

An Application for Reconsideration

- by -

Joel Barnes
("Barnes")

- 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.: 2013A/77

DATE OF DECISION: November 25, 2013

DECISION

SUBMISSIONS

Joel Barnes on his own behalf

OVERVIEW

1. This is an application by Joel Barnes for a reconsideration of Tribunal Decision BC EST # D077/13 (the “Original Decision”), issued on October 2, 2013.
2. Mr. Barnes worked for Mark Anthony Group Inc. carrying on business as Mission Hill Family Estate (the “Employer”) from May 6, 2012, to August 7, 2012. On February 22, 2013, Mr. Barnes filed a complaint alleging that the Employer had contravened the *Act* in failing to pay him wages, overtime pay and statutory holiday pay. The delegate noted that Mr. Barnes had not filed his complaint within the 6 months of the last day of his employment, and exercised her discretion not to investigate the complaint under section s. 76 of the *Employment Standards Act* (the “*Act*”).
3. Mr. Barnes appealed the decision on all three statutory grounds of appeal: that the delegate had erred in law, had failed to observe the principles of natural justice, and that new evidence had become available that was not available at the time the Determination was made.
4. In his appeal submission, Mr. Barnes reiterated his submissions to the Director, which included the reason he had not filed the appeal within the statutory time period, which was that his stepfather had been ill for many months. The Member reviewed Mr. Barnes’ submissions and noted that, although Mr. Barnes repeated the arguments he made before the delegate, he had not challenged the Directors’ exercise of discretion in refusing to further investigate the complaint.
5. The Member reviewed the delegate’s exercise of discretion to refuse to continue investigating Mr. Barnes’ complaint, noting that Mr. Barnes had the burden of demonstrating that it was unreasonable. The Member concluded that not only had Mr. Barnes failed to discharge that burden, the delegate had exercised her statutory discretion in accordance with Tribunal jurisprudence as well as the Supreme Court of Canada’s decision in *Maple Lodge Farms Limited v. Government of Canada* [1982] 2 S.C.R. The Member concluded that Mr. Barnes had demonstrated no error of law in the delegate’s decision.
6. The Member rejected Mr. Barnes’ assertion that the Director’s delegate had failed to observe the principles of natural justice. He found no evidence Mr. Barnes was denied the opportunity to explain why he filed his complaint late, noting that Mr. Barnes made several submissions to the delegate on that point.
7. Finally, the Member also found that Mr. Barnes had failed to meet the test for the introduction of new or additional evidence on appeal. The Member dismissed the appeal under s. 114(1)(f) of the *Act*, concluding that there was no reasonable prospect of it succeeding.
8. Mr. Barnes filed a reconsideration application on November 4, 2013, seeking to have the Original Decision cancelled.

ISSUE

9. 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?

ARGUMENT

10. It is difficult to discern the basis of Mr. Barnes' reconsideration application. On the Reconsideration Application Form, Mr. Barnes states that his "entire family was being harassed and intimidated as of January 15, 2013 by a PLMS Agent legally presenting herself as my former employer's wife"
11. As in his appeal of the Determination, many of Mr. Barnes' submissions are neither helpful nor relevant to his reconsideration application. He makes the following points:
 - the Employment Standards Branch is incapable of basic service;
 - neither the delegate nor her assistants show up for work on time;
 - the delegate is biased;
 - he has sought the assistance of the Ombudsman and BC Human Rights Coalition;
 - his employer took advantage of him during a period of crisis;
 - he was being audited during a period of mourning.

ANALYSIS

12. The *Employment Standards Act*, R.S.B.C. 1996 c. 113 (the "*Act*") confers an express reconsideration power on the Tribunal. Section 116(1) 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.

1. The Threshold Test

13. 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."
14. In *Milan Holdings*, BC EST # D313/98, the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the Tribunal to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. The primary factor weighing in favour 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.

15. 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 T. Kiss*, BC EST# D122/96)
16. 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.
17. 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 panel will, in general, be with the correctness of the decision being reconsidered.
18. In *Voloroso*, BC EST # RD046/01, the Tribunal emphasized that restraint is necessary in the exercise of the reconsideration power:

... the *Act* creates a legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute ...
19. 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 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.
20. I find that Mr. Barnes has not met the threshold test.
21. The issue before the delegate was whether Mr. Barnes had filed his complaint in the time frame provided in the *Act*. The delegate concluded that he had not, and decided to exercise her discretion to stop investigating the complaint. On appeal, the Member found that Mr. Barnes had failed to discharge the onus of establishing that this conclusion was in error. The Member addressed all issues raised by Mr. Barnes in the Original

Decision. In my view, Mr. Barnes' reconsideration request has not raised questions of law, fact, principle or procedure that are so significant that they ought to be reviewed. Indeed, in my view, Mr. Barnes has not raised any questions of law, fact, principle or procedure at all. The submissions do not address the merits of the Original Decision at all; rather, they constitute a complaint about the conduct of staff at the Employment Standards Branch.

22. In my view, Mr. Barnes' application for reconsideration is without merit. The request for reconsideration is denied.

ORDER

23. Pursuant to section 116 of the *Act*, the original decision is confirmed.

Carol L. Roberts
Member
Employment Standards Tribunal