

An Application for Reconsideration

- by -

Thomas Charles Moore
("Mr. Moore")

- 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.: 2016A/59

DATE OF DECISION: May 13, 2016

DECISION

SUBMISSIONS

Thomas Charles Moore on his own behalf

OVERVIEW

1. Thomas Charles Moore (“Mr. Moore”) seeks reconsideration of a decision of the Tribunal, BC EST # D031/16 (the “original decision”), dated February 16, 2016.
2. The original decision considered an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on December 1, 2015.
3. The Determination was made in respect of a complaint filed by Mr. Moore against his former employer, Skinner Bros. Transport Ltd. (“Skinner”) and found Skinner had contravened Part 3, section 18 (payment of wages on termination of employment); Part 4, section 40 (overtime wages); Part 5, section 45 (statutory holiday pay); and Part 7, section 58 (vacation pay) of the *Employment Standards Act* (the “*Act*”) in respect of his employment. The Determination ordered Skinner to pay Mr. Moore wages and interest in the amount of \$7,009.32.
4. The Determination also levied three (3) administrative penalties of \$500.00 each against Skinner for its contraventions of sections 17, 40 and 46 of the *Act*.
5. The total amount of the Determination is \$8,509.32.
6. An appeal of the Determination was filed by Mr. Moore alleging the Director erred in law and failed to observe principles of natural justice in making the Determination.
7. In the original decision, the Tribunal Member considered the grounds and arguments raised by Mr. Moore and found the Director had neither erred in law nor failed to observe principles of natural justice in making the Determination and, finding no merit in any of the grounds of appeal, dismissed it under section 114(1)(f) of the *Act*.
8. In correspondence included with delivery of the original decision, the parties, which includes Mr. Moore, were notified that any application for reconsideration of the original decision was required to be delivered to the Tribunal by the end of the working day on March 17, 2016. This application was delivered to the Tribunal on May 5, 2016, seven weeks past the statutory reconsideration time period set out in subsection 116(2.2) of the *Act*.
9. In this application, Mr. Moore seeks an extension of the statutory reconsideration time period, indicating he delayed applying for reconsideration of the original decision because he needed the monies that were being held in trust by the Employment Standards Branch. I presume from that comment Mr. Moore did not feel he would have received the monies found owing in the Determination, and confirmed as owing in the original decision, if he had sought reconsideration within the statutory time limit.

10. In correspondence dated May 6, 2016, the Tribunal advised the parties the Tribunal was assessing the reconsideration application and while that process was being conducted neither the Director nor Skinner were being asked for submissions.

ISSUE

11. There are two issues being addressed in this decision: first, whether the Tribunal should extend the time period for filing the application for reconsideration; and second, if the first request is granted, whether reconsideration is warranted. The two issues are related in the sense that the absence of a case that warrants reconsideration will operate against an extension of the time period.
12. In respect of the second issue, the Tribunal has discretionary authority to allow an application for reconsideration and in doing so may, as suggested above, assess the merits of the application before imposing the time and expense of responding on the other parties.

ARGUMENT

13. The application contains submissions relating to both issues.
14. In respect of the request by Mr. Moore to extend the time period for filing for reconsideration, he submits the delay was because he desperately needed the funds that were being held in trust by the Director and felt he could no longer delay paying the debts he owed without affecting his “credit rating and court actions”.
15. In respect of the substantive basis for the reconsideration request, Mr. Moore submits the reasoning of Tribunal Member on the question of compensation for length of service, found in paragraph 59 of the original decision, does not accord with an earlier decision of the Tribunal, *Georgina Young*, BC EST # D031/01.
16. Briefly, in the *Young* decision, the Tribunal considered whether a Determination that found section 66 of the *Act* did not apply to Ms. Young’s circumstances because she had resigned after being given notice of a substantial alteration in conditions of employment and decided that, notwithstanding Ms. Young’s decision to quit her employment following notice to substantially alter her employment, she had already been terminated and section 66 did apply to her circumstances.
17. Mr. Moore says the circumstances of his case are the same as in the *Young* case: he was given written notice on November 28, 2014, that his wage would change from a monthly salary to a considerably lower hourly rate effective March 1, 2015; then in a later letter, dated February 3, 2015, he was advised by Skinner that his position was being terminated effective April 3, 2015. On February 13, 2015, Mr. Moore tendered his resignation, effective February 27, 2015.
18. He submits the conclusion reached by the Tribunal in the *Young* case ought to have been reached in his case; that section 66 of the *Act* applied in the circumstances of his case.
19. Mr. Moore asks that this “travesty of justice” be corrected. He seeks to have the original decision referred back to the Tribunal Member who made the original decision or to another panel.

ANALYSIS

20. 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 Tribunals Statutes Amendment Act, 2015*, parts of which came into effect on May 14, 2015, section 116 of the *Act* reads:

- 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 decision or order.
- (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 a decision of the tribunal are parties to a reconsideration of the order or decision.

21. Except for the inclusion of statutory time limits for filing an application for reconsideration and for the Tribunal reconsidering its own orders and decisions, the amendments have not altered the Tribunal's approach to reconsiderations.

22. In respect of the now-imposed statutory time limits for reconsideration applications, the Tribunal has decided the approach to extensions of the reconsideration time period will be consistent with the approach taken to extensions of time in appeals. In *Serendipity Winery Ltd.*, BC EST # RD108/15, the Tribunal stated:

I see no reason to deviate from the criteria [set out in *Re Niemisto*, BC EST # D099/96] when considering requests for an extension of the time period for filing reconsideration applications. However, the question of whether there is a strong *prima facie* case must take into account that the Tribunal's discretionary authority to reconsider under section 116 of the *Act* is exercised with restraint – see *The Director of Employment Standards (Re Giovanni (John) and Carmen Valorso)*, BC EST # RD046/01 – and must remain consistent with the approach taken by the Tribunal in deciding whether reconsideration is warranted. (at para 21)

23. In respect to deciding whether reconsideration is warranted, the Tribunal has developed and applied a principled approach to the exercise of its discretion. The rationale for this approach is grounded in the language and purposes of the *Act*. One of the purposes of the *Act*, found in section 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 section 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). In *The Director of Employment Standards (Re Giovanni (John) and Carmen Valorso)*, *supra*, the Tribunal explained the reasons for its restrained approach:

... 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.

24. In deciding whether to reconsider, the Tribunal considers such factors 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 a denial of, an 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.
25. Applying the above considerations, I am not persuaded there should be an extension of the reconsideration time period in this case. I find the reasons for seeking the extension of time do not satisfy the criteria identified in *Re Niemisto, supra*. In the absence of any further evidence concerning the effect of an application for reconsideration on payment out of wages confirmed to be owing in an appeal decision, the reason for delay is weak and not reasonable.
26. Even if I were to grant an extension of the reconsideration appeal period, I would still reach the conclusion this application does not warrant reconsideration. I am completely satisfied, based on the material before the Tribunal Member in the appeal and considering the allowable scope of review under section 112 of the *Act*, there was no error made in the result of the original decision such as to warrant its reconsideration.
27. I have reached this conclusion for the reasons that follow.
28. As outlined above, Mr. Moore has supported this application with the Tribunal's decision in *Georgina Young, supra*. The tenor of the submission on this decision suggests the particular argument made by Mr. Moore is premised on a statement found at page 5 of that decision, which reads:
- Once an employer acts in a way that evinces an intention not to be bound by the employment contract, the agreement is breached. Capilano unilaterally and unequivocally communicated its intention not to honour its agreement on January 26, constructively terminating Young's employment on that date.
29. To reiterate, the circumstances of that case were that Ms. Young's employer gave notice of its intention to substantially alter conditions of her employment. The Tribunal found the circumstances ought to have given rise to the application of section 66 and been found to be a termination under that provision.
30. The Tribunal set aside that part of the Determination which found section 66 did not apply.
31. Mr. Moore suggests the circumstances of his case were the same and the Director, or the Tribunal on appeal, should have used section 66 and found he was terminated.
32. While Mr. Moore's argument concerning the application of the statement in the *Young* decision to the circumstances of this case has some validity, it must be noted the result in that case was a conclusion that, while the Director ought to have found there was a termination of employment under section 66 of the *Act*, Ms. Young was not entitled to compensation for length of service as her employer had provided notice of the change that constituted the termination and as a result had discharged its liability under section 63 of the *Act*. That is identical to the circumstances here.
33. There is no finding in the Determination that section 66 did not apply to the circumstances of Mr. Moore's case. The Determination simply finds that, "Skinner has no liability to provide CLOS to Mr. Moore".
34. The original decision does no more than confirm the Director was justified in finding Mr. Moore had resigned his employment of his own accord and that Skinner had no liability to him for compensation for length of service.

35. The *Young* decision in no way supports a conclusion that reconsideration is warranted. The Tribunal Member's findings in this case on the analysis by the Director on compensation for length of service are not incorrect or discordant with the decision in *Georgina Young, supra*.
36. In sum, the reconsideration is out of time and is denied for that reason. In any event, it has no merit. Applying principles for extending the reconsideration time period found in the *Act* and consistent with the Tribunal's approach to applications for reconsideration, the request is denied and the application dismissed.

ORDER

37. Pursuant to section 116 of the *Act*, the original decision, BC EST # D031/16, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal