

An Application for Reconsideration

- by -

Imagination (Canada) Corporation
("Imagination")

- 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: Rajiv K. Gandhi

FILE No.: 2017A/113

DATE OF DECISION: December 18, 2017

DECISION

SUBMISSIONS

Hans Rudolf Tschudi

on behalf of Imagination (Canada) Corporation

OVERVIEW

1. Imagination (Canada) Corporation (“Imagination”) asks the Employment Standards Tribunal to reconsider a decision issued on August 14, 2017 (the “Tribunal Decision”, reported at BC EST # D087/17), relating to a complaint (the “Complaint”) originally filed by Xuewen Liang (the “Employee”) on August 21, 2013, and a determination (the “Determination”) issued on February 3, 2015, by a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”).

FACTS

The Determination

2. In the Determination, Imagination was ordered to pay the Employee outstanding wages in the amount of \$24,588.35, compensation for length of service equal to \$9,538.46, vacation pay calculated as \$2,047.61, and interest accruing under section 88 of the *Employment Standards Act* (the “ESA”). Additionally, it was required to pay \$1,500.00 in administrative penalties.
3. It is unnecessary for the purposes of this application to review in detail the Complaint allegations. It is important, however, that both Imagination and the Employee agree that:
 - (a) Imagination did not pay wages between April 1, 2013, and August 23, 2013; and
 - (b) the quantum of outstanding wages is \$24,588.35.
4. Imagination justifies non-payment of wages based on certain allegations of Employee misconduct. On that point, the Delegate found Imagination’s evidence lacking, and relied instead on sections 17 and 21 of the *ESA* to conclude that payment of wages could not be withheld, and on section 66 to find that the protracted non-payment of wages was a substantial change in employment amounting to a constructive termination. The Delegate concluded that Imagination’s argument was insufficient to discharge the liability to pay compensation for length of service under section 63 of the *ESA*.

The Tribunal Decision

5. In the appeal filed with the Employment Standards Tribunal on April 27, 2017 (the “Appeal”), Imagination sought to cancel the Determination based on:
 - (a) the availability of new evidence, not available at the time the Determination was made; and

- (b) the Director's alleged failure to observe the principles of natural justice when making the Determination,

both grounds for appeal under section 112(1) of the *ESA*.

6. With respect to the first ground of appeal, Imagimation argued the discovery of additional evidence proving the Employee's alleged misconduct. Concerning the second, it submitted that placing the burden of proof on Imagimation was unfair, particularly when coupled with what it says was the Employee's refusal to disclose relevant evidence that would otherwise support the misconduct allegations raised before the Delegate.
7. Relevant to this application is the fact that the Appeal was filed more than two years after the Determination, well outside the appeal period specified in section 112(3) of the *ESA*. In requesting an extension of the time under section 109 of the *ESA*, Imagimation said it received no notice of the Determination until served with a Writ of Execution in early 2017, despite having participated in the complaint hearing on January 15, 2014.
8. The Appellant's request for an extension was refused by the Tribunal, in part because, as is set out in the Tribunal Decision, the substantive Appeal was not particularly meritorious, and in part because there existed in the Director's Record material indicating that the Determination was sent to Imagimation on February 4, 2015, by registered mail. Although the Record did not include confirmation of delivery, it likewise did not include a record of delivery failure.

Reconsideration

9. In this application for reconsideration, Imagimation submits that the Tribunal Decision should be varied, cancelled, or referred back to the Tribunal Member who considered the Appeal. It challenges the Member's conclusion that "it defies belief that Imagimation was unaware of [the Determination]."
10. Following receipt of this application, it was determined by the Tribunal that the esteemed Member hearing the Appeal did not have the benefit of two electronic mail messages sent to the Tribunal by Mr. Tschudi, Imagimation's representative (described below as the "previously undisclosed materials").
11. The first message, sent to the Tribunal on May 17, 2017 at 2:25 P.M., contains the following text:

Thank you for letting me know how to ask for an extension.

I have not yet received the missing Reason for Determination, dated February 3, 2015, and I am being sent in circles from one office to the other. Thus, it is not possible to file the new documentation by this afternoon. In addition, having to produce three files out of the one large file is an overwhelming amount of work.

I would thus like to ask for a two week extension in order to collect the necessary Reason for Determination as well as for completing the new files for the Tribunal.

Thank you for your consideration

Kind regards,

H.R. Tschudi

12. The second, sent to the Tribunal on June 2, 2017 at 10:37 A.M., includes the following text:

I have finally been able to sort out the missing Reasons for Determination with [the Delegate]. According to him, it is a simple dating mistake in the determination of February 3, 2014. This should have been February 3, 2015. Thus, there are only two Reasons for Determination, not two [sic].

Since so much time has been spent in trying to resolve this, I would like to ask you to proceed with my applications as one package.

Thank you and have a wonderful weekend.

Kind regards,

H.R. Tschudi

ANALYSIS

13. In considering this application, I have reviewed several hundred pages of materials, including:

- (a) the Director's Record;
- (b) submissions from Mr. Tschudi concerning the Appeal, dated February 21, 2017, but not received by the Tribunal until April 27, 2017;
- (c) correspondence from Mr. Tschudi to the Tribunal dated May 17, 2017, and June 2, 2017 (the "previously undisclosed materials", to which I referred previously);
- (d) the Tribunal Decision; and
- (e) submissions from Mr. Tschudi on this reconsideration application, received September 13, 2017, and October 17, 2017.

14. The previously undisclosed materials are not determinative, but do lend credence to Imagimation's claim that it did not receive a copy of the Determination when originally issued. Although requested for the purposes of this application, the Director did not make submissions concerning these previously undisclosed materials or the matters addressed in those communications.

Reconsideration

15. In limited circumstances, a Tribunal decision may be reconsidered under section 116 of the *ESA*.
16. The discretion to do so must be exercised with restraint, and then only in a manner that is both fair to the parties and consistent with the underlying purpose of the statute. (see *Milan Holdings Inc.*, BC EST # D313/98, at page 6, and *The Director of Employment Standards (Re Giovanni (John) and Carmen Valoroso)*, BC EST # RD046/01, at page 4)
17. Requests for reconsideration are ordinarily approached in two steps. In the first, the applicant seeking reconsideration must satisfy the Tribunal that a question of fact, law, principle, or procedure, flowing from the Tribunal Decision, is so important that it warrants reconsideration.

18. If this threshold test is satisfied, the Tribunal will then consider whether the Tribunal Decision is correct. If it is, the reconsideration will be refused. If it is not, the Tribunal Decision may be varied.
19. In the absence of exceptional circumstances, reconsideration is unlikely. (see *Tagirova and Baranova*, BC EST # RD065/16, at paragraphs 20 and 21) It should not be undertaken where the primary goal of the application is to “re-weigh” evidence already tendered.

The Threshold Test

20. The burden rests with Imagimation to show exceptional circumstances arising out of the earlier refusal to grant an extension of time under section 109 of the *ESA*.
21. Imagimation says it did not receive the Determination when issued in 2015, and did not become aware of it until January 2017. Weighed against that is the fact that the Record includes unmistakable evidence that the Determination was sent by registered mail to what was, at the time, the address listed for Mr. Tschudi, a director of Imagimation, and the company’s controlling mind.
22. I note that section 122(1)(b) of the *ESA* deems service of the Determination to be complete without requiring proof of delivery.
23. The test for granting an extension of time is set out at paragraph 19 of the Tribunal Decision:

The Tribunal has developed a principled approach to the exercise of its discretion as set out in Re Niemisto, BC EST # D099/96. The following criteria must be satisfied to grant an extension:

- 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 on-going bona fide intention to appeal the Determination;*
- iii) the respondent party (i.e., the employer or employee), as well the Director, must have been made aware of this intention;*
- iv) the respondent party will not be unduly prejudiced by the granting of an extension; and*
- v) there is a strong prima facie case in favour of the appellant.*

24. According to the Tribunal Decision, Imagimation did not satisfy the first part of the *Niemisto* test.
25. Considering the evidence in hand at the time, I cannot say that the result was incorrect. I do not believe that the “previously undisclosed materials”, taken at face value, change that outcome. That said, and even though the previously undisclosed materials are not determinative, it is possible that with the benefit of those items the Tribunal Member hearing the Appeal might have reached a different conclusion when assessing whether the Imagimation had a “reasonable and credible explanation” for missing the statutory deadline for filing an appeal.

26. However, that does not mean that Imagimation's application for reconsideration should be automatically granted. The *Niemisto* test is a test in five parts, and all five parts must be satisfied before an extension is granted.
27. Of note, the Tribunal Decision concludes that Imagimation was not favoured by a strong *prima facie* case.
28. The Determination addressed two key issues – outstanding wages and entitlement to compensation for length of service. (Vacation pay and accrued interest are mathematical calculations, driven entirely by the Director's findings concerning wages and liability under section 63 of the *ESA*.)
29. As to the question of outstanding wages, I agree with and adopt the Tribunal Member's comments at paragraph 24 of the Tribunal Decision (emphasis added):

... Even if I accepted the "new evidence" provided, this material does not explain or excuse the failure of Imagimation not to pay [the Employee] any wages for nearly five months. If the Determination did not express it clearly enough for Imagimation and Mr. Tschudi, there is simply no excuse or reason, short of circumstances described in section 22 – which are not present in this case – for refusing to pay an employee wages earned...

30. With respect to the question of compensation for length of service, I make the following observations:
- (a) Despite what was argued on Appeal, it is a matter of trite law that the burden of proof rests squarely with an employer to show that it is discharged from the usual liability to pay compensation for length of service. That is not a breach of natural justice, as Imagimation alleges, and it is fair to say that an employee has no obligation to "help" the employer prove its case.
 - (b) New evidence will only be accepted and considered by the Tribunal in the circumstances outlined in *Davies et. al.* BC EST # D171/03. Key among the four tests to be applied before new evidence will be admitted are the requirements that the evidence:
 - (i) must not, with the exercise of due diligence, have been discoverable or presentable to the Director before the Determination; and
 - (ii) must have high potential probative value, in the sense that it could, if believed, have led the Director to a different conclusion on the material issue.

Much of Imagimation's "new" evidence consists of correspondence passing between the Employee and Mr. Tschudi, or a record of meetings between them, and predates filing of both the Complaint and the complaint hearing. It does not satisfy the *Davies* test. Moreover, I agree that whatever remains would not, in my view, affect the Director's finding that the Employee was entitled to compensation for length of service, either because it is speculative, inconclusive, or otherwise relates to incidents between the parties taking place shortly after the end of the employment relationship. It does not establish cause before the end of employment, irrespective of when it was discovered (what we commonly call "after-acquired cause" but which is more appropriately termed "after-discovered cause".)

31. In my view, there is nothing in Imagimation’s materials that raise a serious question concerning the Tribunal Member’s assessment under the fifth part of the *Niemisto* test, and certainly nothing in my view that warrants reconsideration.
32. That is, even if I were to conclude that reconsideration of the evidence applied to the first part of the *Niemisto* test is warranted, in light of the previously undisclosed materials, I am satisfied that it is not warranted with respect to the Tribunal’s assessment of the evidence under the last part of the *Niemisto* test.
33. Ultimately, I do not believe that Imagimation has in this application for reconsideration shown “exceptional circumstances”. There is nothing in the submissions of Imagimation that, in my view, present a question of fact, law, principle, or procedure, flowing from the Tribunal Decision, requiring reconsideration. Imagimation’s appeal had (has) no reasonable prospect of success. Even if the extension of time had been granted, summary dismissal under section 114(1)(f) of the *ESA* would have been wholly appropriate.

Conclusion

34. In the result, I find that Imagimation’s application fails to satisfy the threshold requirement for reconsideration.

ORDER

35. The Tribunal Decision is confirmed according to section 116 of the *ESA*. Imagimation’s application for reconsideration is refused.

Rajiv K. Gandhi
Member
Employment Standards Tribunal