

An Application for Reconsideration

- by -

Angel M. Dean
("Dean")

- 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/92

DATE OF DECISION: October 17, 2012

DECISION

SUBMISSIONS

Angel M. Dean	on her own behalf
Richard Press	counsel for Kids & Company Corporate Child Care Services (B.C.) Ltd.
John Dafoe	on behalf of the Director of Employment Standards

OVERVIEW

1. Angel M. Dean (“Dean”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of a decision, BC EST # D071/12, made by the Tribunal on July 19, 2012, (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 March 27, 2012. The Determination considered a complaint filed by Dean, who alleged his former employer, Kids & Company Corporate Child Care Services (B.C.) Ltd. (“Kids & Co”) had contravened requirements of section 8 of the *Act*.
2. The Determination had found section 8 of the *Act* had not been contravened and refused to take any further action on the complaint.
3. Dean appealed the Determination on the ground the Director erred in law and failed to observe principles of natural justice in making the Determination.
4. The Tribunal Member of the original decision found the grounds of appeal were not established and, as a result, dismissed the appeal and confirmed the Determination.
5. In this application for reconsideration Dean asserts the Tribunal erred in law and failed to consider several elements of her appeal, made incorrect findings, drew a wrong conclusion about her position during the complaint hearing concerning a November 3, 2010, meeting and, generally, made the wrong decision on her appeal.

ISSUE

6. 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 warrants reconsideration, the substantive issue raised in this application is whether the Tribunal should once again scrutinize the evidentiary record and consider whether there was a reviewable error in the original decision.

ARGUMENT

7. I will only summarize the arguments being made by Dean in this application and the responses to the application from the Director and counsel for Kids & Co.
8. Dean argues the Tribunal should reconsider the original decision because the Tribunal failed to consider:

- that the job title “Assistant Manager” was itself a misrepresentation and therefore a contravention of section 8 of the *Act*;
 - the full contents of the 13 December 2010 e-mail;
 - the misrepresentation inherent in a 21 November 2010 e-mail from Kids & Co to Dean;
 - that the motives of Ms. T were sinister and her evidence unreliable; and
 - the evidence that an 8:30 am start time was not a “one off”.
9. Dean also argues the Tribunal Member in the original decision wrongly found Dean received training by working in the Infant/Toddler area on her first, and only, day of work, wrongly speculated that the word “etc.”, used by Ms. T, could have been reference to “other things associated with the pushing of strollers” and erred in law in stating “Ms. T seems to have fulfilled her obligations regarding Dean’s ability to work”.
10. In response to this application, the Director and counsel for Kids & Co submit Dean has not raised any matter that warrants reconsideration; that the basis for her application, as it was with her appeal, lies in her disagreement with findings and conclusions of fact made in the Determination. Both submissions assert Dean is simply asking for yet another re-weighting of the evidence and re-visiting of the arguments made in the appeal in the hope a different panel of the Tribunal will reach a different conclusion.
11. Counsel for Kids & Co has provided a point-by-point response to the reconsideration arguments made by Dean, noting that a review of the original decision indicates there was a consideration of each of the matters Dean says the Tribunal Member “failed to consider” in the original decision and the arguments alleging the Tribunal Member “wrongly found”, “wrongly states” and “erred in law” all relate to a disagreement with findings of fact made in the Determination that were considered and confirmed in the original decision.

ANALYSIS OF THE PRELIMINARY ISSUE

12. 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.*
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 Giovanni (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.

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. 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 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.
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. Having reviewed the original decision, the material in the appeal file and the submissions of the parties, I am not persuaded this matter warrants reconsideration.
19. I agree completely with the positions taken by the Director and counsel for Kids & Co that this application simply represents an attempt by Dean to have another panel of the Tribunal review and re-weigh the evidence considered by the Director in the complaint process, alter findings of fact made by the Director (without there being any demonstrable error of law in those findings) and reach a different conclusion on the complaint than was reached by the Director; a conclusion that was reviewed and confirmed in the original decision.
20. The application does not show any reviewable error in the original decision and, in my view quite improperly, alleges failings in that decision that are not borne out on any reasonable reading of it. The Tribunal Member went to considerable lengths in the original decision to analyze and explain the reasons for the conclusions reached and the decision made. Having reviewed that aspect of the original decision, I am, frankly, amazed that Dean could suggest there was any error with it.

21. In my view, this application represents the clearest example of where the Tribunal will not allow the matter to proceed past the first stage of analysis.
22. The application is dismissed.

ORDER

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

David B. Stevenson
Member
Employment Standards Tribunal