Citation: Dmytro Ponomarov (Re)
2024 BCEST 85

EMPLOYMENT STANDARDS TRIBUNAL

An application for reconsideration
pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

\- by -

Dmytro Ponomarov
(“Mr. Ponomarov”)

\- of a Decision issued by -

The Employment Standards Tribunal

PANEL: David B. Stevenson

SUBMISSIONS: Dmytro Ponomarov, on his own behalf

FILE NUMBER: 2024/095

DATE OF DECISION: September 11, 2024

DECISION

OVERVIEW

1. Dmytro Ponomarov ("Mr. Ponomarov") seeks reconsideration of a decision of the Tribunal, 2024 BCEST 58 ("original decision"), dated June 19, 2024.

2. The original decision considered an appeal of a determination issued by a delegate of the Director of Employment Standards ("delegate") on February 20, 2024 ("Determination").

3. The Determination was made by the delegate on a complaint filed by Mr. Ponomarov, who alleged he had been unjustly terminated by his former employer.

4. The delegate, applying subsection 76(3)(h) of the *ESA*, determined that she did not have any jurisdiction to adjudicate Mr. Ponomarov's complaint on its merits.

5. An appeal of the Determination was filed by Mr. Ponomarov.

6. The Tribunal Member making the original decision found the appeal had no reasonable prospect of succeeding and, applying section 114(1)(f) of the *ESA*, dismissed it.

7. This application seeks to have the Determination, and, by inference, the original decision, set aside and the matter referred back to the Director with instructions to investigate.

ISSUE

8. 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 *ESA* to reconsider the original decision. If satisfied the case warrants reconsideration, the issue raised in this application is whether this panel of the Tribunal should vary the original decision and the Determination.

BACKGROUND FACTS

9. The original decision records the following factual background, at paras 4-6:

> The Appellant filed a complaint under section 74 of the *ESA* on March 16, 2023, in which he alleged that he had been unjustly terminated. His employment was formally terminated on September 22, 2022. At all material times, the appellant's employment was governed by a collective bargaining agreement negotiated between the BC General Employees' Union ("union") and the British Columbia provincial government.
>
> Section 3(7) of the *ESA* provides as follows:
>
> > If a dispute arises respecting the application, interpretation or operation of
> >
> > (a) a Part or provision of this Act deemed by subsection (3) to be incorporated in a collective agreement, or
> >
> > (b) a provision specified in subsection (6),

> the grievance procedure contained in the collective agreement or, if applicable, deemed to be contained in the collective agreement under section 84 (3) of the *Labour Relations Code*, applies for the purposes of resolving the dispute.

> The delegate, applying subsection 76(3)(h) of the *ESA*, determined that she did not have any jurisdiction to adjudicate the appellant's complaint on its merits. Rather, she held that all issues relating to the appellant's mandatory unpaid leave and subsequent dismissal fell within the jurisdiction of a grievance arbitrator. Section 76(3)(h) states: "The director may stop or postpone reviewing or investigating a complaint or refuse to investigate a complaint if the director is satisfied that...(h) the dispute that caused the complaint may be dealt with under section 3 (7)."

10. In his appeal, Mr. Ponomarov alleged the delegate had erred in law and failed to observe principles of natural justice in making the Determination.

11. The Tribunal Member of the original decision found the delegate had made no reviewable error.

12. The Tribunal Member dismissed the error of law ground of appeal, providing his analysis for that decision at paras. 11-18 of the original decision.

13. On the natural justice ground of appeal, the Tribunal Member dismissed this ground, stating:

> The delegate fully considered all of the arguments advanced by the appellant. The delegate did not breach the rules of natural justice simply because she characterized the facts in a manner that was not consistent with the appellant's view of the matter. All of the delegate's findings of fact were based on a sound evidentiary foundation. I do not find that the delegate was in a conflict of interest merely because she is a provincial government employee.

14. The Tribunal Member summarized his decision as follows:

> . . . I am not persuaded that the delegate erred in summarily dismissing the appellant's complaint. Even if the appellant was solely seeking a declaration that he was dismissed under section 66 – and was not seeking any monetary remedy – all matters relating to the appellant's mandatory leave and subsequent termination fall within the exclusive jurisdiction of a grievance arbitrator and must be addressed under the applicable collective agreement.

ARGUMENTS

15. Mr. Ponomarov's arguments on this application raise seven points of contention. The main point, regardless of how Mr. Ponomarov has framed the "question," simply re-visits his disagreement with the decision of the delegate in the Determination that the delegate had no jurisdiction to consider his complaint, and the decision of the Tribunal Member in the original decision that the delegate did not err in law in dismissing Mr. Ponomarov's complaint under section 76(3) of the *ESA*.

16. Of the other "points" raised in this application, two of them relate to the delegate and the Determination, not to the correctness of the original decision, and have been addressed in the original decision. They will not be considered again here.

17. Relating to the original decision, Mr. Ponomarov challenges that decision on the following bases:

    i. the Tribunal Member was wrong to state Mr. Ponomarov was seeking a declaration that his conditions of employment were "substantially altered";

    ii. the Tribunal Member did not address the three errors of law he raised in his appeal;

    iii. the Tribunal Member misrepresented the available remedy; and

    iv. the Tribunal Member acted unreasonable [sic] and in bad faith.

ANALYSIS

18. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally. Section 116 of the *ESA* 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, or
>
> (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.

19. 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 *ESA*. One of the purposes of the *ESA*, 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 *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.

20. 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. 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.

21. 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.

(see *Zoltan T. Kiss*, BC EST # D122/96)

22. 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.

23. I find this matter does not warrant reconsideration.

24. None of the points of contention Mr. Ponomarov has raised with the original decision demonstrate the Tribunal Member made a reviewable error or that the original decision was otherwise incorrect.

25. On the first point of argument made by Mr. Ponomarov, whether the Tribunal Member was wrong to state Mr. Ponomarov was seeking a declaration that his conditions of employment were "substantially altered," I can't decide whether Mr. Ponomarov is being disingenuous, is exhibiting a willful disregard of the language in section 66 of the *ESA*, or just doesn't understand that an essential element of section 66 is the requirement to make a finding that *"a condition of employment [has been] substantially altered."*

26. On any reading of the complaint Mr. Ponomarov filed with the Director, he was seeking a declaration under section 66 based on the implementation of the vaccine policy and his subsequent termination, which, to paraphrase the words of the Court in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, is also the essential character of Mr. Ponomarov's dispute with his employer and that dispute arises from the collective agreement. It is apparent on the facts that Mr. Ponomarov has sought to

challenge the changes to his conditions of employment on two fronts; that conclusion is consistent with Mr. Ponomarov filing grievances relating to the same matters as those raised in his complaint to the Director.

27. By operation of section 89(g) of the *Labour Relations Code* his dispute with his employer falls within the jurisdiction of an arbitrator. I wholly endorse the correctness of the comment in the original decision that section 89(g) "undoubtedly gives a grievance arbitrator the jurisdiction to determine if a collective bargaining unit employee's terms and conditions of employment have been substantially altered and, if so, to provide a remedy."

28. I would add here that a conclusion about whether conditions of employment have been substantially altered is not decided simply because Mr. Ponomarov says so; it requires analysis against a factual matrix that, applying the above comment, cannot be made by the delegate.

29. I also reject the assertions that the Tribunal Member making the original decision failed to answer the three errors of law raised in the appeal and misrepresented the available remedy. The original decision, read fairly and in context, answered all of the matters raised in Mr. Ponomarov's appeal, including the three "errors of law" he alleged. The question of whether section 66 allows for a remedy independently of section 63 is irrelevant to this application, as I find the decision of the delegate concerning her jurisdiction to consider the complaint was correct.

30. I find the argument alleging the Tribunal Member acted unreasonably and in bad faith to be entirely without merit.

CONCLUSION

31. For the above reasons, the application for reconsideration is denied.

ORDER

32. Pursuant to section 116(1)(b) of the *ESA*, the original decision 2024 BCEST 58, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal