

An Application for Reconsideration

- by -

Dragon and Branka Tarailo

- 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: John Savage

FILE No.: 2005A/82

DATE OF DECISION: July 19, 2005

DECISION

SUBMISSIONS

Dragan Tarailo and Branko Tarailo, for themselves

Kim O. LaBelle, for Wall Financial Corporation

Ivy Hallam, for the Director of Employment Standards

OVERVIEW

1. Dragan Tarailo and Branko Tarailo (collectively referred to as “Tarailo”) made complaints to the Director of Employment Standards regarding unpaid wages. A Delegate of the Director concluded that Wall Financial contravened several provisions of the *Employment Standards Act* and ordered that wages be paid in the amount of \$2,403.00.
2. Tribunal member David B. Stevenson rendered a Decision on an appeal of a Determination of the Director on November 15, 2004. Member Stevenson's decision varied the order of the Director to require payment of an additional sum of \$481.62 plus interest to Tarailo. The Determination of the Director is dated August 6, 2004.
3. The Reconsideration Application Form is dated May 6, 2005, nearly six months from the date of the Decision, and was received by the Tribunal May 12, 2005. The reasons for requesting reconsideration include “clerical error”, “breach of principles of natural justice” and “error in law”.
4. Respecting the delay, the applicant says “The delay of our request for reconsideration did happen, because of family emergency reasons”. The family emergency reasons are not specified. Later on in the submission the applicant says “In addition, there is a real possibility that the Tribunal can vary the decision if there are grounds for application. That was good news for us, because we were not aware of the possibility for the appeal”.
5. The bulk of the submission requesting reconsideration of Member Stevenson's decision involves reference to and a recital of submissions to Member Stevenson.

ISSUE

6. Should the Employment Standards Tribunal reconsider Decision BC EST # D196/04 in the circumstances of this case?

LEGISLATION

7. The statutory authority for reconsideration of a Tribunal decision is found in Section 116 of the *Employment Standards Act* as follows:

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. 1995, c. 38, s. 116; 2002, c. 42, s. 62; 2003, c. 65, s. 12.
8. Reconsideration of a Decision is not a right to which a party is entitled, rather, reconsideration is at the discretion of the Tribunal, and is generally undertaken only in exceptional circumstances: *Re Ekman Land Surveying Ltd.*, BC EST RD#413/02. For example, it would be contrary to one of the policies behind the Act, that requiring the fair and timely resolution of disputes, to allow two hearings for each appeal: *Re World Project Management Inc.*, BC EST RD#134/97. Reconsideration of a Decision of the Tribunal is effectively a third hearing on the issues as there has already been a hearing before the Director and the original appeal to the Tribunal.
9. Important factors that weigh in favour of reconsideration are where there are significant questions of law, principle or procedure that should be reviewed because of their importance to the parties or employees and employers generally: *Re British Columbia Director of Employment Standards*, BC EST RD#046/01. Factors weighing against reconsideration include where the application has not been filed in a timely fashion, and there is not valid cause for the delay and where the applicant's primary focus is to have the reconsideration panel weight the evidence tendered at the prior hearing: *Re Town*, BC EST RD #002/04.
10. Member Roberts recently summarized the grounds for reconsideration in *Re Huang*, BC EST RD#086/05:
- The Tribunal may agree to reconsider a Decision for a number of reasons, including:
- The adjudicator fails to comply with the principles of natural justice;
 - There is some mistake in stating the facts;
 - The Decision is not consistent with other Decisions based on similar facts;
 - Some significant and serious new evidence has become available that would have led the Adjudicator to a different decision;
 - Some serious mistake was made in applying the law;
 - Some significant issue in the appeal was misunderstood or overlooked; and
 - The Decision contains a serious clerical error.
- (*Zoltan Kiss*, BC EST#D122/96)
11. There is a two stage process for determining whether the Tribunal should exercise its discretion to reconsider a Decision; at the first stage, the panel decides whether the matters raised in the application for reconsideration meet the threshold for warranting reconsideration; at the second stage, the merits of the issues in the application are considered: *Re Annable*, BC EST D# 559/98.

THRESHOLD FOR RECONSIDERATION TIMELINESS

12. As noted above, in this case the applicant filed the Reconsideration Form nearly six months following the Decision sought to be reconsidered. The explanations given are (1) that the applicant was not aware that they were entitled to apply for reconsideration of the Decision, and (2) that because of family emergency reasons it took longer to analyze the Decision and request reconsideration. These explanations do not sit well together.
13. With respect to the applicant's position that they were not aware that they were entitled to apply for reconsideration of the Decision, the applicant in their submission refers to a letter dated December 10, 2004 addressed to them from the Tribunal. The second paragraph of the letter reads as follows:

“The Tribunal's decision is final and conclusive. However, section 116 of the Employment Standards Act allows a party to request a reconsideration of a Tribunal Decision. Please refer to the Tribunal's website www.bcest.bc.ca for information on reconsideration of Tribunal decisions”.
14. The Tribunal received a further letter dated December 16, 2004 from Tarailo and responded by correspondence dated December 20, 2004 as follows:

“The Tribunal has received your letter dated December 16, 2004.

In regards to your request for a more determined deadline for submitting the request for reconsideration, the *Employment Standards Act* does not provide a deadline. However the Tribunal has concluded that a request for reconsideration delivered to the Tribunal more than 30 days following the date of the decision must be accompanied by an explanation for the delay.

Some recent decisions of the Tribunal concerning the issue of timeliness of reconsideration application are: *Bonnie Holmes* BC EST D#143/04, *Old Yale Log Homes Ltd.*, BC EST D# 86/04 and *Omobosola Owolabi operating as Just Beauty*, BC EST D#193/04. These decisions can be found on the Tribunal's website: www.bcest.bc.ca”.
15. In their submissions Tarailo refers to this correspondence. The only explanation given for the delay is contained in three sentences as follows:

“The delay of our request for reconsideration did happen, because of family emergency reasons. We simply have not been in the position to analyze your decision and make a request for reconsideration until recent days. We kindly ask the Tribunal to accept our application for reconsideration of the decision”.
16. In my opinion this brief statement falls far short of what is reasonably required to explain a delay of nearly 6 months in making application for reconsideration, especially in light of the receipt of the above noted correspondence from the Tribunal.

SIGNIFICANT QUESTIONS OF LAW, PRINCIPLE OR PROCEDURE

17. I have examined the submission of the applicant on the merits. The submission is complex, but repeats much the same theme.

18. For example, with regard to allegations of a breach of natural justice, Tarailo refers to “The 28 pages of our appeal (with supporting documents) are clearly documented proof of bias when Delegate did chose employer’s side when finding of facts to make decision”. This position suggests bias on the part of the decision maker. Of course, when faced with conflicting submissions and evidence, it will often if not always be necessary to make findings which conflict with the submissions and evidence of one party to the dispute. The fact the decision favours one party's position in the dispute cannot be reasonable proof or evidence of bias.
19. Moreover, accepting the evidence of one person instead of the conflicting evidence of another person or persons is not an error of law. It is a matter of the weight of the evidence and that is something that is not subject to appeal. The weight of the evidence is a matter of fact for the Delegate to determine and is not subject to review by this Tribunal.
20. Tarailo also takes issue with the fact that the Tribunal determined to hold the hearing by way of written submissions and this was “exactly as suggested” by counsel for the Employer. Tarailo, however, acknowledges that it took no position on how the hearing was to be held “but we did leave it to the Tribunal to decide what was necessary to be done”. The holding of an in-person hearing by this Tribunal is relatively rare. That is in part due to the limited grounds for review. Where, as here, one party takes no position on the method of hearing, the determination of the Tribunal on the method of hearing the appeal cannot be reasonable proof of or even evidence of bias.
21. There is an assertion in the Tarailo submission that Tarailo was not given a proper opportunity to respond to submissions from Kim LaBelle (“LaBelle”), counsel for the employer. A letter dated November 2, 2004 was accepted by the Tribunal. The LaBelle submission was that a “continuation” submission filed on or about October 21, 2004 by Tarailo, nearly six weeks after the appeal period had expired, was not an elaboration of previous issues but raised a new ground or grounds of appeal. Tarailo did not reply to the LaBelle submission. The Tribunal considered the “continuation” submission and found that it raised new issues and was out of time, but was also lacking merit, although the LaBelle submission did not address the merits. In the circumstances, there is no substance to this ground of appeal.
22. Much of the rest of the Tarailo submission reviews, at length, the decision of the Delegate and asks this Tribunal to come to a different conclusion. It does not address specific questions of law, but rather takes issue with the findings on the largely factual issues below.
23. In a number of decisions of the Employment Standards Tribunal, panels have adopted the definition of “error of law” set out by the British Columbia Court of Appeal in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 — Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.). That definition can be paraphrased as finding an error of law where there is:
 1. A misinterpretation or misapplication of a section of a statute;
 2. A misapplication of an applicable principle of general law;
 3. Acting without any evidence;
 4. Acting on a view of the facts which could not reasonably be entertained; and
 5. Adopting a methodology that is wrong in principle.
24. In my opinion, the submissions of Tarailo do not raise as issues any errors of law.

SUMMARY

25. The application for reconsideration was not submitted in a timely manner, nor was any reasonable explanation given for the significant delay. The application raises no significant questions of law, principle or procedure. In my opinion this case fails to meet the threshold requirements for reconsideration and the reconsideration power should not be exercised in this case.

ORDER

26. Pursuant to Section 116 of the *Act* I deny the application for reconsideration.

John Savage
Member
Employment Standards Tribunal