Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Tropical Pool & Spa Ltd.
("Tropical")

- 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/156

DATE OF DECISION: December 15, 2016

DECISION

SUBMISSIONS

Deanna Devlin — on behalf of Tropical Pool & Spa Ltd.

OVERVIEW

1. Tropical Pool & Spa Ltd. ("Tropical") seeks reconsideration of a decision of the Tribunal, BC EST # D147/16 (the "original decision"), dated November 3, 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 25, 2016.

3. The Determination was made by the Director on a complaint filed by Jason S. Hovde ("Mr. Hovde") who had alleged Tropical had contravened the *Act* by failing to pay all commission wages owing to him.

4. In the Determination, the Director found Tropical had contravened section 18 of the *Act* and section 46 of the *Employment Standards Regulation* (the *"Regulation"*) and was ordered to pay Mr. Hovde wages in the amount of $816.75, an amount which included annual vacation pay and interest under section 88 of the *Act*, and to pay administrative penalties in the amount of $1,000.00.

5. An appeal of the Determination was filed by Tropical on the ground that new evidence had become available that was not available when the Determination was being made.

6. In the appeal, Tropical sought to have the Determination varied and cancelled.

7. The Tribunal Member making the original decision examined the "new" evidence against each element of the test required by the Tribunal to be met before its discretion whether to accept and consider the fresh evidence would be exercised in favour of such evidence. The Tribunal Member found the "new evidence" upon which Tropical sought to ground the appeal did not satisfy any element of the test and refused to exercise his discretion to accept and consider it.

8. The Tribunal Member concluded Tropical had not met the burden of establishing there was any error in the Determination on the statutory grounds of appeal relied upon, found the appeal had no reasonable prospect of succeeding and dismissed it under section 114 of the *Act*.

9. In this application, Tropical seeks to have the original decision varied to cancel the Determination.

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

ARGUMENT

11. The submissions made by Tropical in this application can be broadly characterized as being of two types: the first challenges findings of fact made in the Determination that were transcribed into the original decision or, alternatively, challenges the consequence of findings of fact made in the Determination; and the second addresses the refusal in the original decision to accept the "new evidence" submitted in the appeal.

12. In respect of the first, Tropical contends findings of fact made in the Determination were "not based on any evidence or facts" or were contrary to the evidence provided. The submissions specifically point to the commission wages that were awarded in the Determination, reiterating their position they were not owing to Mr. Hovde, to the general eligibility of Mr. Hovde to commissions and to the findings that Tropical had contravened sections 18 of the *Act* and section 46 of the *Regulation*.

13. The second seeks to explain why the "new evidence" in the appeal was not provided earlier. Tropical says, "It did not occur to us . . . that our testimony of trying to exhaustively to reach the employee would not be considered as factual."

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.

15. 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.*

16. 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 Giovanno (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.

17. 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.

18. 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.

19. 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.

20. 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.

21. I find this application does not warrant reconsideration.

22. I shall address each of the two types of argument that is raised in support of this application.

23. The first argues against findings of fact made and conclusions drawn from the facts in the Determination. This argument fails in two respects: first its validity is inextricably linked to the "new evidence" that was not accepted in the appeal. Second, the *Act* does not authorize the Tribunal to reach different factual conclusions than was made by the Director in a Determination unless such findings are shown to raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03.

24. On the first argument, it suffices to say this application cannot be affected by "new evidence" that was not accepted in the original decision.

25. On the latter point, the Tribunal has noted in *Britco Structures Ltd.*, *supra*, that the test for establishing findings of fact constitute an error of law is stringent, requiring the appellant to show that the findings of fact are perverse and inexplicable, in the sense that they are made without any evidence, that they are inconsistent with and contradictory to the evidence or that they are without any rational foundation. Unless an error of law is shown, the Tribunal must defer to findings of fact made by the Director.

26. Tropical did not rely on error of law in its appeal, nor did it do anything more in the appeal submission than assert some of the findings made by the Director were "inaccurate". It made no attempt to independently establish any of the findings of fact and conclusions drawn from those facts were an error of law. Their appeal was entirely dependent on the acceptance of the "new evidence" and on the Tribunal Member of the original decision giving it the effect argued by Tropical.

27. The arguments on the facts as found and applied in the Determination are completely misplaced in this application and provide no reason or basis to justify reconsideration.

28. 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*.

29. This application does not indicate, within the above considerations, why this panel should interfere with the discretion of the Tribunal Member making the original decision on the "new evidence" Tropical sought to include with the appeal.

30. Nor does it indicate, within the context of the test applied by the Tribunal Member and the reasons given in the original decision for finding the test had not met, why this panel should interfere with the conclusions reached in the original decision on the "new evidence".

31. The correct test was applied in the original decision. On analysis, I find the reasons given in the original decision for not accepting the "new evidence" show no error. They are reasonable and, in my view, also correct. There is no allegation in this application that the decision to refuse the "new evidence" was not made in good faith, was made without authority or that there was a procedural irregularity in making it.

32. I am somewhat concerned by the suggestion in Tropical's submission in this application that the "new evidence" was provided for the limited purpose of showing Tropical had made "an exhaustive effort" to reach Mr. Hovde over a certain period of time.

33. That suggestion does not accord with the appeal submission, as it is clear from the appeal that the "new evidence" was sought to be added as proof of Mr. Hovde's termination date and to establish that Mr. Hovde had removed records from his employment file. It was those aspects of the "new evidence" to which the original decision was addressed. As noted in the original decision, nothing in the material submitted as "new evidence" altered the fact that outstanding wages were not paid within the time the *Act* required them to be paid or gave credence to the allegation that Mr. Hovde had misappropriated parts of his employment records. I would add that if the sole purpose of the "new evidence" was to show Tropical made "exhaustive efforts" to reach Mr. Hovde, that purpose was completely irrelevant to the issues being raised in the appeal and on that basis alone would have been denied acceptance and consideration.

34. There is nothing new in this application; it substantially recycles the position of Tropical, expressed, unsuccessfully, in the appeal; it continues to seek reliance on evidence and facts that were not accepted or considered in the appeal. These matters weigh heavily against this application.

35. In sum, there is nothing in this application which demonstrates any error in the original decision nor is there any other reason that would justify the Tribunal exercising its discretion to order a reconsideration of that decision.

36. The application is denied.

ORDER

37. Pursuant to section 116 of the *Act*, the original decision, BC EST # D147/16, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal