

An Application for Reconsideration

- by -

Hemlunda Fishing Ltd.
("Hemlunda")

- 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/147

DATE OF DECISION: December 15, 2016

DECISION

SUBMISSIONS

Lorne Osborne

on behalf of Hemlunda Fishing Ltd.

OVERVIEW

1. Hemlunda Fishing Ltd. (“Hemlunda”) seeks reconsideration of a decision of the Tribunal, BC EST # D103/16 (the “original decision”) dated August 5, 2016.
2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 27, 2016.
3. The Determination was made by the Director on a complaint filed by Christopher Auger (“Mr. Auger”) who had alleged Hemlunda had contravened the *Employment Standards Act* (the “*Act*”) by failing to pay all wages owing to him.
4. In the Determination, the Director found Hemlunda had contravened section 18 of the *Act* and was ordered to pay Mr. Auger wages in the amount of \$3,975.43, an amount which included interest under section 88 of the *Act*, and an administrative penalty in the amount of \$500.00.
5. An appeal of the Determination was filed by Hemlunda alleging the Director failed to observe principles of natural justice in making the Determination and that new evidence had become available, although the original decision notes an “error of law” argument was invoked.
6. Hemlunda argued the Director erred in interpreting the definition of “fisher” found in section 1 of the *Employment Standards Regulation*. The Tribunal Member making the original decision found it was open to the Director to interpret the term “fisher” and the interpretation placed on that definition in the Determination did not show an error of law.
7. Hemlunda argued the Director did not “fairly or objectively” decide the complaint as he accepted Mr. Auger’s testimony “100%”, to the complete exclusion of the evidence of Mr. Osborne, a director of Hemlunda and its representative in the complaint process, and that of his witnesses. The Tribunal Member was not convinced the Director had acted unfairly or lacked objectivity in making findings on the evidence provided by the parties to the complaint. The Tribunal Member found the reasons provided by the Director for accepting the evidence of Mr. Auger over that presented by Hemlunda were “persuasive”.
8. The Tribunal Member making the original decision decided the “new evidence” Hemlunda sought to submit with the appeal did not meet the test established by the Tribunal for allowing a party to submit new, or additional, evidence with an appeal, finding the evidence Hemlunda sought to submit with the appeal lacked the necessary probative value to warrant its inclusion and consideration.
9. The Tribunal Member dismissed the appeal under section 114 of the *Act*.
10. The original decision was issued on August 5, 2016, and was sent to the parties the same day. Correspondence from the Tribunal on that day, which accompanied a copy of the original decision sent to all of the parties, contained a prominently displayed box containing reconsideration information advising the

parties, among other things, that the deadline date for delivery of an application for reconsideration to the Tribunal was September 6, 2016. This application was delivered to the Tribunal on October 21, 2016, more than six weeks past the expiry of the statutory time limit for making a reconsideration application. Hemlunda has requested an extension of the statutory reconsideration time period.

ISSUE

11. 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

12. Hemlunda has, essentially, resubmitted the arguments and evidence it provided in the appeal, including resubmitting the evidence it sought to submit as “new evidence” in the appeal. In respect of the “new evidence”, Hemlunda submits such material did satisfy the four-part test for accepting new, or additional, evidence referred to in the original decision. The submission does not address the reasoning on this ground set out in the original decision or show how that reasoning represents an error that justifies reconsideration of the original decision and its cancellation. On its face, this argument represents nothing more than an attempt to have this panel re-visit the original decision on that matter and reach a different conclusion from the original decision on its admissibility as “new evidence”.
13. Hemlunda says the delay was, substantially, the result of the absence of Mr. Osborne from the country from August 15 to September 10, 2016. Hemlunda does not say it was unaware of the result of the original decision before August 15, 2016.
14. In this application Hemlunda seeks to have the original decision cancelled.

ANALYSIS

15. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally.
16. Section 116 of the *Act* reads:

- 116** (1) *On an 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.*

17. The authority of the Tribunal under section 116 is discretionary. A principled approach to this discretion has been developed and applied. 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 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.

23. The application has been filed outside of the time period allowed for making reconsideration applications. The reason given for the delay and the need for an extension of time reasonably explains some of the delay, but not all of it. Ultimately, this application is, simply put, not timely. The delay weighs against the application.
24. In respect of the disagreement with the decision to not accept the “new evidence”, I will note first that such a decision involved an exercise of discretion by the Tribunal Member making the original decision. The Tribunal does not lightly interfere with that exercise of discretion unless it can be shown the exercise of discretion was not made in good faith, there was a mistake in construing the limits of authority, there was a procedural irregularity or the decision was unreasonable, in the sense that there was a failure to correctly consider the applicable principles, a failure to consider what was relevant or a failure to exclude from consideration matters that were irrelevant or extraneous to the purposes of the *Act*.
25. This application does not indicate, within the above considerations, why this panel should interfere with the decision of the Tribunal Member making the original decision on the “new evidence” Hemlunda sought to include with the appeal.
26. On analysis, I find the reasons given in the original decision for not accepting the “new evidence” were both reasonable and correct. The Tribunal Member applied the test adopted and consistently applied by panels of the Tribunal when considering requests for including new evidence with an appeal. I agree with the reasoning of the Tribunal Member in finding the “new evidence” was of limited probative value on the question for which Hemlunda sought to introduce it.
27. There is no allegation the denial of the requested extension was not made in good faith or that the Tribunal Member exceeded the limits of his authority.
28. There was no procedural irregularity and the Tribunal Member did not fail to consider matters that were relevant or consider matters that were irrelevant.
29. There is nothing new in this application; it recycles the same submissions as were made, unsuccessfully, in the appeal. It weighs against this application that it seeks to have this panel re-visits the arguments made in the appeal and not accepted in the original decision.
30. I find this application does not demonstrate there is an error in the original decision that would justify the Tribunal exercising its discretion to order a reconsideration of that decision.
31. The application is denied.

ORDER

32. Pursuant to section 116 of the *Act*, the original decision, BC EST # D103/16, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal