

An Application for Reconsideration

- by -

Grant Howard
("Howard")

- 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

ADJUDICATOR: Ian Lawson

FILE No.: 2003/28

DATE OF DECISION: July 17, 2003

DECISION

OVERVIEW

This is a request for reconsideration under s. 116 of the *Employment Standards Act* (“Act”) filed by Grant Howard (“Howard”) on April 30, 2003. It relates to the decision of Adjudicator Kenneth Wm. Thornicroft made on March 4, 2003 (“Original Decision”). That decision dismissed Howard’s appeal from a Determination made on November 25, 2002, on the basis that the appeal was filed out of time and Howard’s request for an extension of time was denied. The request for reconsideration is now decided without a hearing, on the basis of written submissions.

FACTS

Howard was employed by Kirk Capital Corporation (“KCC”) as a sub-mortgage broker paid by commission. Howard filed a complaint with the Director alleging that KCC failed to pay his commission respecting ten separate transactions, that KCC incorrectly deducted legal fees from some of his commissions, and that he was wrongfully dismissed by KCC.

After an investigation in which evidence was gathered from a number of witnesses, the Director’s delegate issued a Determination which held, *inter alia*, that Howard had been wrongfully dismissed and was entitled to compensation for length of service in the amount of \$876.35; that he is to be reimbursed \$1,483.96 for KCC’s wrongful deduction of legal fees from his commissions; and that Howard is entitled to commission wages plus vacation pay and interest in the amount of \$26,265.33. The commission wages were awarded only respecting two of the ten transactions which were the subject of Howard’s complaint.

The Original Decision found that the Determination was sent by registered mail to Howard on November 25, 2002, and that a notification of delivery card was left at Howard’s address on November 25, 2002. The Adjudicator held that no proper explanation was given by Howard for failing to deal with the delivery card until December 18, 2002 (which was the deadline for filing an appeal from the Determination). Howard submitted to the Adjudicator that he had placed the delivery card in a “large drawer” and did not turn his mind to it until December 18, 2002. Howard further submitted that he had failed to “locate” the card, and when he finally obtained the Determination from the post office, he was further delayed because the matter was complex and he needed to consult counsel.

Howard delivered a notice of appeal to the Tribunal registry on December 24, 2002, and requested an extension of time to allow the appeal to be filed. On January 2, 2003, the Tribunal’s Vice-Chair requested submissions from all parties as to whether an extension of time ought to be granted. The issue was then referred to Adjudicator Thornicroft for decision.

ISSUE

Should the Original Decision denying an extension of time to appeal now be reconsidered?

ANALYSIS

The legislature enabled the Tribunal to reconsider any of its decisions under s. 116 Act as follows:

116. (1) On application under subsection (2) or on its own motion, the tribunal may
 - (a) reconsider any order or decision of the tribunal
 - (b) cancel or vary the order or decision or refer the matter back to the original 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.

The Tribunal has adopted a principled approach to the exercise of this discretion to reconsider, keeping in mind that one of the Act's purposes is to provide fair and efficient procedures for resolving disputes over the interpretation and application of the Act, and another of the Act's purposes is to promote the fair treatment of employees and employers. In *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97) the Tribunal stated:

To realize these purposes in the context of its reconsideration power, the Tribunal has attempted to strike a balance between two extremes. On the one hand, failing to exercise the reconsideration power where important questions of fact, law, principle or fairness are at stake, would defeat the purpose of allowing such questions to be fully and correctly decided within the specialized regime created by the Act and Regulations for the final and conclusive resolution of employment standards disputes: Act, s. 110. On the other hand, to accept all applications for reconsideration, regardless of the nature of the issue or the arguments made, would undermine the integrity of the appeal process which is intended to be the primary forum for the final resolution of disputes regarding Determinations. An "automatic reconsideration" approach would be contrary to the objectives of finality and efficiency for a Tribunal designed to provide fair and efficient outcomes for large volumes of appeals. It would delay justice for parties waiting to have their disputes heard, and would likely advantage parties with the resources to "litigate": see *Re Zoltan T. Kiss* (BC EST #D122/96).

The Tribunal has therefore developed a two-stage analysis for reconsiderations: first, the reconsideration panel decides whether the matters raised in the application warrant reconsideration; if reconsideration is warranted, the panel proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration and a review of the original decision "on the merits." The reconsideration power will be exercised with restraint, as it is meant to be an extraordinary remedy. A non-exhaustive list of grounds for reconsideration include:

- 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 distinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

The Tribunal stated in *Milan Holdings Ltd.*, *supra*:

The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise “a serious mistake in applying the law”: *Zoltan Kiss, supra*.

After reviewing the Original Decision, I am not satisfied that any significant questions of law, fact, principle or procedure have been raised by Howard, or that any arguable case has been made out to warrant the reconsideration. The only issue for the Adjudicator to decide in the Original Decision was whether an extension of time to appeal ought to be granted pursuant to s. 109(1)(b) of the Act. The relevant portion of the Adjudicator’s findings are as follows:

Although the delay in filing an appeal in this case is not lengthy, that fact, alone, is not sufficient to justify overlooking the statutory time limit. There is no proper explanation before me as to why the appellant failed to “locate” the delivery notice (which was delivered on November 26th) until December 18th, 2002. Mr. Howard simply says that he placed the notice in a “large drawer” and did not turn his mind to the notice until December 18th. Surely, such a cavalier treatment of an important legal notice ought not to redound to his credit.

Further, I reject the notion that filing an appeal in this case was a burdensome task; in essence, the appeal simply reiterates arguments that were before the delegate. I note that the appellant filed this appeal in person; this appeal was not filed by legal counsel.

The Tribunal has consistently held that extensions of time to appeal should not be granted as a matter of course and it should exercise its discretion to grant an extension only where there are compelling reasons to do so: *Metty M. Tang, BC EST#D211/96*. Six criteria have emerged to determine whether compelling reasons exist to grant an extension, and all six must be met by appellants seeking an extension:

1. there is a good reason they could not appeal before the deadline;
2. there is not an unreasonably long delay in appealing;
3. they always intended to appeal the determination;
4. the other parties (the respondent and the Director) are aware of the intent to appeal;
5. the respondent will not be harmed by an extension; and
6. they have a strong case that might succeed, if they get an extension (see *Bravo Cucina Restaurante Italiano Ltd. BC EST#D343/00*).

Howard has made extensive submissions in support of his request for reconsideration, enthusiastically referring to many previous Tribunal decisions. Unfortunately, the bulk of his submissions relate to whether the appeal has merit, and very little relates to other aspects of the test for granting an extension of time. At the heart of the Original Decision is the Adjudicator’s conclusion that no adequate explanation

was made by Howard for neglecting to pick up the Determination for twenty-two days. Howard's lengthy written submissions do not address this key finding, and Howard's only reference to the issue is found on p. 25 of his response to KCC's submission on the same point, which response I reproduce *verbatim*:

At page 6-7 paragraph (Solicitors Rebuttal) the solicitor suggests that the applicant does not take issue with the Original Panel's decision to provide reasonable explanation to file his appeal. The purpose of the reconsideration is different from that of the reasons stipulated for an appeal and for this reason the issue was not addressed. The applicants reasoning was in fact an honest mistake. Where such a large commissions is concerned there would be no appreciable reasoning or purpose to stage a delay of this nature. The applicant has always responded in a fairly timely fashion in regards to the entire applications and investigation. In fact, as indicated the Delegate had delayed the process by six months. I see no retribution for this oversight. In any event, the Tribunal should not penalize or punish a party with an incorrect decision for the sake of a late appeal. The Adjudicator in his decision pointed to the fact that the delay was not lengthy. Furthermore, it has had no impending prejudice on the part of the respondents whom has continued to withhold the funds owing to the applicant since December 18th, 2002 in an effort to negotiate a new settlement. The delay has caused no harm to the respondents contrary to what they would desire the Tribunal to believe. The reason to grant an extension is grounded in a prima facie case and the reconsideration powers of the Tribunal.

In my view, the lack of an adequate explanation for failing to appeal in time is the *ratio decidendi* of Original Decision and nothing has been raised by Howard to call that finding into question. Further, no significant issue of law, fact, principle or procedure has arisen in my review of the Original Decision that warrants reconsideration. Indeed, the Original Decision is a routine application of principles that have been applied by the Tribunal in every case where an appellant fails to file an appeal in time. In any event, the Adjudicator exercised a discretionary power in refusing Howard's request for an extension, and it is my view that his exercise of that discretion ought not to be interfered with unless there is a patent error of law or principle in how that discretion was exercised. There being no such error apparent to me, no reconsideration is warranted.

ORDER

Howard's request for reconsideration of the Original Decision pursuant to s. 116 of the Act is denied.

Ian Lawson
Adjudicator
Employment Standards Tribunal