

An application for Reconsideration

- by -

B & C List (1982) Ltd.
("B&C")

- 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.: 2005A/137

DATE OF DECISION: September 30, 2005

DECISION

SUBMISSIONS

Dugald E. Christie	on behalf of B&C List (1982) Ltd.
Lynne E. Egan	on behalf of the Director
David Shelkie	on his own behalf

OVERVIEW

1. B&C List (1982) Ltd. (“B&C”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of a decision, BC EST #D042/05, made by the Tribunal on April 4, 2005 (the “original decision”). The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards on January 24, 2005. The Determination had found B&C had contravened Section 63 of the *Act* in respect of the employment of David Shelkie (“Shelkie”) and ordered B&C to pay wages to Shelkie in the amount of \$510.26 and imposed an administrative penalty of \$500.00. The original decision confirmed the Determination.
2. This application was filed with the Tribunal by counsel for B&C on July 15, 2005. There is no issue concerning the timeliness of the application. The application asks the Tribunal to review the original decision on the grounds that the complaint hearing conducted by a delegate of the Director failed to comply with principles of natural justice. The application also contains arguments relating to the correctness of the conclusion that Shelkie was entitled to length of service compensation and the conclusion that an amount of money paid to Shelkie at the termination of his employment was a gift.
3. The application asks that B&C be given an oral hearing and an opportunity to present its case at that hearing. Although not specifically requested, it would logically follow that this Panel is being asked to set aside the original decision and the Determination.

ISSUE

4. In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case is appropriate for reconsideration, the substantive issue raised in this application, as it was in the appeal, is whether the Director failed to comply with principles of natural justice in making the Determination and whether the Director made errors about to the entitlement of Shelkie to wages for length of service compensation and the amount of that entitlement.

ANALYSIS OF THE PRELIMINARY ISSUE

5. The legislature has conferred an express reconsideration power on the Tribunal in Section 116 which provides:
- 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.*
6. Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's 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 interpretation and application*" of its provisions. Another stated purpose, found in subsection 2(b), is to "*promote the fair treatment of employees and employers*". The general approach to reconsideration is set out 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 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. An assessment is also made of the merits of the original decision.
7. Consistent with the above considerations, 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.
8. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively "re-weigh" evidence already submitted to the panel which made the original decision (as distinct from tendering new evidence or demonstrating an important finding of fact made without a basis in the evidence) and come to a different conclusion.

9. 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.
10. After review of the original decision, the submissions of the parties and the material on file, I have decided this application does not warrant reconsideration.
11. This application does nothing more than restate facts that were before the panel in the original decision and reiterate the arguments that were raised in the appeal, considered in the original decision and rejected. Specifically, the original decision states the following arguments made by B&C:

B&C argues that the delegate erred in law in finding that it accommodated Mr. Shelkie's work schedule with his other employer, and had the right to terminate his employment when he was unable to work on October 20, 2003. Further, they contend that the delegate erred in not finding that Mr. Shelkie's refusal to work amounted to insubordination, also constituting just cause.

B&C further contends the hearing process was flawed and that it was denied the opportunity to be heard.

. . .

Finally, B&C argues that the payment made to Mr. Shelkie at the end of his employment was was not a gift.
12. The issues are identified in the original decision as being whether the delegate failed to comply with principles of natural justice in making the Determination and whether the delegate erred in concluding Shelkie's employment was terminated without just cause. The matter of the overpayment was addressed in the original decision as follows:

Mr. Shelkie's final paycheque indicates that he was paid for 30.16 hours. Although B&C denied that the overpayment was a gift, it does not say why Mr. Shelkie was paid for 20 hours that he did not work, either at the hearing or on appeal. In a May 4, 2004 fax to the delegate in response to Mr. Shelkie's complaint, B&C suggests it paid Mr. Shelkie \$230.00 more than he was entitled to for "humanitarian reasons". This explanation is at odds with Ms. Adamo's March 17, 2005 reply submission. I find Ms. Adamo's explanation, offered only after receipt of the Determination, to be lacking in credibility. I find it was open for the delegate to infer the overpayment was a gift, and decline to interfere with the delegate's conclusion on this issue.
13. The original decision found no basis in law or fact for the allegation that B&C was denied a fair hearing, noting the failure of B&C to identify in the appeal what issues were missed by the delegate and what evidence was available and presented but not considered by the delegate. I note the same deficiency in this application, which simply restates some of the evidence that was before the delegate and submits those facts ought to have been sufficient to justify Shelkie's termination.
14. A comprehensive analysis of the just cause issue was provided in the original decision. I can find no flaw or error in that analysis.
15. The application is denied.

ORDER

16. Pursuant to Section 116 of the *Act*, I order the original decision be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal