An Application for Reconsideration

- by -

Dan Joe Levesque carrying on business as Granby River Roadhouse
("Mr. Levesque")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2016A/69

DATE OF DECISION: July 19, 2016

DECISION

SUBMISSIONS

Dan Joe Levesque	on his own behalf, carrying on business as Granby River Roadhouse

OVERVIEW

1. Dan Joe Levesque, carrying on business as the "Granby River Roadhouse" ("Mr. Levesque"), has applied, pursuant to section 116 of the *Employment Standards Act* (the "*Act*"), for reconsideration of BC EST # D073/16, issued on May 3, 2016, by Tribunal Member Roberts (the "Appeal Decision").

2. Mr. Levesque's application was filed on June 3, 2016, one day after the 30-day statutory reconsideration application period expired (see subsection 116(2.1) of the *Act*). In his original application, Mr. Levesque did not apply for an extension of the reconsideration application period (see Part 6 of the Reconsideration Application Form – Form 2). By letter dated June 8, 2016, the Tribunal's Appeals Manager wrote to Mr. Levesque advising him that his application was late and requesting further submissions and/or documents by no later than June 22, 2016. Mr. Levesque did not file any material to further explain why his section 116 reconsideration application was late nor did he provide any further submission and/or documents with respect to the merits of his section 116 application.

3. Given that Mr. Levesque's only excuse for filing a late section 116 application is that he had some unexplained computer problem, and that he has not provided *any* further explanation as to why he did not file a timely application, coupled with what I consider to be, in any event, an unmeritorious application, I am of the view that this application should be summarily dismissed. My reasons for so concluding are set out in greater detail, below.

PRIOR PROCEEDINGS

4. On January 26, 2016 a delegate of the Director of Employment Standards (the "delegate"), following an oral complaint hearing conducted on October 22, 2015, issued a Determination and accompanying "Reasons for the Determination" (the "delegate's reasons") ordering Mr. Levesque to pay his former employee, James T. Teskey ("Mr. Teskey"), the total sum of $609.45 on account of unpaid wages and section 88 interest. Further, and also by way of the Determination, the delegate levied two separate $500 monetary penalties (see section 98) against Mr. Levesque based on his contraventions of sections 18 (failure to pay wages on termination of employment) and 28 (failure to keep payroll records) of the *Act*. Thus, the total amount payable by Mr. Levesque under the Determination is $1,609.45.

5. In making the Determination, the delegate principally relied on Mr. Levesque's testimony as corroborated by other witnesses. Mr. Levesque maintained that Mr. Teskey was paid in full, in cash, but he did not have any corroborating payroll records. The delegate rejected Mr. Teskey's position as to the total number of hours he worked. Notwithstanding that the delegate largely upheld Mr. Levesque's position, he appealed the Determination arguing that the delegate failed to observe the principles of natural justice.

6. Mr. Levesque's appeal was late (by about 2 ½ weeks), principally because he initially submitted the appeal to an Employment Standards Branch office rather than filing the appeal with the Tribunal (the appeal process is detailed in a text box on the second, and last, page of the Determination). Although Member Roberts was

satisfied that Mr. Levesque had a reasonable and credible explanation for his late appeal, she nonetheless summarily dismissed the appeal under section 114 of the *Act*. Member Roberts did not specifically refer to subsection 114(1)(f) in dismissing the appeal – ("there is no reasonable prospect that the appeal will succeed") – but her reasons unequivocally demonstrate that she did not consider the appeal to be meritorious. I might add that the presumptive merit of an appeal is a factor to be considered when determining if the appeal period should be extended (see *Niemisto*, BC EST # D099/96). Thus, the appeal was likely dismissed under one or both of subsections 114(1)(b) and (f) of the *Act*. The former provision states that an appeal may be summarily dismissed if it is filed outside the statutory appeal period.

7. I have reproduced the key findings from Member Roberts' decision, below (at paras. 21 – 28):

> Although Granby [Levesque] alleges a failure to comply with principles of natural justice as the ground of appeal, the appeal submissions are, in essence, an assertion that the delegate's conclusion is wrong.
>
> The Tribunal recognizes that parties without legal training often do not appreciate what natural justice means. Principles of natural justice are, in essence, procedural rights that ensure that parties know the case being made against them, the opportunity to reply, and the right to have their case heard by an impartial decision maker. Natural justice does not mean that the delegate accepts one party's notion of "fairness."
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> I am satisfied that Granby had a fair hearing. There is no suggestion that Granby did not have full opportunity to present its case and to respond to the evidence presented by Mr. Teskey. I find no merit to this ground of appeal.
>
> I understand Granby's argument to be that the Determination is wrong; that the delegate erred in his findings of credibility and gave inappropriate weight to Mr. Teskey's evidence.
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> Having reviewed the Determination, the submissions and the record, I find the appeal submissions consist of nothing more than a repetition of the position Granby advanced, or submissions it ought to have advanced, before the delegate.
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> Although Granby has not suggested that the delegate erred in law, I would find no basis to arrive at such a conclusion on the evidence in any event. In my view, the delegate properly considered the evidence and arguments before him and concluded that Mr. Teskey was entitled to wages. I find his conclusions to be well-founded and have no basis to interfere with them.
>
> Furthermore, the assessment of the credibility and reliability of the witnesses is solely within the purview of the delegate. The delegate, in fact, preferred Mr. Levesque's evidence to Mr. Teskey's on some issues, finding against Granby where there was an absence of employer records which were required to be maintained under the *Act*.
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> The appeal is dismissed.

THE APPLICATION FOR RECONSIDERATION

8. As noted at the outset of these reasons, this application was filed one day after the statutory reconsideration application period expired. I have neither a formal application for an extension of the application period nor any reasonable explanation as to why the present application was not filed in a timely manner. On that basis alone, this application could be dismissed. However, leaving that issue to one side, the application – extremely cursory though it is – is nothing other than a simple statement of disagreement with the Appeal Decision. Mr. Levesque maintains that Mr. Teskey should not have been awarded any unpaid wages since "[h]e was totally paid in cash in full". Although employers are entitled, under the *Act*, to pay wages in cash (see section 20(a), employers are also required to maintain proper payroll records relating to all such payments. A sensible employer should obtain written receipts for any wages paid in cash in order to avoid a subsequent dispute about whether payments were made and/or in what amounts.

9. Mr. Levesque also states that he intends to request the police to investigate Mr. Teskey's (and his witnesses') untruthful testimony at the complaint hearing. I strongly doubt that the police will be much interested in investigating Mr. Levesque's allegations in this regard but, in any event, that proposed course of action has no relevance to the present application.

10. For the reasons given by Member Roberts, which I wholly endorse, the appeal was entirely unmeritorious and the instant application is a simple statement of disagreement with the conclusions set out in the Appeal Decision. This application does not disclose a proper basis for reconsideration of the Appeal Decision (see *Director of Employment Standards (Milan Holdings Inc.)*, BC EST # D313/98).

ORDER

11. Mr. Levesque's application to have the Appeal Decision reconsidered is refused. The Appeal Decision is confirmed as issued.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal