

An Application for Reconsideration

- by -

578047 B.C. Ltd. operating as Pro Gas & Heating
("Pro Gas")

- 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

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2004A/44

DATE OF DECISION: May 26, 2004

DECISION

SUBMISSIONS:

Michael L. Nielsen on behalf of 578047 B.C. Ltd. o/a Pro Gas & Heating
 Rod Bianchini on behalf of the Director

OVERVIEW

578047 B.C. Ltd. operating as Pro Gas & Heating (“Pro Gas”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “Act”) of a decision made by an Adjudicator of the Tribunal, BC EST #D030/04, dated February 18, 2004. (the “original decision”) The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 11, 2003. The Determination found that Pro Gas had contravened Part 3, Section 18 and Part 4, Section 40 in respect of the employment of Paul Bjarnason (“Bjarnason”) and ordered Pro Gas to pay an amount of \$1,067.91. The original decision confirmed the Determination.

In this application, Pro Gas says the original decision represents a breach of the rules of natural justice and a serious mistake in law.

ISSUE

In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case is appropriate for reconsideration, the substantive issue raised in this application is whether the Adjudicator of the original decision erred in deciding the Director did not fail to observe principles of natural justice in making the Determination.

ANALYSIS OF THE PRELIMINARY ISSUE

The legislature has conferred an express reconsideration power on the Tribunal in Section 116 which provides:

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.*
- (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.*

Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal’s 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 interpretation and application” of its provisions. Another stated purpose, found in subsection 2(b), is to “promote the fair treatment of employees and employers”. The general approach to reconsideration is set out 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 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. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively “re-weigh” evidence already tendered before the Adjudicator (as distinct from tendering new evidence or demonstrating an important finding of fact made without a basis in the evidence) and come to a different conclusion. An assessment is also be made of the merits of the Adjudicator’s decision.

Consistent with the above considerations, 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.

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.

After reviewing the original decision, the material on file and the arguments of the parties to this application, I have decided this is a case that does not warrant reconsideration.

The primary question raised by this application, which is whether the Director failed to observe principles of natural justice in making the Determination, was in my view adequately and comprehensively addressed by the Adjudicator of the original decision. The Adjudicator concluded on the facts that the Director had made “more than reasonable efforts to give Pro Gas an opportunity to respond to Bjarnason’s claim, by telephone, in writing and in person” and had not failed to observe principles of natural justice in making the Determination.

This application does nothing more than re-visit the argument made to the Adjudicator of the original decision on the natural justice ground of appeal. In the context of the facts and circumstances outlined in the original decision, there is no error, of law or otherwise, in the original decision. Additionally, having rejected the natural justice ground of appeal, the Adjudicator of the original decision took the correct

approach to the attempt by Pro Gas to introduce evidence on appeal that could have been provided to the Director at any time during the complaint process.

The request for reconsideration is denied.

ORDER

Pursuant to Section 116 of the *Act*, I order the original decision be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal