

An application for Reconsideration

- by -

Donald Stephen Marlow operating as Donmar HVAC Services
(“Donmar”)

- 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.: 2006A/60

DATE OF DECISION: July 13, 2006

7. The third matter relates to the Director not providing Donmar with the original Complaint and Information Form filed by Toh with the Director.
8. The fourth and fifth matters relate to the overtime and holiday pay claims that were raised at the hearing. The original decision canvassed whether the delegate's decision to deal with these claims as she did was a failure by the delegate to observe principles of natural justice and found, in the circumstances, that it was not.
9. The last matter relates to a dispute with the recitation in the original decision of facts gleaned from the Determination. This matter primarily takes issue with findings and conclusions of fact set out in the Determination. While the original decision contains some observations based on the material before the Tribunal Member, the Member made no independent findings of fact concerning the merits of the claims made by Toh.

ISSUE

10. 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 Director erred in law and failed to comply with principles of natural justice in making the Determination and whether the Tribunal erred by not accepting the new evidence presented by Donmar with the appeal.

ANALYSIS OF THE PRELIMINARY ISSUE

11. 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) *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.*
12. 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 made of the merits of the original decision. The focus of a reconsideration application is the original decision.

13. 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.
14. It will weigh against an 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.
15. 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.
16. After reviewing the original decision, the submissions of the parties and the material on file, I have decided this application does not warrant reconsideration.
17. This application does little more than continue Donmar's challenges to the findings of fact made in the Determination. My assessment of this application echoes the assessment made in the original decision, which states:
- Donmar's submission consists largely of allegations of factual errors made by the delegate.
18. The allegation in this application of factual errors in the original decision is simply another attempt to have this Tribunal address alleged factual errors made by the delegate in the Determination. The comment made in the original decision, that findings of fact which do not constitute errors of law are not reviewable under Section 112 of the *Act*, and the conclusion that Donmar had not shown any error of law in the findings of fact, are both correct.
19. The concern raised by Donmar about the propriety of the delegate including the overtime and holiday pay claims at the hearing process was addressed in the original decision. Mr. Marlowe, who acted for Donmar at the complaint hearing, continues to object to the way the claims were raised. He says he was "ambushed" by the delegate at the complaint hearing. While it is difficult to reject his characterization of the process applied by the delegate, the question correctly considered in the original decision was whether the process had effectively denied Donmar a fair hearing on the overtime and holiday pay claims. The Member found it had not, also noting that, because the claims were decided on a review of documents provided by Donmar, the result would have been the same even if Donmar had additional time to respond. I can find no error in the original decision in either the analysis or the conclusion on the concern raised.
20. This application is denied

ORDER

21. Pursuant to Section 116 of the *Act*, I order the original decision be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal