An Application for Reconsideration

- by -

Lyle Storey
("Mr. Storey")

- 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/143

DATE OF DECISION: November 19, 2014

DECISION

SUBMISSIONS

Dale Kermode, Q.C. on behalf of Lyle Storey

OVERVIEW

1. Lyle Storey ("Mr. Storey") seeks reconsideration of a decision of the Tribunal, BC EST # D086/14 (the "original decision"), dated September 26, 2014.

2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on July 3, 2014.

3. The Determination was made by the delegate on a complaint filed by Mr. Storey, who alleged his former employer, ARAS 360 Technologies Inc. ("ARAS") had contravened the *Employment Standards Act* (the "*Act*") by failing to pay all commission earnings owed to him and failed to pay compensation for length of service upon his termination.

4. The Determination found the *Act* had not been contravened and that no wages were outstanding.

5. An appeal was filed by Mr. Storey alleging the Director erred in law and failed to observe principles of natural justice in making the Determination. The appeal sought to have the Tribunal refer the matter back to the Director.

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

7. The Tribunal Member of the original decision determined, on the error of law argument, that Mr. Storey was doing "little more than simply disputing the delegate's findings of fact and rearguing in the hopes that he will get a more sympathetic hearing from the Tribunal." Based on that view, the Tribunal Member of the original decision found Mr. Storey had not established there was an error of law in the Determination.

8. On the natural justice ground, the Tribunal Member of the original decision found Mr. Storey had not been denied the opportunity to know the case being presented by ARAS in support of their decision to terminate him, the opportunity to challenge that case or the opportunity to present evidence and argument in support of his position. The Tribunal Member decided, on the face of the material, that Mr. Storey had not been denied the procedural rights proffered by principles of natural justice and had not otherwise demonstrated there was any denial of natural justice in the complaint process that led to the Determination.

ISSUE

9. 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

10. In this application for reconsideration Mr. Storey revisits the same arguments made in his appeal, submitting he was denied a fair hearing by a lack of advance notice of the specifics of the alleged cause for his termination and by a reliance by the Director on evidence led by ARAS that was not put to him in cross-examination.

11. Counsel for Mr. Storey argues both the Determination and the original decision suffer from a failure to appreciate and apply the rule in *Browne v. Dunn* (1893) 6 R. 67 (H.L.), which he says establishes a "right to exclusion of evidence that has been led by one party, if that evidence has not been reasonably put to the opposing party in cross examination". It is submitted that, applying the rule to the circumstances, the evidence presented by ARAS of Mr. Storey's demotion, his discussion with Ms. Krizmanich and the basis for his termination should have been excluded and the delegate's reliance on it was a breach of natural justice.

ANALYSIS

12. 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*
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> *(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.*

13. 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 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 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) Valoroso and Carmen Valoroso operating as Primadona Ristorance Itlaniano)*, BC EST # RD046/01, the Tribunal explained the reasons for restraint:

> . . . the *Act* creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute . . .
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> 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.

14. 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.

15. 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.

16. 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.

17. 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.

18. I am not persuaded this application warrants reconsideration.

19. The application does nothing more than re-assert challenges made in the appeal that were not accepted in the original decision. Its primary focus is, in reality, not the original decision but disagreement with the Determination. This application attacks the original decision for no other reason than it did not accept the Determination was flawed.

20. Both of the arguments upon which the appeal, and this application, are based were answered in the following excerpt from the original decision (at paras. 34 – 36):

> . . . there is no legal obligation on the part of ARAS to put any oral evidence of its witness . . . to him [Mr. Storey] in cross examination or to give the oral evidence to be proferred at the Hearing to him in advance of the Hearing. Mr. Storey certainly could have cross examined Ms. Krizmanich and challenged any oral evidence she gave at the Hearing.
>
> I also do not find there to be any basis to conclude that the delegate prevented Mr. Storey from rebutting any evidence of Ms. Krizmanich or ARAS.
>
> I find this to be a case where the delegate heard both parties and, in reaching his conclusions, carefully evaluated and weighed that evidence and reached conclusions about the strength of the parties' respective positions . . .

21. That part of the original decision, which I view as its essence, is not challenged in this application except by way of invoking the rule in *Browne v. Dunn*. My response to this argument against the original decision is threefold.

22. First, the rule in *Browne v. Dunn* is not a rule of law, it is a rule of evidence; one which allows the decider of fact to attribute less weight to evidence not "put" to the party against whom it is intended to operate in cross-examination. Its focus is credibility.

23. Second, its utility as a procedural rule in complaint proceedings under the *Act*, where a large number of determinations are made following investigation and the vast majority of participants are lay persons, is dubious. As noted in *J.C. Creations Ltd. o/a Heavenly Body Sport*, BC EST # RD317/03, employment standards legislation is designed as a relatively quick and cheap means of resolving employment disputes. The complaint and appeal processes should be relatively informal and efficient, with minimum possible reliance on lawyers: see page 11. This view is reinforced by the statement of purposes in section 2, and the procedural protection provision found in section 77, which states:

> *77 If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.*

24. The above is the limit of procedural protection provided in the *Act*. The application of principles of natural justice should reflect the extent of this protection and not, as indicated in the original decision, extend procedural rights to require the full panoply of procedural and technical rules that might operate in a criminal or civil court proceeding.

25. Third, as a factual matter, the Tribunal Member of the original decision found Mr. Storey had the opportunity to both respond and rebut the evidence of Ms. Krizmanich, but did neither. There was no evidence in the material that the complaint hearing procedure adopted by the delegate impacted adversely on Mr. Storey's ability to make his case and respond to the case presented by ARAS. If he alleges it did, he had the burden of establishing that allegation and he failed to meet that burden.

26. Raising the same arguments again in an application for reconsideration does not alter the Tribunal's view of them. This application re-argues challenges to the Determination and challenges aspects of the original decision without demonstrating a reviewable error and, in the absence of such an error, are matters which would be inappropriate to reconsider.

27. There is no basis to allow reconsideration of the original decision and accordingly the application is denied.

ORDER

28. Pursuant to section 116 of the *Act*, the original decision, BC EST # D086/14, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal