Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

James Melrose
("Mr. Melrose")

- 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.: 2017A/78

DATE OF DECISION: August 4, 2017

British Columbia

DECISION

SUBMISSIONS

James Melrose on his own behalf

OVERVIEW

1. James Melrose ("Mr. Melrose") seeks reconsideration of a decision of the Tribunal, BC EST # D050/17 (the "original decision"), dated May 2, 2017.

2. The original decision considered an appeal of a Determination issued by the Director of Employment Standards (the "Director") on November 30, 2016, and an application under section 109(1)(b) of the *Act* for an extension of the appeal period.

3. The Determination was made by the Director on a complaint filed by Mr. Melrose, who had alleged Immigrant Services Society of British Columbia ("ISS") had contravened the *Act* by failing to pay regular and overtime wages and by failing to maintain accurate payroll records. The Determination found the *Act* had not been contravened, no wages were owed, and no further action would be taken.

4. An appeal of the Determination was filed by Mr. Melrose, alleging the Director erred in law and failed to observe principles of natural justice in making the Determination. The appeal was filed one day after the expiry of the statutory time period set out in section 112(3) of the *Act* and included a request for an extension of the statutory time period.

5. The Tribunal Member making the original decision denied the requested extension and dismissed the appeal under section 115 of the *Act*.

6. In the original decision, the Tribunal Member considered the criteria used by the Tribunal when considering a request to extend the statutory time period and, while accepting most of the criteria for granting an extension of time supported an extension of time, found the appeal had no presumptive merit and, based on that finding, exercised the discretion granted in section 109(1)(b) to refuse the extension.

7. An application for reconsideration was received by the Tribunal on June 1, 2017 – the last day of the statutory time period for filing such application under section 116(2.1). In the application, Mr. Melrose requested a one-month extension of the time period – to July 4, 2017 – in order to allow him to make more complete submissions. In the submission on the requested extension, Mr. Melrose says the extension is required to examine a "large volume of documents in the Appeal Record", which he says were only disclosed after his appeal had already been submitted and which raises a "significant issue of non-disclosure by the ESB during the investigation", affecting the "integrity of the investigation, procedural fairness, principles of natural justice and the outcome" of the original decision.

8. In the application received on June 1, 2017, Mr. Melrose has indicated he is seeking reconsideration on each of the three grounds of appeal found in section 112(1) of the *Act*.

9. On July 4, 2017, the Tribunal received a comprehensive submission from Mr. Melrose on his reconsideration request, which was supplemented on July 14, 2017, by an additional submission, additional documentation, and a modified version of the July 4 submission.

ISSUE

10. 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 cancel the original decision and refer the matter back to the original panel or, if more appropriate, to the Director.

ARGUMENT

11. The application for reconsideration is structured to identify and argue two broad issues. The first is identified as "preliminary issues for reconsideration" and raises the following questions:

    1. Did the Tribunal Member making the original decision commit an error of law by assessing the merits of the appeal before deciding whether to extend the appeal period;
    2. Did the Tribunal Member making the original decision commit an error of law by misinterpreting and/or misapplying the criteria set out in *Re Niemisto*, BC EST # D099/96, in denying the extension request; and
    3. Was there a clerical error in the original decision.

12. As best I can determine, Mr. Melrose alleges the error made in the original decision was in considering and deciding the substantive merits of the appeal without first making a decision on whether to extend the time period. Mr. Melrose submits the original decision is contradictory in the sense that it appears to say the Tribunal does not make a decision on the merits of an appeal when considering an application to extend the appeal period, yet does exactly that.

13. Mr. Melrose asks whether the decision, which both denied the requested extension *and* dismissed the appeal, was a typographical error.

14. The other issue raised in the application for reconsideration is characterized by Mr. Melrose as a "substantive issues for reconsideration" and under that issue Mr. Melrose argues the Tribunal Member making the original decision erred by misinterpreting and/or misapplying sections 28 and 35 of the *Act* and principles of natural justice and that the Director (and the Employment Standards Branch generally) failed to accommodate Mr. Melrose' mental condition and failed to attempt to rectify "ongoing and systemic employment issues" raised by Mr. Melrose in his complaint against ISS.

15. Mr. Melrose submits there was an error, in both the Determination and the original decision, in applying section 35 of the *Act*. He argues, in effect, that his working overtime hours – even when that work was not directly or indirectly required by the employer and, in this case, was contrary to a long-standing overtime policy established and published by the employer – was a contravention of section 35. He submits the correct approach was to make ISS responsible and liable for all overtime hours he worked even if the overtime was neither authorized by nor known to ISS.

16. In the context of this argument, Mr. Melrose also submits the Director and the Tribunal Member making the original decision took a wrong approach to the evidence, allegedly ignoring a large volume of evidence that he says demonstrated ISS had "directly or indirectly" allowed him to work additional and overtime hours, without appropriate compensation, from the date he was hired (March 6, 2008) to the last day he worked (June 25, 2016).

17. Mr. Melrose submits there was error in failing to find a contravention of section 28 of the *Act*, because ISS never recorded the additional and overtime hours he claimed to have worked.

18. Mr. Melrose says the Director failed to observe principles of natural justice in several ways: by refusing his reasonable adjournment requests; by failing to explain the "options" available to him for advancing his case; by failing to give him an opportunity to make submissions and argument in lieu of an oral hearing; by failing to disclose the written response of ISS to his claims; by unilaterally deciding to allow additional witnesses to testify for ISS; by failing to contact and interview any of the persons he had identified as potential witnesses to his claims; and by failing to disclose relevant evidence acquired during the investigation.

19. Mr. Melrose alleges the Director and the Tribunal have failed in their duty to accommodate his mental disability. In support of this allegation, he cites the partial response by the Director to his adjournment request and the decision of the Tribunal, expressed in the original decision, to deny his "reasonable" request for an extension of the statutory appeal period.

20. Finally, Mr. Melrose challenges the effect of the limitation on claims expressed in section 74 of the *Act*, arguing ISS was aware of all the issues he had raised in his complaint and the Director acted unreasonably in not addressing them.

ANALYSIS

21. 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 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, or*
>
> *(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.*

22. 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 are unlikely to alter the Tribunal's approach to reconsiderations.

23. In that respect, the Tribunal has said the authority of the Tribunal under section 116 is discretionary. A principled approach to this discretion has been developed and applied. 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). 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 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 timeliness and such factors as the nature of the issue and its importance both to the parties and the system generally. Delay in filing for reconsideration will 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. The Tribunal has accepted an approach to applications for reconsideration that resolves itself 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 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.

26. 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.

27. 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 in the reconsideration.

28. I find this application does not warrant reconsideration. I am satisfied there was no error made in the original decision and I view this application as nothing more than an attempt by Mr. Melrose to have this panel re-visit his appeal and reach a different result than was reached in the original decision.

29. I note first that the original decision, about whether or not to extend the statutory time period for the appeal, involved an exercise of discretion by the Tribunal Member making the original decision. The Tribunal does not lightly interfere with such an exercise of discretion unless it can be shown the exercise of discretion was not made in good faith, there was a mistake in construing the limits of authority, there was a procedural

irregularity or the decision was unreasonable, in the sense that there was a failure to correctly consider the applicable principles, a failure to consider what was relevant or a failure to exclude from consideration matters that were irrelevant or extraneous to the purposes of the *Act*.

30. As indicated above, this application does little more than reiterate the request for an extension of the time period for an appeal.

31. On that matter, I find the reasons given in the original decision for denying the request for an extension of the time period were reasonable and correct.

32. The criteria set out in *Re Niemisto*, *supra*, are of long standing and, as noted in the original decision, have been consistently applied. These criteria are solidly grounded in the statutory purposes of efficiency, finality and fairness – to all parties, not just the applicant. In respect of the last criterion – the strength of the applicant's case was appropriately considered. It is neither an efficient use of Tribunal resources nor is it fair to the other parties, who are after all the beneficiaries of a favourable Determination, to extend the appeal period and to require a response to an appeal that is obviously devoid of merit.

33. There was no error or inconsistency in the original decision in considering that criterion was addressed. It is one of the five criteria considered *before* deciding a request to extend the statutory appeal period. It is not necessary, as suggested by Mr. Melrose, to make a decision, using the first four criteria, on whether to extend the appeal period before considering that criterion. The Tribunal Member making the original decision did not err in considering *all* of the relevant criteria before deciding whether to grant an extension. As indicated above, for reasons of efficiency, finality and fairness, it is appropriate to examine all of the criteria, including the relative strength of the appeal, when considering a request for an extension of the appeal period and before making any judgement on whether an extension of time is justified.

34. I specifically reject the contention there is any inconsistency in the original decision on the application of this criterion. Mr. Melrose' reliance on the comment in the original decision to support this contention: that, ". . . the Tribunal does not consider the merits of the appeal when deciding to extend the time period", ignores the words immediately preceding that comment: ". . . except to the extent necessary to determine if there is a "strong *prima facie* case that might succeed". As well, the entire sentence that includes those comments is a correct statement of how this criterion is to be applied.

35. There is no typographical error in the conclusion set out in the original decision. A dismissal of the appeal follows logically from a refusal to extend the appeal period. The appeal does not go forward, the grounds of appeal are not met and the Determination is unchanged; section 115 of the *Act* allows the Tribunal to dismiss the appeal and confirm the Determination.

36. Based on a consideration of the material in the file, the findings of fact made and the reasoning contained in the Determination, I completely agree with the assessment made in the original decision of the strength of the appeal on its face. The arguments made by Mr. Melrose in the appeal were, in substance, exactly the same as are being advanced in this application: that the Director erred in finding section 35 did not apply and the Director failed to comply with principles of natural justice in making the Determination.

37. The Tribunal Member found the first argument was nothing more than a challenge to findings of fact not shown to be an error of law and, on the second, that Mr. Melrose had not met the burden imposed on a person relying on the natural justice ground of objectively demonstrating a breach of principles of natural justice by the Director.

38. That was a correct assessment of the substance of the appeal and I adopt the reasoning in the original decision on both those matters. While the original decision makes no specific reference to the argument concerning section 28, a conclusion on that argument is implicit in the finding on section 35 – in short, it would be a complete mockery of the purposes of the *Act* if ISS was required to record hours claimed by Mr. Melrose that he was not authorized to work, about which ISS was unaware and for which ISS was ultimately not found to be responsible for paying.

39. The argument that the Director failed to accommodate Mr. Melrose' disability was made in the appeal. The Tribunal Member making the original decision found nothing in the appeal that showed the Director failed to provide Mr. Melrose with a reasonable opportunity to present and provide evidence in support of his case, to know the position of ISS and to respond during the investigation process to that position. A fair and reasonable view of the record and the Determination indicates the Director was alert to Mr. Melrose' disability and provided accommodation for it through the investigation process. There is no indication in the file that Mr. Melrose ever contended the Director was responding inappropriately to his disability. The duty to accommodate does not require either the Director, or the Tribunal, to find an employment claim that is not supported in fact or law.

40. Mr. Melrose has provided no objective basis for asserting the Tribunal has failed to accommodate his mental disability. It is implausible to say the Tribunal has "failed to accommodate Mr. Melrose' disability" by doing nothing more than exercising a statutorily mandated discretion in a principled manner. That is not the law relating to duty to accommodate and nothing Mr. Melrose has submitted in his appeal indicates otherwise.

41. In this application, Mr. Melrose challenges the reasonableness of the time period *"established by the ESB for rectifying ongoing and systemic employment issues"* raised by him in his complaint. This argument appears to be addressed at sections 74, 76 and 80 of the *Act*. Section 74 imposes time limits on filing complaints and section 80 limits an employer's wage liability to, typically, a six-month period before the filing of the complaint. Section 76 allows the Director to, among other things, refuse to accept and investigate a complaint that is not made within the time limits set out in section 74. This argument is raised for the first time in this application and it appears to be grounded in nothing more than an attempt by Mr. Melrose to expand the evidentiary base for challenging the findings made in the Determination. As indicated above, the focus of a reconsideration application is the correctness of the original decision. It is not consistent with the objectives of reconsideration to allow new issues and arguments to be made, as such an approach undermines the integrity, efficiency, certainty and finality of the appeal process that is sought to be preserved by the reconsideration process and unnecessarily complicates the restraint with which the Tribunal approaches reconsideration.

42. In any event, much of what Mr. Melrose complains about in this argument is governed by statutory provisions over which neither the Director nor the Tribunal have any authority. Even if I addressed it, I would find there was nothing in this argument that warranted a reconsideration of Mr. Melrose' claim.

43. The "new" evidence submitted by Mr. Melrose is irrelevant to this application. It is not probative to any issue raised in either the appeal or this application; it does not reflect in any way on either the delay in filing the appeal or the substantive merits of the appeal.

44. In sum, Mr. Melrose has not shown there is any basis for disturbing the exercise of discretion by the Tribunal Member in the original decision. The Tribunal Member applied the criteria adopted and consistently applied by panels of the Tribunal when considering requests for an extension of time.

45. There is no allegation the denial of the requested extension was not made in good faith or that the Tribunal Member exceeded the limits of his authority. There is no basis for alleging a general failure to accommodate Mr. Melrose' mental disability.

46. There was no procedural irregularity and the Tribunal Member did not fail to consider matters that were relevant or consider matters that were irrelevant.

47. Both, and in my view either, of the reasons given in the original decision were sufficient to deny the requested extension of the appeal period. Neither of those reasons has been impeached in this application. There is no broader issue raised by this application that might operate in favour of reconsideration.

48. I do not find it necessary to make any findings or comments in respect of the delay in completing and delivering this application. I have considered all of the arguments made by Mr. Melrose in all of his submissions and find nothing that would justify or compel the Tribunal using its authority to allow a reconsideration of the original decision.

49. This application is denied.

ORDER

50. Pursuant to section 116 of the *Act*, the original decision, BC EST # D050/17, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal