

An Application for Reconsideration

- by -

Dawn McConnell
("Ms. McConnell")

- 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/156

DATE OF DECISION: December 24, 2014

DECISION

SUBMISSIONS

Dawn McConnell on her own behalf

OVERVIEW

1. Dawn McConnell (“Ms. McConnell”) seeks reconsideration of a decision of the Tribunal, BC EST # D101/14 (the “original decision”), dated November 5, 2014.
2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 25, 2014.
3. The Determination was made by the Director on a complaint filed by Loesha Blackwell (“Ms. Blackwell”), who alleged Ms. McConnell had contravened the *Act* by failing to pay wages owed to her.
4. The Determination found Ms. McConnell had contravened Part 3, section 18 of the *Act*, ordered Ms. McConnell to pay Ms. Blackwell wages and interest in the amount of \$837.94 and imposed an administrative penalty in the amount of \$500.00.
5. An appeal was filed by Ms. McConnell using all of the available grounds under section 112(1) of the *Act*. Ms. McConnell sought to have the Tribunal cancel the Determination.
6. The Tribunal Member of the original decision dismissed the appeal under section 114(1)(f) of the *Act* and, under section 115 of the *Act*, confirmed the Determination.
7. The Tribunal Member of the original decision determined Ms. McConnell had not met the burden of demonstrating an error of law in the Determination; that Ms. McConnell was disputing findings of fact made by the Director; and that the Director had properly applied the definition of “employer” and “employee” in the *Act* and the applicable common law tests in finding there was an employment relationship between Ms. McConnell and Ms. Blackwell.
8. On the natural justice ground, the Tribunal Member of the original decision found Ms. McConnell had not established the Director breached principles of natural justice in making the Determination. Specifically, the Tribunal Member found Ms. McConnell had not proven the Director was biased and had acted unfairly toward her, had prevented her from presenting her case, had inappropriately interfered with her examination of Ms. Blackwell or had pre-determined the outcome of Ms. Blackwell’s claim.
9. The Tribunal Member of the original decision found the additional evidence which Ms. McConnell sought to include with the appeal did not satisfy the requirements set out by the Tribunal in *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03 and, based on that finding, did not allow or consider it. I agree with and adopt the reasoning in the original decision on whether to accept the additional evidence into the appeal.

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. In this application for reconsideration Ms. McConnell revisits the same arguments made in her appeal, submitting the Director erred on the status of Ms. Blackwell under the *Act*, that she was denied a fair hearing, bullied by the Employment Standards Branch and that the case has been handled in an “unprofessional and biased” manner by the Branch and, it now appears by the Tribunal, with the entire conduct of the case designed to allow the Branch, and the Tribunal, to “win their case”.
12. The arguments made in the application do not indicate how the original decision is wrong, alleging only that the “overview” contained in the original decision is “laden with inaccuracies” that “appear” designed to help the Branch and the Tribunal “win their case”.
13. It is unnecessary to provide a summary of the arguments raised or review the facts asserted in this application, as they both mirror what was submitted in the appeal and have been adequately set out in the original decision.

ANALYSIS

14. 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 of the *Act* 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.*
15. 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 “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.

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 application does nothing more than re-assert the challenges made in the appeal of the Determination that were not accepted in the original decision. Its primary focus is not the original decision but disagreement with the Determination. This application attacks the original decision for no other reason than it did not accept the appeal and, in Ms. McConnell's opinion, that shows the Tribunal as equally "unprofessional and biased" as the Branch.

21. There is nothing in the application for reconsideration that shows the original decision was wrong in any respect. Ms. McConnell has not shown the Tribunal was "unprofessional and biased". The "inaccuracies" alleged in the original decision represent nothing more than Ms. McConnell's disagreement with the findings made in the Determination and, by extension, with the summary of those findings set out in the original decision.

22. Raising the same arguments and challenges that were addressed in the appeal again in an application for reconsideration, without demonstrating a reviewable error, will not alter the Tribunal's view of them and, in the absence of such an error, would be inappropriate to reconsider.

23. There is no basis to allow reconsideration of the original decision and accordingly the application is denied.

ORDER

24. Pursuant to section 116 of the *Act*, the original decision, BC EST # D101/14, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal