

An Application for Reconsideration

- by -

Sushil Kumar Mehta
("Mr. Mehta")

- 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.: 2015A/120

DATE OF DECISION: September 30, 2015

DECISION

SUBMISSIONS

Sushil Kumar Mehta

on his own behalf

OVERVIEW

1. Sushil Kumar Mehta (“Mr. Mehta”) seeks reconsideration of a decision of the Tribunal, BC EST # D082/15 (the “original decision”), dated August 12, 2015.
2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 11, 2015.
3. The Determination was made by the Director on a complaint filed by Mr. Mehta against his former employer, Vectrance Canada Inc. (“Vectrance”), claiming termination pay in the amount of \$26,000.00.
4. The Determination found Mr. Mehta had not filed the complaint within the time period provided in section 74 of the *Act* and, applying section 76 of the *Act*, declined to proceed with the complaint.
5. An appeal was filed by Mr. Mehta alleging the Director erred in law and failed to observe principles of natural justice in making the Determination.
6. In the original decision, the Tribunal Member accepted the finding of the Director that Mr. Mehta’s employment with Vectrance was terminated May 2, 2014, and, in order to fall within the time limited for filing a complaint set out in section 74 of the *Act*, was required to file his complaint against Vectrance by or before November 2, 2014. His complaint was late by two months and it was on this basis the Director considered whether to exercise the discretion provided in section 76 of the *Act* to refuse to investigate or proceed with it.
7. The Tribunal Member correctly identified the central question as being whether the Director committed a reviewable error of law in exercising the discretion granted in section 76 of the *Act* to refuse to investigate or proceed with a complaint. The Tribunal Member found the Director’s decision not to investigate or proceed with Mr. Mehta’s complaint was in accordance with principles set out in the Tribunal’s decision *Jody L. Goudreau and Barbara E. Desmarais*, BC EST # D66/98, and the principles expressed by the Supreme Court of Canada in *Maple Lodge Farms Limited v. Government of Canada*, [1982] 2 S.C.R. 2 and that Mr. Mehta had not shown such exercise of discretion was an abuse of power, that the Director made a mistake in construing the limits of his authority or that the Director had committed a procedural error. In other words, the Tribunal Member found the Director had not committed an error of law in refusing to investigate or proceed with Mr. Mehta’s complaint.
8. The Tribunal member also found no evidence the Director had failed to observe principles of natural justice in making the Determination.
9. The Tribunal Member found no basis on which to interfere with the Director’s discretionary decision, dismissed the appeal and confirmed the Determination.

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. In this application. Mr. Mehta does nothing more than re-assert the position he expressed in his appeal: that the complaint was filed in time and even if it was not, justice required the Director to proceed with it.
12. He grounds his submission in this application on all of the same arguments and provisions of the *Act* that were raised in his appeal. Those submissions did not convince the Tribunal Member who made the original decision there was any merit to the appeal and they are no more convincing in this application. The argument invoking sections 52, 54, 56 and 67-71 of the *Act* are, simply put, woven from the cloth of some illusion held by Mr. Mehta, for they are not based on any facts found in the file. There is no evidence Mr. Mehta was on any leave contemplated by Part 6 of the *Act* or that his “notice of termination” should have been found to be of no effect for any of the reasons expressed in section 67 of the *Act*.

ANALYSIS

13. As a result of recent amendments to the *Act*, section 116 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 served with an order or a decision of the tribunal may make an application under this section.*
- (2.1) *The application may not be made more than 30 days after the date of the order or decision.*
 - (2.2) *The tribunal may not reconsider an order or decision on the tribunal's own motion more than 30 days after the date of the decision or order.*
- (3) *An application may be made only once with respect to the same order or decision.*
- (4) *The director and a person served with an order or decision of the tribunal are parties to a reconsideration of the order or decision.*

14. The amendments do not alter that the authority of the Tribunal under section 116 is discretionary. As the reconsideration decisions issued by the Tribunal have indicated, 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 Inc.*, 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 favor 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.

15. In deciding whether to reconsider, the Tribunal has considered factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. Section 116(2.1) of the *Act* now provides for a distinct consideration of the timeliness of a reconsideration application. Timeliness is not an issue on this 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.
16. 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.
17. 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.
18. 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.
19. I am not persuaded this application warrants reconsideration.
20. As I have indicated above, this application does no more than re-submit the same submissions made in the appeal that were not accepted in the original decision. The stated objective of this application is to have a different panel of the Tribunal open their eyes to the violations of the *Act* and the unethical and unjust actions of Vectrance that was allegedly not done by the Tribunal Member who made the original decision. The focus of this application is not the original decision – Mr. Mehta wants the original decision to just be ignored – but continues to be the Determination. That is an inappropriate use of the reconsideration provisions of the *Act*.
21. The Determination was not found to be wrong by the Tribunal Member who made the original decision and Mr. Mehta has failed to show the original decision is wrong in any way. Overall, there is nothing in this

application that would justify the Tribunal using its authority to allow reconsideration of the original decision and accordingly the application is denied.

ORDER

22. Pursuant to section 116 of the *Act*, the original decision, BC EST # D082/15, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal