

An application for Reconsideration

- by -

Edward Allen Magee operating Delta Enterprises
("Mr. Magee")

- 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/144

DATE OF DECISION: October 20, 2005

DECISION

SUBMISSIONS

Garth S. McAllister	on behalf of Edward Allen Magee
Berhane Semere	on behalf of the Director
Moonyean Booth	on her own behalf

OVERVIEW

1. Edward Allen Magee operating Delta Enterprises (“Mr. Magee”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of a decision, BC EST #D097/05, made by the Tribunal on July 13, 2005 (the “original decision”). The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards on March 24, 2005.
2. The Determination found Mr. Magee had contravened Sections 18 and 63 of the *Act* in respect of the employment of Moonyean Booth (“Ms. Booth”) and ordered Mr. Magee to pay wages to Ms. Booth in the amount of \$5,987.94 and imposed administrative penalties of \$1000.00. The original decision confirmed the Determination.
3. This application was filed with the Tribunal by counsel for Delta on August 12, 2005. There is no issue concerning the timeliness of the application.
4. The application asks the Tribunal to review the original decision on the grounds there was a denial of natural justice in three respects:
 - (i) by concluding Mr. Magee had a full opportunity to respond to the initial complaint;
 - (ii) by refusing to accept into evidence additional material provided by Mr. Magee with his appeal; and
 - (iii) by not holding an oral hearing on the appeal.
5. The application also submits it was patently unreasonable to allow Ms. Booth’s claim for wages for work allegedly done at home against the specific instructions of Mr. Magee.

ISSUE

6. 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 is whether there was a denial of natural justice and whether there were errors about the entitlement of Ms. Booth to wages for work allegedly done at home.

ANALYSIS OF THE PRELIMINARY ISSUE

7. 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.*
8. 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.
9. 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.
10. 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 or issues raised in the reconsideration.
11. 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.

12. The first argument on natural justice does no more than echo one of the grounds of appeal from the Determination. The Director had concluded Ms. Booth was entitled to length of service compensation. In the appeal, counsel for Mr. Magee argued that Mr. Magee had not been adequately informed of all of the elements of the complaint, including Ms. Booth's allegation that she had been fired, and as a result had not been given an opportunity to respond. The original decision addressed that argument, and rejected it on the facts. In my view, the material reasonably supported the decision of the original panel on this point.
13. In this application, counsel for Mr. Magee challenges that result, arguing the material relied on for that conclusion does not support it. Essentially, the objective of this aspect of the application is to have this panel review and re-weigh the material and change findings and conclusions of fact made by the original panel. That is not an appropriate basis for reconsideration unless the findings and conclusions are perverse, in a legal sense. As indicated above, that is not the case here.
14. The second argument on natural justice relates to the decision of the panel in the original decision to refuse to accept the additional evidence provided by Mr. Magee with the appeal. Essentially, counsel for Mr. Magee says this evidence should have been admitted because Mr. Magee didn't fully understand the nature of the complaint.
15. The original decision was consistent with the approach of the Tribunal to appeals grounded in paragraph 112(1)(c) of the *Act*, which says:

112 (1) Subject to this section, a person served with a determination may appeal the determination on one or more of the following grounds: . . .

(c) evidence has become available that was not available at the time the determination was made.
16. The conclusion by the panel in the original decision, that the evidence which Mr. Magee sought to introduce was available during the investigation of the complaint and ought to have been presented, was correctly determinative of this ground of appeal.
17. The third argument on natural justice is based on the decision of the Tribunal to conduct and adjudicate the appeal on written submissions. Counsel for Mr. Magee says the Tribunal's failure to hold an oral hearing denied Mr. Magee the chance to test the credibility of the material provided by Ms. Booth to support her complaint.
18. The Tribunal has authority to conduct an appeal in a manner it considers necessary and is not required to hold an oral hearing (see *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). Section 103 of the *Act* incorporates several provisions of the *Administrative Tribunals Act* ("*ATA*") including section 36 which states: ". . . the tribunal may hold any combination of written, electronic and oral hearings".
19. The appeal was grounded on an assertion that the Director had failed to observe principles of natural justice in making the Determination and that new evidence had come available that was not available when the Determination was made. An oral hearing was not necessary to decide those grounds of appeal. The material in the file was sufficient to reach a conclusion on both issues.

20. In essence, this argument is a further effort to get at the findings of fact that were made by the Director in the complaint process.
21. The final argument in this application attacks the reasonableness of the decision of the Director to allow Ms. Booth's wage claim for work she had performed at home. In the application, counsel for Mr. Magee says:
- At paras. 12 and 17, the Member reviewed the evidence of both Ms. Booth and Mr. Magee relating to the unpaid extra time as summarized by Mr. Suhr in the Determination. At para. 18, she repeated the Mr. Suhr's conclusion that Ms. Booth was entitled to be paid for unauthorized work, but did not consider the appropriateness of that conclusion.
22. What the argument fails to either recognize or acknowledge is that the appeal did not ask the Tribunal to consider the appropriateness of that part of the Determination, either as a matter of law, over which the Tribunal would have authority under paragraph 112(1)(a), or as a matter of fact, over which the Tribunal would have no authority under Section 112. This is an argument that could have been made on appeal. As indicated above, Section 116 is discretionary. It is not an appropriate exercise of that discretion to consider issues on reconsideration that were not raised and argued in the appeal (see *City of Surrey*, BC EST #D433/98 (Reconsideration of BC EST #D411/97) and *W E P Holdings Ltd. operating Robins Donuts*, BC EST #RD486/01).
23. The application is denied.

ORDER

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

David B. Stevenson
Member
Employment Standards Tribunal