

An Application for Reconsideration

- by -

Landrock Construction Ltd.  
("Landrock Construction")

- 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:** Robert E. Groves

**FILE No.:** 2016A/100

**DATE OF DECISION:** August 31, 2016

## DECISION

### SUBMISSIONS

Katy E. Allen

counsel for Landrock Construction Ltd.

### OVERVIEW

1. This is an application under section 116 of the *Employment Standards Act* (the “*Act*”). Landrock Construction Ltd. (“Landrock Construction”) seeks reconsideration of a decision of the Tribunal dated July 13, 2016 (the “Appeal Decision”).
2. The Appeal Decision was the result of an appeal by Landrock Construction of a determination issued by a delegate of the Director of Employment Standards (the “Delegate”) on February 5, 2016 (the “Determination”).
3. The Determination followed a hearing of a complaint filed by a former employee of Landrock Construction, Andrew Porter (the “Complainant”), who alleged that it had failed to pay him wages as required by the *Act*.
4. The Delegate determined that Landrock Construction had contravened the *Act* and that it owed the Complainant \$10,600.32 for wages, vacation pay, compensation for length of service and interest. The Delegate also imposed two administrative penalties of \$500.00. The total the Delegate determined that Landrock Construction was required to pay was, therefore, \$11,600.32.
5. Landrock Construction appealed the Determination pursuant to section 112 of the *Act*. In the Appeal Decision, the Tribunal dismissed the appeal and confirmed the Determination.
6. I have before me Landrock Construction’s Appeal Form and submissions including the Determination and the Delegate’s Reasons for it, the record the Director was required to produce pursuant to section 112(5) of the *Act*, the Appeal Decision, Landrock Construction’s application for reconsideration, and its submissions in support of the application.
7. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings on applications for reconsideration. Having reviewed the materials before me, I find I can decide this application based on the written materials filed, without an oral or electronic hearing.

### ISSUES

8. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:
  - a. Does the request meet the threshold established by the Tribunal for reconsidering a decision?
  - b. If so, should the decision be confirmed, cancelled, varied or referred back to the original panel, or another panel of the Tribunal?

## FACTS

9. Landrock Construction operates a masonry business. It employed the Complainant as a stone fabricator.
10. The Complainant was employed from 2006 until January 21, 2015. Initially, the Complainant worked for a company called Landrock Landscaping & Excavating Ltd. In December 2014, Landrock Construction commenced to operate the business of that company. The Complainant's employment was not terminated, and his job duties did not change following the disposition.
11. The Delegate determined, and Landrock Construction does not appear to dispute, that Landrock Construction was a successor employer pursuant to section 97 of the *Act*. Accordingly, the Complainant's employment was deemed to be continuous and uninterrupted, despite the disposition of the operations of the business.
12. The Complainant's employment ended on January 21, 2015, following a conversation between the Complainant and a supervisor, Aldo Trinetti ("Trinetti"). Trinetti did not testify at the hearing of the complaint, and the Delegate's Reasons do not set out the details of the conversation. The Complainant's evidence was that Trinetti told him he was fired, and that he should take his personal possessions and leave. The Complainant did so.
13. One of the arguments made on behalf of Landrock Construction at the hearing was that Trinetti had no authority to dismiss the Complainant. The other argument offered by Landrock Construction was that the principal of the company, Vince D'Arpino ("D'Arpino"), telephoned the Complainant shortly after the dismissal, informed the Complainant that Trinetti lacked the authority to dismiss, and that the Complainant should return to work. Since the Complainant declined to do so, Landrock Construction submitted that he had quit.
14. The Delegate determined that the Complainant had been dismissed without cause. She concluded that there was no reason for the Complainant to have questioned Trinetti's authority to dismiss as Trinetti had hired the Complainant and had acted as his "boss" throughout the time he was employed. Further, the Delegate decided that the Complainant's declining to return to work was of no moment, as he had already been dismissed and so there was no employment relationship in place for him to quit.
15. Landrock Construction appealed the Determination, on three grounds.
16. First, it submitted that the dismissal was for cause. In support, it offered new evidence to the effect that the Complainant had smoked marijuana at work.
17. Second, Landrock Construction asserted that the Delegate had failed to take into account a payment by way of a cheque alleged to have been made to the Complainant which should have reduced his entitlement to vacation pay.
18. Finally, Landrock Construction submitted that the Delegate conducted the hearing in a manner that was unfair when she refused it an adjournment. D'Arpino represented the company at the hearing. He did so by telephone. Landrock Construction alleged that D'Arpino requested the adjournment because he had suffered a health emergency the night before, he had attended at a hospital, and he was suffering the effects of medication when the hearing commenced.

19. A preliminary issue which arose in the appeal was whether the Tribunal should extend the time for Landrock Construction to bring the appeal. Landrock Construction had filed its appeal almost two months late.
20. The Tribunal declined to exercise its section 109(1)(b) discretion to extend the time for Landrock Construction to file its appeal. In doing so, it affirmed the decision of the Tribunal in *Niemisto*, BC EST # D099/96, which identified several non-exhaustive criteria the Tribunal should consider when deciding whether the time for filing an appeal should be extended. Those criteria are:
  - i. There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit.
  - ii. There has been a genuine and ongoing *bona fide* intention to appeal the Determination.
  - iii. The respondent [parties], including the Director, must have been made aware of this intention.
  - iv. The respondent part[ies] will not be unduly prejudiced by the granting of an extension.
  - v. There is a strong *prima facie* case in favour of the appellant.
21. I pause to say that another factor the Tribunal has added to the list is the length of the delay in requesting an appeal following the expiry of the specified limitation period (see *Bravo Cucina Ristorante Italiano Ltd.*, BC EST # D344/00).
22. The Tribunal in the Appeal Decision noted that Landrock Construction had received the Determination in a timely way, about a month before the appeal period was due to expire. D'Arpino asked Trinetti to file an appeal, but Trinetti did not do so. The reasons given were that Trinetti was pre-occupied with other matters, including a stressful divorce proceeding and the sale of his family residence. In addition, he suffered from asthma, which required visits to the hospital.
23. The Tribunal observed that since Trinetti was D'Arpino's brother-in-law, the latter should have been aware of the former's personal problems, and, in any event, D'Arpino should have taken greater care to monitor Trinetti's actions so as to ensure that the appeal was filed within the time prescribed by the statute.
24. D'Arpino did not discover that the appeal had not been filed until at least a week after the prescribed time period had expired. Even then, D'Arpino did not immediately file an appeal. Instead, he "began to figure out how to appeal" and to gather evidence. It was not until several weeks thereafter, however, when D'Arpino learned that execution proceedings flowing from the Determination had been commenced, that he sought legal advice, and an appeal was then filed.
25. Based on these facts, the Tribunal concluded that Landrock Construction had not provided a reasonable and credible explanation for the delay in requesting an appeal. It held, further, that Landrock Construction had not established a *bona fide* intention to appeal. The Tribunal was also of the view that the underlying presumptive merits of the issues raised by Landrock Construction in its appeal were insufficient to warrant an extension.
26. Regarding the issue of the Complainant's alleged use of marijuana at work, the Tribunal noted that while D'Arpino suspected that the Complainant had misconducted himself in this way prior to the hearing of the complaint, he presented no argument to the Delegate in favour of a dismissal based on cause. Instead, he relied on the argument that the Complainant had quit, and so there should be no requirement that Landrock Construction pay him compensation for length of service.

27. It was only after the Determination was issued that D'Arpino commenced to investigate the issue of the Complainant's marijuana use, and obtained an affidavit from another employee, Geoff Storey ("Storey"), who stated that the Complainant had, in fact, used marijuana while at work.
28. In rejecting this ground of appeal, the Tribunal held that this evidence was not "new" for the purposes of section 112(1)(c) of the *Act*, as no reason was offered why it was not available to Landrock Construction much earlier, and therefore could not, with reasonable diligence, have been obtained and submitted to the Delegate before the Determination was made. The Tribunal also questioned the probative value of the evidence, given that Storey admitted that he, too, had smoked marijuana at work, yet there was no indication he had ever been disciplined or dismissed.
29. Regarding the miscalculation of the vacation pay to which the Complainant was entitled, the Tribunal noted that the cheque Landrock Construction produced on appeal was not part of the record before the Delegate, and Landrock Construction had provided no explanation for its absence. The inference to be drawn is that the Tribunal again concluded that the evidence was not new, and that the Complainant should not be prejudiced by a failure on the part of Landrock Construction to refer to the evidence, or to produce it, in the proceedings before the Delegate.
30. On the question whether the Delegate failed to observe the principles of natural justice when she refused Landrock Construction an adjournment at the commencement of the hearing, the Tribunal observed that Landrock Construction had failed to produce any corroborating medical evidence that D'Arpino was medically unfit to participate as the company's representative. Indeed, the Delegate's Reasons revealed that D'Arpino was, in fact, entirely capable of presenting Landrock Construction's position clearly, and that he did so. Landrock Construction's position at the hearing was that Trinetti had no authority to dismiss the Complainant, and when the Complainant refused to return when requested to do so by D'Arpino, the proper legal conclusion should be that the Complainant had quit. There was no indication in the appeal material submitted by Landrock Construction that it intended to present other evidence and arguments to the Delegate at the hearing which D'Arpino's medical condition prevented.

## DISCUSSION

31. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116, the relevant portion of which reads 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, cancel or vary the order or decision or refer the matter back to the original panel or another panel.
32. The reconsideration power is discretionary, and must be exercised with restraint. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal.
33. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *Act*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is also derived from a desire to preserve the integrity of the appeal process mandated in section 112 of the *Act*.

34. With these principles in mind, the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party seeking to have the Tribunal's appeal decision overturned.
35. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal considers the applicant's submissions, the record that was before the Tribunal in the appeal proceedings, and the decision the applicant seeks to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. In order for the answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the appeal decision which are so important that they warrant reconsideration.
36. In general, the Tribunal will be disinclined to reconsider if the primary focus of the application is to have the reconsideration panel re-weigh arguments that failed in the appeal. It has been said that reconsideration is not an opportunity to get a "second opinion" when a party simply does not agree with an original decision (see *Re Middleton*, BC EST # RD126/06).
37. If the applicant satisfies the requirements in the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.
38. In my view, Landrock Construction's application raises issues which are sufficient to persuade me that the Appeal Decision should be reconsidered. That said, I have concluded that the order made in the Appeal Decision should be confirmed.
39. The *Act* imposes an appeal deadline to ensure that appeals are dealt with promptly.
40. In *Metty M. Tang*, BC EST # D211/96, the Tribunal expressed the approach it has consistently followed in considering requests to extend time limits for filing an appeal:
- Section 109(1)(b) of the *Act* provides the Tribunal with the discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.
41. Landrock Construction's application identifies several grounds on which it submits the Appeal Decision should be cancelled or, in the alternative, that it should be varied to provide that the Determination be returned to the Director for a re-hearing. Many of the grounds relate to the manner in which the Tribunal chose to dispose of the issues raised on appeal. I note, however, that Landrock Construction has not challenged the Tribunal's disposition on the issue of the amount of vacation pay owed to the Complainant.
42. The first line of attack from Landrock Construction focuses on a comment in the Appeal Decision questioning the wisdom of D'Arpino's decision to delegate the task of filing an appeal to Trinetti. Landrock Construction submits that it was inappropriate for the Tribunal to "second-guess" D'Arpino's decision as to who should file the appeal.
43. The Tribunal did not question that it was open to Landrock Construction, through D'Arpino, to decide who should file an appeal on behalf of the company. What the Tribunal questioned was D'Arpino's choice of Trinetti, given the latter's personal difficulties at the time. Of even greater concern, in the view of the Tribunal, was the apparent failure of D'Arpino, the principal of Landrock Construction, to monitor Trinetti's giving proper attention to the important task of filing an appeal within the time period stipulated.

44. In my opinion, the Tribunal's concerns bore directly on factors the Tribunal was bound to consider when deciding whether it should exercise its discretion to extend the time for filing an appeal. The main factor engaged by these facts was whether Landrock Construction had offered an explanation for its delay that was reasonable, in the circumstances. What is reasonable requires a balanced consideration of all the relevant circumstances, but the analysis is informed by the stricture that an appellant be required to demonstrate a requisite level of diligence in pursuing an appeal (see *Re Roseg Management Corp.*, BC EST # D127/04).
45. I am not persuaded that it was perverse for the Tribunal to conclude that a questionable choice, under the circumstances, of Trinetti as the person to be made responsible for filing a timely appeal and, more importantly, the failure of the principal of Landrock Construction to monitor whether that task was being performed, demonstrated, in part, that the company had failed to act in a manner that was reasonable. Previous decisions of the Tribunal have revealed that a belief an appeal has been filed by a person at an appellant's direction is an insufficient explanation justifying an extension where the appellant fails to exercise diligence in ensuring the instructions have been carried out (see, for example, *Re KS Labour Contractors Ltd.*, BC EST # D071/09, and *Re Craftsman Collision (1981) Ltd.*, BC EST # D030/10).
46. I reject, too the submission of Landrock Construction that it was sufficient to warrant an extension that Trinetti had failed to file a timely appeal due to personal and health reasons. My reason is that this evidence addresses but one of the factors identified in *Niemisto*, and the cases which follow it. Instead, the Tribunal must consider all of the factors when exercising its section 109(1)(b) discretion.
47. The factor the Landrock Construction submission addresses is whether it has offered an explanation for the delay which is at least credible. I have no reason to doubt the veracity of Trinetti's evidence. However, the mere fact that Trinetti was suffering personal and health issues at the relevant time is not conclusive of the issue the Tribunal had to decide. The other factors identified in the *Niemisto* line of authority also needed to be considered, and a balance struck, if the Tribunal were to exercise its discretion appropriately. This, indeed, is what the Tribunal in the Appeal Decision did.
48. Landrock Construction also points to the comment of the Tribunal in the Appeal Decision to the effect that the company had a "rather cavalier attitude" concerning its appeal. Landrock Construction says that its attitude regarding the appeal was irrelevant.
49. I disagree. The degree to which the evidence revealed a genuine, ongoing *bona fide* intention to appeal the Determination was clearly a factor the authorities have said the Tribunal was required to consider.
50. The evidence established that D'Arpino delegated the responsibility for filing the appeal to a subordinate who turned out to be an unwise choice to perform that task. D'Arpino did not monitor Trinetti's work during the appeal period. When D'Arpino discovered that the appeal had not been filed properly several weeks passed before he sought legal advice. He did so only after he learned that execution proceedings had been commenced to enforce the order in the Determination.
51. A factor to be considered when deciding whether a genuine, ongoing *bona fide* intention to appeal has been established is the length of the delay. Here the delay in filing the appeal after the time for doing so had expired was approximately two months. The Tribunal has previously stated that a delay of that duration is substantial (see *Bravo Cucina, supra*). The Tribunal in the Appeal Decision observed that the length of the delay in this case was "significant". I agree. Generally, the longer the delay, the more likely it is that the Tribunal will place less weight on an appellant's protestations that it had a genuine, ongoing *bona fide* intention to appeal.

52. In my view, it was open to the Tribunal to infer that Landrock Construction appeared to have taken the requirements of the appeal process much less seriously than was warranted, and that it only acted with vigour once the consequences of its dilatory approach became obvious. On the facts presented in this instance, I cannot say it was wrong for the Tribunal to have concluded that Landrock Construction had failed to establish a genuine, ongoing *bona fide* intention to appeal throughout the period from the time it received the Determination until it sought legal counsel some months later.
53. Landrock Construction asserts further that the Appeal Decision reveals an error of law because it failed to properly address whether any party would be unduly prejudiced by an extension. This assertion is incorrect. The Tribunal stated that apart from the further delay the processing of an appeal might cause it was difficult to conclude that the Complainant would be prejudiced if the appeal period were extended, particularly as the sums owed to him had been deposited in trust with the Director. However, the Tribunal concluded that other factors weighed more heavily in the balance, in this instance.
54. Landrock Construction challenges the Tribunal's statement in the Appeal Decision that D'Arpino failed to provide corroborating medical evidence to demonstrate that he was medically unfit to represent the company at the hearing before the Delegate. Landrock Construction refers to D'Arpino's affidavit, submitted to the Tribunal as part of its new evidence. Exhibited to that affidavit is a hospital record showing that D'Arpino visited the hospital the evening before the hearing, complaining of abdominal pain.
55. No one disputes that D'Arpino visited the hospital as stated. In the absence of any evidence to the contrary, I also accept his affidavit testimony that he was drowsy from lack of sleep and because he had taken some medication, and that he did not feel well at the time the hearing commenced. Landrock Construction argues that the existence of these facts required the Delegate to grant an adjournment. It says it was an error of law for the Tribunal to decide otherwise.
56. While the evidence Landrock Construction produced shows why D'Arpino might have desired that the hearing occur on a different day, it does not address the concern expressed by the Tribunal in the Appeal Decision. The concern expressed was that the evidence did not establish that D'Arpino was medically unfit to represent Landrock Construction at the hearing. What the Tribunal decided was that even if D'Arpino had shown that he did not feel well at the hearing, he had not established that his representation of Landrock Construction suffered in the sense that his condition prevented him from fully presenting the company's position to the Delegate.
57. Rather, as the Tribunal stated in the Appeal Decision, D'Arpino communicated the position of Landrock Construction to the Delegate clearly. The position of the company was that Trinetti had no authority to dismiss the Complainant, and when D'Arpino so advised the Complainant, and asked him to return to work, the Complainant refused. For Landrock Construction, this meant that the Complainant had quit, and so no compensation for length of service should have been paid to him.
58. There is no evidence showing that there were any other facts or arguments Landrock Construction wished to present, or to present differently, at the hearing that it failed to address, either because of D'Arpino's physical condition at the time, or for any other reason.
59. That being so, I am not persuaded that the Tribunal was wrong in finding that the Delegate exercised her discretion lawfully when she declined to grant Landrock Construction's request for an adjournment of the hearing.



60. The final argument presented by Landrock Construction relates to its assertion that the Complainant used marijuana while at work. It asserts that it was an error for the Tribunal to have alluded to the fact that Storey, who said he had used marijuana with the Complainant at work, had not, apparently, himself been disciplined or dismissed by the company. Landrock Construction says that the company's dealings with Storey were not relevant and, even if they were, different circumstances may have rendered him unworthy of dismissal. As for the Complainant, Landrock Construction submits that the allegation of marijuana use was uncontradicted, and it constituted just cause for dismissal.
61. Again, I must reject Landrock Construction's submission on this point. The issue for the Tribunal on an application to extend the time for appeal was not whether the Complainant had used marijuana at work, or even if he had, whether that constituted just cause for his dismissal. Rather, the issue was whether the appeal was "presumptively meritorious", in the words of the Tribunal or, as stated in *Niemisto*, Landrock Construction had established a strong *prima facie* case for a successful appeal on this basis, having regard to the grounds of appeal set out in section 112.
62. Many of the comments of the Tribunal in the Appeal Decision on this point were directed at the paucity of the evidence presented by Landrock Construction in support of its contention that it had established a strong *prima facie* case it should not have been ordered to pay compensation for length of service to the Complainant because the company could have dismissed him for cause. To be sure, one of the matters the Tribunal queried was the lack of an explanation from Landrock Construction as to why Storey was retained as an employee after using marijuana at work while the company insisted that the Complainant should have been dismissed for the same misconduct. But the Tribunal also expressed its scepticism concerning a case for cause on other grounds.
63. For example, it referred to the fact that despite D'Arpino's suspecting, prior to the Complainant's departure from the company, that the Complainant might have used marijuana at work, he never investigated the matter until after the hearing conducted by the Delegate. Further, the Tribunal questioned why, if marijuana use by the Complainant was a matter of concern, D'Arpino asked the Complainant to return to work following his dismissal by Trinetti. In my view, the Tribunal was correct to identify all these matters as areas of concern that should have been addressed by Landrock Construction when it applied for an extension of the time to file its appeal. Its failure to do so led the Tribunal to conclude, properly in my opinion, that the *prima facie* case for cause presented by Landrock Construction was weak, rather than strong.
64. The other important consideration noted by the Tribunal regarding the impact that alleged marijuana use might carry when it decided whether Landrock Construction's appeal should proceed was the fact that it does not appear the company relied on it in any substantive way at the hearing of the complaint, or in any other submission to the Delegate prior to the Determination being issued. The Delegate's reasons do not refer to marijuana use as an issue that had been raised. D'Arpino's affidavit, submitted on behalf of Landrock Construction in the appeal, states that he asked the Complainant at the hearing whether he had smoked marijuana at work, and the Complainant replied in the negative. It is clear from the Delegate's Reasons, however, that the thrust of the Landrock Construction case at the hearing was focused on other issues. As I have said, the company argued that Trinetti had no authority to dismiss the Complainant, and the Complainant's failure to return to work thereafter meant that he had quit.
65. Given that the issue of cause, based on alleged marijuana use at work, was only investigated in a serious manner after the hearing was concluded, despite D'Arpino's prior suspicions and a lack of evidence demonstrating an impediment to his investigating the matter earlier, it was open to the Tribunal to decide that the evidence relating to cause Landrock Construction developed for the appeal was not "new" for the

purposes of section 112(1)(c), and so the company had not established a strong *prima facie* case in favour of success in the appeal on this basis either.

66. Finally, I observe that there is another factor noted in *Niemisto* which Landrock Construction has never addressed, and to which the Tribunal did not refer in the Appeal Decision. Even if it can be established that an appellant had a genuine, ongoing *bona fide* intention to appeal, the Tribunal will consider whether the appellant has apprised the respondent parties and the Director of this intention. Here, there is no indication that Landrock Construction gave notice of its intention to these interested parties at any time before the appeal was requested, some two months after the time for doing so had expired. This factor, too, can be said to weigh against Landrock Construction's request for an extension of the time to appeal.

### **ORDER**

67. Pursuant to section 116 of the *Act*, I order that the Appeal Decision of the Tribunal, BC EST # D093/16, be confirmed.

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**Robert E. Groves**  
**Member**  
**Employment Standards Tribunal**