

An Application for Reconsideration

- by -

DBD Westcoast Construction Ltd.
("DBD")

- 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/134

DATE OF DECISION: October 31, 2016

DECISION

SUBMISSIONS

John Ramos

on behalf of DBD Westcoast Construction Ltd.

OVERVIEW

1. DBD Westcoast Construction Ltd. (“DBD”) seeks reconsideration of a decision of the Tribunal, BC EST # D105/16 (the “original decision”), dated August 16, 2016. A request by DBD for an extension of the statutory time period to file a reconsideration application was filed with the Tribunal on September 20, 2016, five days after the reconsideration appeal period found in section 116(2.1) had passed.. DBD filed its reconsideration application on September 30, 2016.
2. The original decision considered an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on March 2, 2016, and an application under section 109(1)(b) of the *Act* for an extension of the appeal period.
3. The Determination was made by the Director on complaints filed by Alan Gazo (“Mr. Gazo”) and Justin Wilson (“Mr. Wilson”), who had alleged DBD had contravened the *Act* by failing to pay them regular wages and annual vacation pay. In the Determination the Director found DBD had contravened sections 18 and 58 of the *Act* in respect of the employment of Mr. Gazo and Mr. Wilson and ordered DBD to pay them wages in the total amount, including interest, of \$3,606.76. The Director also imposed two administrative penalties on DBD in the amount of \$1,000.00
4. An appeal of the Determination was filed by DBD alleging the Director failed to observe principles of natural justice and asserting that evidence had become available that was not available when the Determination was being made. The appeal was filed more than ten weeks after the expiry of the statutory time period set out in section 112(3) of the *Act*.
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 considered the criteria used by the Tribunal when considering an extension request and found DBD had not satisfied the necessary elements of the criteria to justify a favourable exercise of discretion under section 109(1)(b) of the *Act*. The Tribunal Member found DBD had provided no objectively based evidence to explain the delay and there was no evidence of an ongoing intention to appeal the Determination.
7. On the substantive merits of the grounds of appeal chosen by DBD, the Tribunal Member of the original decision found DBD had not shown the Director had failed to observe principles of natural justice in making the Determination and the evidence DBD sought to introduce with the appeal did not meet the test for allowing such evidence on appeal, as it was not new and could have been provided to the Director before the Determination was made. The Tribunal Member found the appeal was comprised almost entirely of a reiteration of arguments made by DBD at the complaint hearing.
8. The appeal was dismissed.

ISSUE

9. 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

10. The arguments made by DBD in this application reiterate the arguments made in the appeal of the Determination and include some comments relating to the reasons provided in the original decision for refusing to grant an extension of the appeal time period and for rejecting the appeal on its merits.
11. While the reconsideration application expresses disagreement with some of the comments in the original decision, nothing in the arguments address the correctness of the original decision or the reasoning upon which the original decision was made.
12. The communication with the Tribunal on September 20, 2016, requesting an extension of the time for making a reconsideration application, identifies a lack of experience with the *Act* and the need to consult legal counsel as the reasons for the requested extension.
13. The reconsideration submission does not address the delay in filing this application or attempt to provide an explanation for it.

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. 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.
15. This application has been filed outside of the statutory reconsideration period provided in section 116(2.1) of the *Act*. DBD has requested an extension of the reconsideration filing period.

16. Section 116(2.1) was introduced as part of amendments to the *Act* made in the *Administrative Tribunals Statutes Amendment Act, 2015*. In *Serendipity Winery Ltd.*, BC EST # RD108/15, the Tribunal stated the approach to requests for extending time limits for reconsideration applications would consider the same criteria as in extension requests for appeals, but also taking into account the Tribunal has a discretionary authority under section 116 that is exercised with restraint: see paras. 19 – 21.
17. In respect of consideration of applications for reconsideration generally, 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.
18. 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.
19. 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 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.
20. 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.
21. 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.

22. I find this application does not warrant reconsideration. DBD has not shown there was any error made in the original decision that would justify the exercise of discretion to reconsider that decision.
23. This application has two aspects: first, DBD re-asserts its disagreement with the Determination; and second it takes issue with some of the comments found in the rationale provided in the original decision for the findings and conclusions made.
24. The first aspect was considered and decided in the appeal.
25. The findings made in the original decision relating to the request for an extension of the time period were entirely consistent with the approach taken by the Tribunal to requests for an extension of the statutory appeal period and the statements in the original decision were reasonably grounded in the evidence and circumstances of the case. The Tribunal Member applied the criteria adopted and consistently applied by panels of the Tribunal when considering requests for an extension of time.
26. The Tribunal Member was completely justified, in the circumstances, in finding DBD's explanation for the delay was not reasonable. Attempts in this application to provide further explanation for a delay of more than ten weeks or express disagreement with the statements in the original decision do not assist in showing reconsideration is warranted.
27. I take a similar view of the findings in the original decision on the merits of the grounds of appeal relied on by DBD.
28. DBD has not met the burden of showing there was any error in the original decision, let alone one that warrants reconsideration. There is simply no avoiding the validity of the conclusion reached in the original decision that the appeal had no presumptive merit and was doomed to fail in any event.
29. The application simply re-states arguments that were made to the Director and rejected and that were considered and dismissed on appeal.
30. The Tribunal Member of the original decision was correct in finding no natural justice concerns were present in the process applied to the complaints made by Mr. Gazo and Mr. Wilson and the decision made by the Director on those complaints.
31. The Tribunal Member of the original decision correctly applied the tests adopted by the Tribunal for the admission of new or additional evidence on appeal. The conclusion reached was entirely consistent with both the tests adopted when considering this ground of appeal, with the language of the provision, which applies to evidence becoming available that was "*not available when the determination was being made*", and with the purposes of the *Act*, that seeks to ensure expeditious resolution of disputes and avoid the possibility of parties dissatisfied with the result seeking ways to avoid the consequences of a determination.
32. Also factoring against this application is the unexplained delay in filing. Inexperience with the processes of the *Act* is not an acceptable basis for missing time limits or for granting an extension of those time limits. Most of the parties involved in processes under the *Act* are inexperienced. That is a primary reason why the Tribunal has made a substantial number of on-line resources available to assist in understanding and complying with the statutory and procedural requirements. The letter of August 16, 2016, from the Tribunal, which accompanied the original decision when it was sent to DBD prominently indicated the reconsideration application deadline and directed the recipient to a specific location on the Tribunal's web site "for information on the reconsideration process".

33. The delay is unreasonable and unacceptable.
34. For all the above reasons, this application is denied.

ORDER

35. Pursuant to section 116 of the *Act*, the original decision, BC EST # D105/16, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal