An application for Reconsideration

- by -

AMS Consulting Ltd.
("AMS")

- 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: Carol L. Roberts

FILE No.: 2007A/85

DATE OF DECISION: September 19, 2007

DECISION

SUBMISSIONS

George Kos: On behalf of AMS Consulting

John Dafoe: On behalf of the Director of Employment Standards

OVERVIEW

1. This is an application by AMS Consulting Ltd. ("AMS") for a reconsideration of Decision #D054/07 issued by the Tribunal on June 14, 2007.

2. Joy Buemann filed a complaint with the Employment Standards Branch alleging that AMS contravened the Act by failing to pay banked time and overtime wages. On February 16, 2007, a delegate of the Director of Employment Standards issued a Determination finding that AMS had contravened sections 17 and 40 of the Act in failing to pay Ms. Buemann wages and overtime.

3. AMS appealed the Determination on the grounds that the Director had erred in law in concluding that the alleged overtime hours worked prior to February 9, 2005 constituted a "time bank" pursuant to section 42 of the *Act*, and in concluding that Ms. Buemann was entitled to be paid overtime wages. AMS also appealed on the grounds that the Director had failed to observe the principles of natural justice in making the Determination. Specifically, AMS contended that because the delegate was predisposed to find a contravention of the *Act* he therefore failed to conduct an impartial investigation.

4. The Tribunal Member found that the Director's delegate concluded that Ms. Beumann had not been paid in accordance with the Act for the hours she worked for the last six months of her employment and that he had done so without any reference to a "time bank". The Member found no error of law in this respect.

5. The Member found no evidence that the delegate was biased against AMS. The Member said that the fact the delegate considered AMS witness statements "spoke against" AMS's claim that the delegate only pursued avenues of investigation to confirm her position", and dismissed the appeal on this ground.

TIMELINESS

6. The application for Reconsideration was filed July 30, 2007. Although the Act does not set out a time limit for the bringing of an application, the Rules provide that reconsideration applications should be brought within 30 days. This application was made approximately 45 days after the decision was issued. The Director took no position on the timeliness of the application.

7. In *Director of Employment Standards,* (BC EST #RD046/01) the Tribunal set out the following principles to be considered relating to timeliness of applications:

- The Tribunal will properly consider delay in deciding whether to exercise the reconsideration discretion

- Where delay is significant, an applicant should offer an explanation for the delay.

- 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.

- 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.

8. In my view, although there was some delay in filing the application, the delay is not significant and I will consider the application.

ARGUMENT

9. AMS says the Member "erred in law and/or contravened the principles of natural justice". In support of the application, AMS refers to the Member's quote "what were Buemann's hours of work…" and says that this raises the issue of whether the Member "applied the correct set of facts and information to the appropriate decision". AMS says that the reference to Buemann in a parallel appeal/reconsideration application brings into question of whether the Member mixed information from one appeal with information from another and raises issues about the correctness of the decision.

10. AMS says that there are "significant irregularities" in the original decision such that it is appropriate for the Tribunal to suspend collection action in respect of the Determination.

11. The delegate says that although the Member mistakenly referred to Ms. McKenzie as Ms. Buemann in another decision, AMS fails to indicate how the analysis of the facts and law is incorrect. He submits that AMS is attempting to turn a typographical error into an error of law and that cannot be supported upon a reading of the decision.

12. The delegate opposes the suspension request on the basis that the reconsideration application lacks merit.

ISSUES

13. There are two issues on reconsideration:

1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?

2. If so, should the decision be cancelled or varied or sent back to the member?

ANALYSIS

14. The *Employment Standards Act*, R.S.B.C. 1996 c. 113 ("Act") confers an express reconsideration power on the Tribunal. Section 116 provides

> (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.

The Threshold Test

15. The Tribunal reconsiders a Decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *Act* detailed in Section 2 "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act."

16. In *Milan Holdings (BCEST # RD313/98)* the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. The primary factor weighing in favor of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

17. The Tribunal may agree to reconsider a Decision for a number of reasons, including:

- The member fails to comply with the principles of natural justice;
- There is some mistake in stating the facts;
- The Decision is not consistent with other Decisions based on similar facts;
- Some significant and serious new evidence has become available that would have led the member to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The Decision contains a serious clerical error.

(*Zoltan Kiss* BC EST#D122/96*)*

18. While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.

19. After weighing these and other factors, the Tribunal may determine that the application is not appropriate for reconsideration. Should the Tribunal determine that one or more of the issues raised in the application is appropriate for reconsideration, the Tribunal will then review the matter and make a decision. The focus of the reconsideration member will in general be with the correctness of the decision being reconsidered.

20. In *Valoroso* (BC EST #RD046/01*)*, the Tribunal emphasized that restraint is necessary in the exercise of the reconsideration power:

> .. the Act creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute…

21. 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 image 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.

22. Having considered the Applicant's submission, I am not persuaded that this is an appropriate case to exercise the reconsideration power for the following reasons:

23. The Applicant asserts an error of law without any analysis of the alleged error. The sole argument in support of the reconsideration relates to a typographical error in another decision. There is no evidence how a typographical error in a different decision constitutes an error of law in this decision.

24. AMS has not demonstrated a sound basis for exercising the reconsideration power in the absence of a legal basis to do so.

25. In light of my conclusion on the application for reconsideration, it is unnecessary to consider the application by AMS under Section 113 of the Act for a suspension of the effect of the Determination and decision. That application is moot and, on that basis, is denied.

ORDER

26. Pursuant to Section 116 of the *Act*, I deny the application for reconsideration and confirm the original decision.

Carol L. Roberts
Member
Employment Standards Tribunal