Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Scott Andrews Investments Inc.
("SAII")

- 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.: 2014A/121

DATE OF DECISION: October 20, 2014

Employment Standards Tribunal
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British Columbia

DECISION

SUBMISSIONS

Trevor R. Thomas — counsel for Scott Andrews Investments Inc.

OVERVIEW

1. Scott Andrews Investments Inc. ("SAII") seeks reconsideration of a decision of the Tribunal, BC EST # D070/14 (the "original decision"), dated August 12, 2014.

2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on March 25, 2014[1].

3. The Determination was made by the Director on a complaint filed by Curtis Stevenson ("Stevenson"), who alleged Scott Andrews Investments Inc. ("SAII") had contravened the *Employment Standards Act* (the "*Act*") by failing to pay regular wages and annual vacation pay.

4. The Determination found SAII owed Stevenson wages and interest in the amount of $7,093.96 and imposed administrative penalties against SAII in the amount of $1,500.00. The total amount of the Determination is $8,593.96.

5. An appeal was filed by SAII alleging the Director erred in law, failed to observe principles of natural justice in making the Determination and that evidence had become available that was not available at the time the Determination was being made. The appeal sought to have the Tribunal cancel the Determination.

6. The appeal was filed late.

7. As well, SAII had failed to request reasons for the Determination as provided in section 81 of the *Act* and as required by section 112(2), although the Appeal Form wrongly indicates the "written reasons for the determination" are included with the appeal.

8. The Tribunal Member of the original decision dismissed the appeal under subsections 114(1)(b) and (f) of the *Act* and confirmed the Determination.

9. In the original decision, the Tribunal Member found SAII had not shown there was any basis upon which the Tribunal should exercise its discretion under section 109(1)(b) to grant an extension of time to file the appeal.

10. The Tribunal Member of the original decision considered whether the appeal demonstrated any reasonable prospect it could succeed on the grounds of appeal raised, found it did not and found, as well, the appeal did not show the Director had made any error of law or had failed to observe principles of natural justice.

11. The Tribunal Member found no evidence that would qualify as "new" evidence under the test applied by the Tribunal for the admission of additional evidence on appeal.

12. The Tribunal has not sought submissions from any other party to this application.

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[1] The Determination is dated March 23, 2013, but the inclusion of the "3', rather than a "4" in the year is an obvious typographical error which does not affect its validity: see section 123 of the *Act*.

ISSUE

13. 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 grant the request to reconsider and cancel the original decision and refer the matter back to the Director.

ARGUMENT

14. In this application, counsel for SAII submits the Tribunal Member of the original decision failed to properly consider two factors when deciding the timeliness issue: whether Stevenson would be unduly prejudiced by the granting of an extension; and whether there was a strong *prima facie* case in favour of the appeal.

15. In respect of the first factor, counsel argues this factor was misapplied because SAII only missed the appeal date by 49 days and the question of whether Stevenson was an employee or an independent contractor "is not complex". Counsel submits that evidence relating to that question could easily be recalled or produced after the period of delay.

16. In respect of the merits of the appeal, counsel argues the Tribunal Member of the original decision committed two errors: reaching a conclusion on this factor without having the Director's reasons for the Determination; and, in the absence of evidence in the record and reasons from the Director, failing to address and decide the issue of whether Stevenson was an employee or an independent contractor in the appeal. On the latter point, counsel says the error in the original decision was passing judgement on that issue without evidence or reasons.

ANALYSIS OF THE PRELIMINARY ISSUE

17. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally. Section 116 of the *Act* states:

> *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.*

18. As the Tribunal has stated in numerous reconsideration decisions, the authority of the Tribunal under section 116 is discretionary. A principled approach to the exercise of this discretion has been developed. The rationale for this 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 application and interpretation"* of its provisions. Another stated purpose, found in subsection 2(b), is to *"promote the fair treatment of employees and employers"*. The approach is fully described 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 *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.

19. 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. Undue delay in filing for reconsideration will mitigate against the 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.

20. 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.

21. It will weigh against the 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.

22. 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.

23. I am not persuaded this application warrants reconsideration.

24. The decision of the Tribunal about whether to extend the statutory time period for filing the appeal is a matter of discretion. At its root, this application challenges that exercise of discretion.

25. One panel of the Tribunal will not lightly interfere with a discretionary decision of another panel. While I do not suggest an exercise of discretion by one panel of the Tribunal can never be reviewed and altered by a reconsideration panel, there is a burden on an applicant challenging a discretionary decision of a Tribunal Member to show the exercise of discretion by that Tribunal Member was not consistent with established legal principles, that it was not made in good faith, was arbitrary or was based on irrelevant considerations.

26. In exercising his discretion in this case, the Tribunal Member was guided by factors that have been consistently applied to applications seeking to extend the time period for filing an appeal. The Tribunal Member of the original decision, by considering and applying those factors in making the original decision,

did not deviate from established legal principles applicable to such cases. SAII has not shown there was any error in this respect.

27. There is no suggestion of bad faith or arbitrariness in the original decision or that it was based on irrelevant considerations.

28. Like the Tribunal Member of the original decision, I have carefully reviewed the appeal material and substantially agree with his findings and conclusions in respect of the factors considered.

29. I agree the request for an extension is not supported by a credible and reasonable explanation for the delay, that there is no evidence of a genuine and ongoing *bona fide* intention on the part of SAII to appeal the Determination during the appeal period and there is no evidence that the Director or Stevenson were made aware by SAII of any intention to appeal until the late appeal was filed.

30. I agree with the assessment in the original decision of the "prejudice" factor: that while "there may not be any prejudice . . . the Tribunal needs to be mindful of the need for a timely disposition of an appeal". The argument made by SAII, that 49 days is not "excessive" misses the point. It simply expresses a difference of opinion about the length of the delay; it does not show the Tribunal Member erred in any respect in expressing his view that the delay in this case was sufficiently long to be considered in the context of the statutory purpose found in section 2(d) of the *Act*.

31. As well, I accept the analysis and conclusion in the original decision concerning the presumptive merits of the appeal.

32. I accept entirely, and agree with, the Tribunal Member's assessment of the "new evidence" ground of appeal. The "new evidence" sought to be introduced by SAII into the appeal would not satisfy the Tribunal's test for admitting such evidence, it being apparent that the proposed evidence either could have been presented to the Director during the complaint investigation process, was irrelevant or not probative.

33. I agree the appeal does not raise a strong *prima facie* case. In this respect I note that an assessment of the *prima facie* case criterion does not require a conclusion that the appeal will fail or succeed; it requires consideration of the relative strength of the appeal against long standing principles that apply in the context of those grounds. As noted by the Tribunal in *Gerald Knodel a Director of 0772646 B.C. Ltd. carrying on business as Home Delivery*, BC EST # D083/11:

> . . . [this] inquiry [into whether there is a *prima facie* case] flows from the section 2 purposes of the *Act* and, in particular, the need for fair treatment of the parties and fair and efficient dispute resolution procedures. Simply put, it is neither fair nor efficient to put parties through the delay and expense of an appeal process where the appeal is doomed to fail.

34. In this case, the relevant principles would include the evidentiary burden that requires a party alleging a person is not an employee for the purposes of the *Act* to show that person does not perform work that brings them within the definition of "employee". The section 112(5) "record" and the appeal are completely devoid of the evidence necessary to satisfy that burden. There is, in fact, no reference at all in the section 112(5) "record" of SAII taking the position that Stevenson was an independent contractor.

35. Counsel for SAII submits the Tribunal Member in the original decision ought to have addressed the issue of Stevenson's status under the *Act*. I disagree. Having denied an extension of the time for filing an appeal, there was no reason to conduct a further analysis of the merits of the appeal in the original decision and, particularly, no reason to perform a speculative reconstruction and analysis of findings of fact.

36. In sum, SAII has not shown the original decision was wrong in any respect or that this panel ought to interfere with the discretion exercised in the original decision to refuse to extend the statutory appeal period; the application for reconsideration is denied.

ORDER

37. Pursuant to section 116 of the *Act*, the original decision, BC EST # D070/14, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal