An Application for Reconsideration

- by -

C.G. Motorsports Inc.
("CGM")

- 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.: 2012A/107

DATE OF DECISION: October 17, 2012

DECISION

SUBMISSIONS

Aidan P. Butterfield — counsel for C.G. Motorsports Inc.

OVERVIEW

1. C.G. Motorsports Inc. ("CGM") seeks reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision, BC EST # D091/12, made by the Tribunal on August 28, 2012 (the "original decision").

2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on May 1, 2012.

3. The Determination was made by the Director on a complaint filed by Kwok Chiu Yeung ("Mr. Yeung"), who alleged CGM had contravened the *Act* by failing to pay length of service compensation. The Determination found that CGM had contravened Part 8, section 63 of the *Act* and ordered CGM to pay the complainant $7,396.61, an amount which included both wages and interest.

4. The Director also imposed administrative penalties on CGM under Section 29(1) of the *Employment Standards Regulation* (the *"Regulation"*) in the amount of $500.00.

5. CGM filed an appeal of the Determination, alleging the Director had erred in law and that new evidence had come available that was not available when the Determination was being made. CGM sought to have the Determination cancelled or referred back to the Director. The appeal was filed late and CGM requested an extension of the time period allowed under the *Act* for filing an appeal.

6. The Tribunal Member of the original decision refused to extend the time period for filing and dismissed the appeal.

7. CGM seeks reconsideration of the original decision.

ISSUE

8. 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 substantive issue raised in this application is whether the Tribunal should grant the request to extend the time period for filing the appeal and consider the merits of the appeal.

ARGUMENT

9. Counsel for CGM submits the Tribunal Member erred in law in the original decision by misapplying the criteria identified in *Re: Niemisto*, BC EST # D099/96, and used by the Tribunal when considering whether to extend the time period for filing an appeal under the *Act*. Specifically, counsel argues the Tribunal Member erred by failing to limit his inquiry of the merits of the appeal to whether the appellant had demonstrated a *prima facie* case, prematurely adjudicating the merits of the appeal without providing the appellant an opportunity to adduce evidence or to make submissions on the merits of the appeal.

10. Counsel submits that at least a *prima facie* case had been made and the Tribunal Member should not have analyzed and adjudicated each head of the appeal without having the benefit of the full submission of the appellant on each of those matters.

11. Counsel also says the Tribunal Member in the original decision was wrong as well in stating the "new evidence" submitted by CGM with the appeal "would likely fail to qualify as "new evidence" under the test in *Re: Merilus Technologies*." The Tribunal Member, among other things, found the evidence was not relevant. Counsel for CGM disagrees, arguing the evidence presented is relevant to the issue of whether Mr. Yeung had quit his employment.

12. The Tribunal has not sought submissions in response to the reconsideration request from either Mr. Yeung or the Director. If the request for reconsideration is allowed, the Tribunal will seek input from the other parties on the substantive matters raised by the reconsideration.

ANALYSIS OF THE PRELIMINARY ISSUE

13. 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 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.*

14. 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) and Carmen Valoroso)*, 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 . . .
>
> 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" is not 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 considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. 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 an 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.

ANALYSIS

19. Having reviewed the original decision, the material in the appeal file and the submissions of CGM on the reconsideration request, I am not persuaded this matter warrants reconsideration.

20. The decision of the Tribunal about whether to extend the statutory time period for filing the appeal is matter of discretion, one which was guided by well established principles.

21. A key element of the applicable principles is that one panel of the Tribunal does not lightly interfere with a discretionary decision of another panel. While I do not suggest an exercise of discretion by one panel of the Tribunal can never be reviewed and altered by a reconsideration panel, there is a burden on an applicant challenging a discretionary decision of a Tribunal Member to show the exercise of discretion by that Tribunal Member was not consistent with established legal principles, that it was not made in good faith, that it was arbitrary or that it was based on irrelevant considerations.

22. In exercising his discretion in this case, the Tribunal Member addressed those questions identified in the Tribunal's July 11, 2012, letter to the parties. Those questions compel an analysis of the factors typically examined when considering whether to extend the time for filing an appeal and, as counsel for CGM has correctly indicated, are set out in *Re: Niemisto*, *supra*. The typical factors are well established and have been consistently applied to applications to extend the time period for filing an appeal.

23. In this context of the exercise of discretion in the original decision, there is no suggestion of bad faith or arbitrariness by the Tribunal Member in the original decision or that the exercise of discretion was based on irrelevant considerations.

24. This application is based principally on the contention that the Tribunal Member's exercise of discretion was inconsistent with established principles. More particularly, that the Tribunal Member went beyond an examination of whether the appeal contained a *prima facie* case and, inappropriately, examined the full merits of the appeal.

25. As this appeal does not raise any dispute with the consideration and conclusion in the original decision on any of the other factors examined, I need not address them in this decision and accept that they stand as decided in the original decision. In sum, the Tribunal Member found that CGM did not have a reasonable and credible explanation for failing to file the appeal within the statutory time period, that CGM had expressed a *bona fide* intent to appeal the Determination before the expiry of the time period and that CGM had not made any other party aware of that intention. There was no finding on the question of prejudice.

26. As it relates to the central argument on the exercise of discretion in the original decision, I would point out initially that the particular factor identified in *Re: Niemisto* directs a consideration of whether there is a "strong *prima facie* case in favour of the appellant". The Tribunal has accepted that the phrase, in lay terms, is equivalent to asking if "the person appealing has a strong case that might succeed": see *Curtyn Construction Ltd.*, BC EST # RD148/02. The Tribunal has never considered a *prima facie* case to reflect the meaning suggested by counsel for CGM in its argument for reconsideration.

27. The Tribunal has adopted an approach to the assessment of this criterion that, while it does not require a conclusion that the appeal will fail or succeed, does require consideration of the relative strength of the appeal against long standing principles that apply in the context of the grounds chosen for appeal. The rationale for this approach is found in the stated purposes of the *Act* and which has been expressed by the Tribunal in *Gerald Knodel a Director of 0772646 B.C. Ltd. carrying on business as Home Delivery*, BC EST # D083/11, as follows:

> . . . this inquiry [into whether there is a strong *prima facie* case] flows from the section 2 purposes of the *Act* and, in particular, the need for fair treatment of the parties and fair and efficient dispute resolution procedures. Simply put, it is neither fair nor efficient to put parties through the delay and expense of an appeal process where the appeal is doomed to fail.

28. Accordingly I agree entirely with the statement found at para. 44 of the original decision: that to the extent necessary to determine whether there is a "strong *prima facie* case" the Tribunal will examine the merits of the appeal. That statement does not deviate from established principles applied by the Tribunal to a consideration of requests to extend the statutory time period for appeals. An examination of the relative strength of an appeal considered against established principles necessarily requires some conclusions to be made about the merits.

29. I am not persuaded, and do not find, that the Tribunal Member of the original decision did any more than what was required to give expression and meaning to the "strong *prima facie* case" factor.

30. He considered the grounds of appeal chosen by CGM and applied those grounds of appeal against established and long standing principles that apply to those chosen grounds. The Tribunal Member found the first of the five points raised under the error of law ground of appeal – tested against the Tribunal's "unequivocal" statement that it is not an error for the Director to require "clear and convincing" evidence that an employee has quit or abandoned their employment – rendered that point unpersuasive and unmeritorious.

31. The Tribunal Member found the second point in the appeal argument to be inconsistent with findings of fact based on evidence from both Mr. Yeung and CGM, and as such lacking merit. It may have assisted the analysis for the Tribunal Member to have noted the grounds of appeal in section 112 of the *Act* do not allow for appeals rooted in a disagreement with findings and conclusions of fact made by the Director, as that principle also applied to consideration of other points listed as "error of law", but that omission does not detract from the correctness of the finding made on those points that challenged findings of fact.

32. The Tribunal Member found no basis in the Determination or in the section 112(5) record for CGM suggesting Mr. Yeung had been offered, and refused, reasonable alternative employment offered by CGM or in the suggestion the Director erred by failing to consider whether CGM had "just cause" to terminate Mr. Yeung, as "just cause" was neither raised nor sought to be proven by CGM. A cursory examination of the section 112(5) record bears out the correctness of the Tribunal Member's finding on these points and supports a conclusion that, on those points, the appeal had no chance to succeed.

33. Finally, the Tribunal Member found the last point in the "error of law" argument was unsupported by, and in fact directly contradicted by, the reasons provided in the Determination for finding Mr. Yeung had not quit his employment.

34. The argument made by counsel for CGM relating to the comments of the Tribunal Member concerning the "new evidence" ground of appeal also fails for the same reasons as the above arguments fail.

35. A judgement about whether to allow new evidence into an appeal is a discretionary one, with such discretion being guided by testing the proposed evidence against the considerations found in the *Re: Merilus Technologies* case, which can safely be described as setting out the established principles. The original decision clearly reflects application of those principles in considering the likelihood the new evidence would be admitted. The best counsel for CGM can say is that he disagrees with how the Tribunal Member perceived the proposed evidence and, ultimately, how he viewed the effect of applying established principles to that material and to the request to extend the appeal time period. On reflection, I agree entirely with the views expressed in the original decision about whether the material submitted with the appeal could be viewed as "evidence" at all and whether it could be considered to be relevant to the issue of whether Mr. Yeung quit his employment.

36. As with the above matters, it was not an error to make an assessment of the "new evidence", testing that proposed evidence against established principles to determine whether there was sufficient likelihood such evidence would be allowed to justify extending the filing period on that ground of appeal. In exercising his discretion to refuse an extension of the statutory time period and to deny the appeal, I am not persuaded the Tribunal Member made any error in the assessment of the appeal or in applying his conclusions to the other elements of the chosen grounds of appeal.

37. In sum, it was correct and appropriate for the Tribunal Member in the original decision to take an approach to the application to extend the appeal period that included, in result, an acceptance that it is neither fair nor efficient to put parties through the delay and expense of an appeal process where the appeal is of dubious merit and which has little or no prospect of ever succeeding. That approach necessarily requires an examination of the grounds of appeal applied against principles established and applied by the Tribunal to those grounds of appeal.

38. The application for reconsideration is denied.

ORDER

39. Pursuant to section 116 of the *Act*, the original decision is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal