

An Application for Reconsideration

- by -

Tim McKay
("Mr. McKay")

- 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.: 2016A/139

DATE OF DECISION: October 28, 2016

DECISION

SUBMISSIONS

Tim McKay on his own behalf

OVERVIEW

1. Tim McKay (“Mr. McKay”) seeks reconsideration of a decision of the Tribunal, BC EST # D110/16 (the “original decision”), dated August 26, 2016.
2. The original decision considered an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on May 13, 2016.
3. In the Determination the Director found a complaint made by Mr. McKay against his former employer, Double H Holdings Ltd. (“DHH”) had been settled and, exercising the discretion allowed in section 76(3)(i), decided to stop investigating or adjudicating Mr. McKay’s complaint.
4. An appeal of the Determination was filed by Mr. McKay alleging the Director erred in law, failed to observe principles of natural justice and asserting that evidence had become available that was not available when the Determination was being made.
5. The Tribunal Member making the original decision dismissed the appeal under section 114 of the *Act*.
6. In the original decision, the Tribunal Member found Mr. McKay had not established the Director had erred in law in making the Determination, had not established there was an unfairness in the process which led to a settlement of his complaint or demonstrated the delegate conducting the mediation that led to the resolution of his complaint was biased or lacked neutrality and, considering and applying the requirements for the admission of new, or additional, evidence in an appeal, there was nothing in the material submitted with the appeal that met those requirements.

ISSUE

7. 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 cancel the original decision and refer the matter back to the original panel or, if more appropriate, to the Director.

ARGUMENT

8. Mr. McKay raises five points in support of his request for reconsideration:
 1. He alleges a person “sitting on the tribunal appeal board”, unnamed in the submission, is directly related to two persons who are “part of [his] complaint” and that circumstance creates a conflict of interest which affects the original decision. The suggestion is that this unnamed person participated in the decision to dismiss Mr. McKay’s appeal and that event creates a reasonable apprehension of bias and a consequent breach of natural justice which, as a matter of law, would nullify the original decision.

2. He submits his complaint should be returned to the Director to be decided “without bias and without conflict of interest”. The suggestion here is that bias and conflict of interest are present in the process as it has evolved to date.
 3. He says he is “concerned that much of [his] complaint has been glossed over and disregarded, such as a conflict between directors of Employment Standards regarding having a lawyer”.
 4. He says he is also concerned by the way his medical condition and doctor’s letter was discounted in the original decision.
 5. He submits the settlement agreement was void because he had refused to sign it. This is the same point that was the focus of his appeal.
9. The only matter of the above points that has not been addressed in the original decision is the allegation of conflict of interest.

ANALYSIS

10. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration. Section 116 of the *Act* reads:
- 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 served with an order or a decision of the tribunal may make an application under this section.
- (2.1) The application may not be made more than 30 days after the date of the order or decision.
- (2.2) The tribunal may not reconsider an order or decision on the tribunal’s own motion more than 30 days after the date of the decision or order.
- (3) An application may be made only once with respect to the same order or decision.
- (4) The director and a person served with an order or a decision of the tribunal are parties to a reconsideration of the order or decision.
11. The Tribunal has developed and applied a principled approach to the exercise of its discretion under section 116. The rationale for this approach is grounded in the language and purposes of the *Act*. One of the purposes of the *Act*, found in section 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 section 2(b) is to “promote the fair treatment of employees and employers”. The approach is fully described in *Milan Holdings Inc.*, 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 able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

12. In deciding whether to reconsider, the Tribunal considers timeliness and such factors as the nature of the issue and its importance both to the parties and the system generally. Delay in filing for reconsideration will likely lead to a denial of an 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.
13. The Tribunal has accepted an approach to applications for reconsideration that resolves itself 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 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.
14. 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.
15. 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 in the reconsideration.
16. I find this application does not warrant reconsideration. Mr. McKay has not shown there was any error made in the original decision that would justify the exercise of discretion to reconsider that decision.
17. I concur completely with the analysis and conclusions reached in the original decision. All of the matters raised in the submission by Mr. McKay accompanying his request have been completely and correctly addressed in the original decision with the exception of the "conflict of interest" allegation that has been made against an unidentified Member of the Tribunal.
18. In respect of that allegation, which raises the spectre of apprehension of bias against the processes of the Tribunal generally and the unnamed Member of the Tribunal specifically, I can only state that such an allegation is a serious one and must be proven on the evidence; the evidence must clearly support the allegation made and show a "real likelihood" or probability of conflict of interest resulting in a reasonable apprehension of bias and a consequent breach of principles of natural justice. The following comments of the Tribunal from *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99, which applied to allegations of actual bias, but apply equally to the allegations made here, describe the burden imposed on an individual making allegations against the integrity of a decision maker:

. . . the evidence presented should allow for objective findings of fact that demonstrate actual bias or a reasonable apprehension of bias. The rationale for this requirement is anchored in the principle that a party against whom an allegation of bias is made is not permitted to explain away the circumstances in which the

allegation arises or to deny the presence of a biased mind. This principle is enunciated by Laskin, C.J.C., in *P.P.G. Industries Canada Ltd. v. A.-G. Can.* (1975), 65 D.L.R. (3d) 354 (S.C.C.), where he stated that "the introduction of evidence to explain away a situation which raised a reasonable apprehension of bias affecting that party's position in respect of a decision which he challenged" would not be permitted (see also *C.D. Lee Trucking Ltd. v. B. C. Labour Relations Board and others*, B.C.J. No. 2776, November 26, 1998, Vancouver Registry No. A981590).

19. Employment Standards Tribunal Members take an oath of office, in which they undertake not to decide cases in which the Member has an actual or potential conflict of interest. A conflict of interest is described as:

A conflict between private interests and official responsibilities; it includes both financial and non-financial conflicts. A conflict of interest exists if the facts could give rise to a reasonable apprehension of conflict of interest in the mind of a reasonable and informed person.
20. There is a presumption that a member of the Tribunal has not acted where there is a conflict of interest and thus caused a breach of principles of natural justice; that the Member has acted fairly and impartially in carrying out the responsibilities for which he or she was appointed. This presumption is one of the reasons why the evidentiary threshold is high, and can only be satisfied with "cogent evidence".
21. Mr. McKay does not identify the Tribunal Member who is apparently the object of his allegation. He specifically does not allege this person is the Tribunal Member who made the original decision. In any event, it is highly improbable the Tribunal Member who made the original decision is related to the two persons identified in the reconsideration application submission as being "part of" Mr. McKay's complaint. The submission does not identify how the conflict arises in the context of the Tribunal's decision making process and it is equally improbable that any member of the Tribunal other than the Tribunal Member whose signature is on it was involved in making the original decision.
22. It is the kind of vague allegation Mr. McKay has made in this application that has invoked the strong judicial criticism that frequently accompanies cases of this type.
23. The allegations made by Mr. McKay here are not even close to meeting the evidentiary requirements for showing the original decision is tainted by a real or potential conflict of interest by a Member of the Tribunal.
24. The allegation is categorically rejected as being groundless.
25. Otherwise, the original decision has adequately addressed the allegations of bias against the delegate conducting the mediation process, has confirmed the correctness of the Director's conclusion of a settlement of Mr. McKay's complaint and in doing so has spoken to the relevance of the details of his complaint, and has adequately, and correctly, addressed the "medical condition" argument raised by Mr. McKay in seeking to have the agreement to resolve the complaint set aside.
26. On the above considerations, the request by Mr. McKay does not satisfy the threshold requirements for reconsideration and the application is denied.

ORDER

27. Pursuant to section 116 of the *Act*, the original decision, BC EST # D110/16, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal