

An Application for Reconsideration

- by -

Mason Trains Ltd.
("Mason Trains")

- 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/157

DATE OF DECISION: December 4, 2014

DECISION

SUBMISSIONS

Howard Albert Mason

on behalf of Mason Trains Ltd.

OVERVIEW

1. Mason Trains Ltd. (“Mason Trains”) seeks reconsideration of a decision of the Tribunal, BC EST # D015/12 (the “original decision”), dated February 13, 2012.
2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 22, 2011.
3. The Determination was made by the Director on complaints filed by Adrian R. Plant and Justin P. Coutu (the “complainants”), who alleged Mason Trains had contravened the *Act* by failing to pay all wages to them.
4. The Determination found the *Act* had been contravened and that wages in the amount of \$25,324.50 were owing to the complainants. The Director also imposed administrative penalties in the amount of \$1,000.
5. An appeal was filed by Mason Trains alleging the Director failed to observe principles of natural justice in making the Determination. The appeal sought to have the Determination cancelled.
6. The Tribunal Member of the original decision dismissed the appeal and confirmed the Determination.
7. The Tribunal Member of the original decision decided Mason Trains had not been denied the procedural rights proffered by principles of natural justice - the opportunity to know the case being presented by the complainants and full opportunity to respond - and had not otherwise demonstrated there was any denial of natural justice in the complaint process.
8. In making the original decision, the Tribunal Member noted that while Mason Trains had provided explanations to the Director for not paying the wages of the complainants, the explanations contradicted objective evidence and were unsupported by any evidence from Mason Trains. The Tribunal Member found the appeal did no more than repeat the assertions made to the Director during the complaint process and, similarly, provided no evidence with the appeal to support those assertions.
9. This application has been filed nearly twenty-one months after the original decision was made.

ISSUE

10. 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

11. Mason Trains contends it was unable to provide any documents to the Director because they were all seized and the owner of Mason Trains, Howard Mason, was denied access to them.
12. In respect of the delay in seeking reconsideration, Mason Trains says, simply, it had no knowledge the reconsideration process was available.

ANALYSIS

13. 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 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 application and interpretation” 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 a 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” 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.

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. 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.
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.

(Zoltan Kiss, BC EST # D122/96)

17. 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.
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.
19. I am not persuaded this application warrants reconsideration.
20. The delay in filing this application is extreme and the reason for the delay, like the delay itself, is unreasonable and unacceptable.
21. The application itself does nothing more than re-submit assertions that were not accepted by the Director in making the Determination as reason to deny the complainants claims or by the Tribunal Member in the original decision as establishing an error in the Determination and a reason to cancel it.
22. Making the same assertions again in an application for reconsideration does not alter the Tribunal's view of them. This application seeks reconsideration of the original decision without demonstrating a reviewable error in the original decision and, in the absence of showing such an error, it would be inappropriate to reconsider.
23. In the absence of any reasonable or acceptable explanation for the extreme delay in seeking reconsideration and in the absence of any basis that would justify reconsideration of the original decision, the application is denied.

ORDER

24. Pursuant to section 116 of the *Act*, the original decision, BC EST #D015/12, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal