

An Application for Reconsideration

- by -

Scott Andrews, a Director and Officer of Scott Andrews Investments Inc.
(“Mr. Andrews”)

- 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/122

DATE OF DECISION: October 20, 2014

DECISION

SUBMISSIONS

Trevor R. Thomas

counsel for Scott Andrews, a Director and Officer of
Scott Andrews Investments Inc.

OVERVIEW

1. Scott Andrews, a Director and Officer of Scott Andrews Investments Inc. (“Mr. Andrews”), seeks reconsideration of a decision of the Tribunal, BC EST # D071/14 (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.
3. The Determination was made by the Director under section 96 of the *Act* 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. In a Determination also issued March 25, 2014 (the “corporate determination”), the Director found wages were owed to Stevenson in the total amount of \$7,093.96. That was the amount of the Determination made under section 96 of the *Act*.
4. An appeal of the Determination was filed by Mr. Andrews, 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.
5. The appeal was filed late.
6. The Tribunal Member of the original decision dismissed the appeal under subsections 114(1)(b) and (f) of the *Act* and confirmed the Determination.
7. In the original decision, the Tribunal Member found Mr. Andrews 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.
8. The Tribunal Member of the original decision considered whether the appeal demonstrated any reasonable prospect it could succeed on the grounds of appeal raised and found it did not.
9. The Tribunal has not sought submissions from any other party to this application.

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

ARGUMENT

11. This application for reconsideration was filed with the Tribunal in conjunction with an application for reconsideration of the appeal decision on the corporate determination. The submissions on both applications are identical.
12. In this application, counsel for Mr. Andrews 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.
13. 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.
14. The submission on this application makes no reference that the late appeal of Mr. Andrews was filed with the Tribunal three days after SAII’s appeal.
15. In respect of the merits of the appeal, counsel argues the Tribunal Member of the original decision committed two errors: reaching a conclusion on the merits of the appeal 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.
16. The submission on this application makes no reference that the merits of the appeal would necessarily relate to the consideration involved in a determination under section 96 of the *Act*.

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 Giovanni (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 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 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. Mr. Andrews 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. I have carefully reviewed the appeal material and substantially agree with the 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 Mr. Andrews to appeal the Determination during the appeal period and there is no evidence that the Director or Stevenson were made aware by Mr. Andrews 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 on behalf of Mr. Andrews, that the delay in this case 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. Finally, I accept completely the analysis and conclusion in the original decision concerning the presumptive merits of the appeal.
32. The Tribunal Member of the original decision correctly noted the basis for challenging a Determination under section 96 is limited to arguing those issues that arise under that provision. They are listed in the original decision. The Tribunal Member made findings on those issues. None are challenged in this application.
33. The arguments on the presumptive merits of the appeal apply only to the decision made in the appeal of the corporate determination. The failure to address this part of the original decision is tacit acceptance of its correctness.
34. In sum, Mr. Andrews 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

35. Pursuant to section 116 of the *Act*, the original decision, BC EST # D071/14, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal