving actual or a reasonable apprehension of bias is high and demands "clear and convincing" objective evidence. Subjective opinions, however strongly held, are insufficient to support a finding of actual or a reasonable apprehension of bias.

42. The burden requires objective evidence from which a reasonable person, acting reasonably and informed of all the relevant circumstances would conclude the object of the allegation was biased against him. That burden has not been met here; there is no clear objective evidence from which it can reasonably be found the Tribunal was disposed to hold an adverse view of FAI or their case such that the Tribunal's ability to conduct an appeal, analyze the material neutrally and render an impartial decision was compromised.

43. There is, in fact, absolutely nothing in the appeal that remotely suggests the Tribunal exhibited a bias against FAI.

44. The assertion that such bias can be found in the way the appeal was processed by the Tribunal, in comments made and reasoning expressed by the Tribunal Member making the original decision or in his reliance on findings of fact made in the Determination falls so far short of meeting the required evidentiary burden as to be worthless.

45. The response of the Tribunal to the request for a transcript, or other record, and the hearing notes was consistent with the position enunciated by the Tribunal to such requests. As noted in the excerpt from *Lockerbie & Hole Industrial Inc.*, *supra,* cited above, the approach of the Tribunal is based on a potential jurisdiction concern, a reliability concern and a deliberative privilege concern. It was unnecessary, and did not affect any of the procedural rights to which FAI was entitled, for the Tribunal to have handled the request within the administrative processing of the appeal.

46. In respect of the allegation against the Tribunal Member, I find the comments made by the Tribunal Member in the original decision were reasonable, grounded in findings of fact made in the Determination, and responsive to the arguments made by FAI in their appeal submissions. The matters used to support the bias allegation are nothing more than part of the analysis and reasoning involved in the adjudicative process and do not provide any objective foundation for a finding of bias.

47. In sum, there is nothing in this application that would justify the Tribunal using its authority to allow reconsideration of the original decision and accordingly the application is denied.

ORDER

48. Pursuant to section 116 of the *Act*, the original decision, BC EST # D058/15, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal