

Citation: Munchang Choi
2025 BCEST 9

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 -

Munchang Choi

- of a Decision issued by -

The Employment Standards Tribunal

PANEL: Robert E. Groves
SUBMISSIONS: Munchang Choi, on his own behalf
FILE NUMBER: 2024/145.ESA.RE
DATE OF DECISION: January 9, 2025

DECISION

OVERVIEW

1. Munchang Choi applies for a reconsideration (the “**Application**”) of a decision (the “**Appeal Decision**”) of a Member (the “**Member**”) of the Employment Standards Tribunal (the “**Tribunal**”) dated November 5, 2024, and referenced as 2024 BCEST 107. The Application is brought pursuant to section 116 of the *Employment Standards Act (ESA)*.
2. This matter originated when Mr. Choi, an employee of Lloyd’s Register Canada Limited (“**Lloyd’s**”) filed a complaint pursuant to section 74 of the *ESA* (the “**Complaint**”) alleging a wage loss, a claim for expenses, multiple forms of harassment experienced at his workplace, and a retaliatory dismissal.
3. Mr. Choi delivered the Complaint to the Employment Standards Branch (the “**Branch**”) almost four weeks beyond the six months period for the filing of complaints mandated by section 74(3) of the *ESA*.
4. In a determination dated July 17, 2024 (the “**Determination**”), a delegate (the “**Delegate**”) of the Director of Employment Standards (the “**Director**”) dismissed the Complaint. The Delegate decided that she should decline to exercise the discretion set out in section 74(5) of the *ESA* to extend the time for the delivery of Mr. Choi’s Complaint. The Delegate’s accompanying Reasons for the Determination (the “**Reasons**”) stated that Mr. Choi had not established the existence of any special circumstances precluding him from filing his Complaint in a timely manner, as the statute required him to do if his request for an extension were to be granted.
5. Mr. Choi appealed the Determination pursuant to each of the three grounds set out in section 112(1) of the *ESA*. He requested that the Tribunal order the time for the filing of his Complaint to be extended. In his Appeal Decision, the Member applied section 114(1)(f) of the *ESA* and concluded there was no reasonable prospect the appeal would succeed. The Member dismissed the appeal and ordered that the Determination be confirmed.
6. For the reasons set out below, I have decided Mr. Choi has failed to establish that the Appeal Decision should be reconsidered. It follows that the Appeal Decision is confirmed.

ISSUES

7. Has Mr. Choi raised questions of fact, law, principle, or procedure flowing from the Appeal Decision which are so important that a reconsideration is warranted?
8. Issues relating to the Appeal Decision I discern that Mr. Choi has identified in the Application, which he submits should satisfy the threshold test for a reconsideration are:
 - Did the Member proceed unfairly, and disregard Mr. Choi’s right to a fair hearing, by failing to fully acknowledge or accommodate his mental health needs, or by neglecting to adequately consider, or to give proper weight to, the evidence of his mental health condition?

- Did the Member act unjustly in failing to recognize, and to defer to, a Federal Court ruling granting Mr. Choi an extension of time in a separate proceeding?
9. The Application contains, in addition, a submission that Mr. Choi did not make to the Delegate, or to the Tribunal in the appeal. Mr. Choi contends that the Branch did not commence to investigate his Complaint until eight months had elapsed from the date it was delivered. Mr. Choi argues that the delay was unreasonable and discriminatory.
10. The Tribunal must also determine an appropriate remedy. Should the Appeal Decision be confirmed, varied, or cancelled, or should the matter be referred back to the Member or to another panel of the Tribunal?

ANALYSIS AND CONCLUSIONS

The section 116 test for reconsideration

11. As the Tribunal has stated repeatedly, the reconsideration power is discretionary, and it must be exercised with restraint.
12. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal. The Tribunal must pay heed to the section 2 purposes of the *ESA*, including the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the statute. It should also take care to ensure that its application of the reconsideration power is not utilized in a way that undermines the appeal process mandated in section 112, which is intended to incorporate an element of finality. Put differently, it is not a purpose of an appeal that it merely acts as a means of discovery for the reconsideration process that follows it.
13. With these principles in mind, the Tribunal has adopted a two-stage analysis when considering applications for reconsideration (see: *Re Milan Holdings*, BC EST # D313/98). At stage one, the Tribunal asks whether the matters raised in an application warrant a reconsideration of the appeal decision at all.
14. A factor which militates against reconsideration is the desire on the part of an applicant to have the Tribunal simply re-weigh arguments that failed in the appeal. It is not a purpose of reconsideration that a different panel of the Tribunal is requested to provide a “second opinion,” or to consider the matter afresh without regard to the findings of a delegate, or the analysis of a member of the Tribunal in an appeal. Like an appeal, a reconsideration application is a process designed to correct reviewable errors. It is not a process designed to consider a complaint anew, as if the matter was being presented, as it were, on a “blank slate” (see: *Re Middleton* BC EST # RD126/06; *Re Abbotsford Concrete Products Ltd.*, BC EST # RD085/10).
15. It has also been said that the opportunity the *ESA* provides to a party to rely on “new evidence” in an appeal pursuant to section of 112(1)(c) of the statute is not intended to permit a person dissatisfied with the result of a determination to seek out other evidence in support of an appeal when that evidence could have been presented during the initial investigation of the complaint (see: *Re Merilus Technologies Inc.*, BC EST # D171/03). With limited exceptions, I am of the view that this admonition

should apply with even greater emphasis in respect of evidence and arguments an applicant presents for the first time in an application for reconsideration pursuant to section 116.

16. If the applicant satisfies the requirements at the first stage, the Tribunal will move to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.

17. As I noted earlier, I have decided that the Application fails at the first stage of the inquiry. For the most part, Mr. Choi merely repeats arguments that were properly rejected by the Member in the Appeal Decision. Moreover, I have concluded that the Application sets out no questions of fact, law, principle, or procedure flowing from the Appeal Decision which are so important that they warrant a reconsideration.

18. My reasons follow.

Did the Member proceed unfairly, and disregard Mr. Choi's right to a fair hearing, by failing to fully acknowledge or accommodate his mental health needs, or by neglecting to adequately consider, or to give proper weight to, the evidence of his mental health condition?

19. In correspondence preceding the issuance of the Determination, the Delegate informed Mr. Choi that he had filed his Complaint late.

20. In response, Mr. Choi advised the Delegate, and offered documentary evidence to support his claim, that he suffered from a mental health condition which had impacted his ability to manage his affairs, including his ability to file his Complaint in a timely manner. Mr. Choi stated that "the stress and trauma from the events leading to my termination, combined with my ongoing medical treatment and psychological counseling, precluded me from meeting the filing deadline."

21. In addition, Mr. Choi asserted that his wife and son suffered serious health issues following his dismissal by Lloyd's. Mr. Choi affirmed that "[t]hese challenging family circumstances made it extremely difficult for me to complete all necessary tasks in a timely manner."

22. In her Reasons, the Delegate acknowledged what Mr. Choi and his family had endured following his dismissal. However, the Delegate concluded the health struggles described by Mr. Choi did not establish the existence of the "special circumstances" required to invoke the exercise of the discretion identified in section 74(5) of the *ESA*. In reaching this conclusion the Delegate observed that Mr. Choi had not demonstrated how, exactly, the issues he and his family confronted had acted to preclude him from filing his Complaint at any time during the six months period mandated in section 74(3). Regarding this point, of note for the Delegate was Mr. Choi's evidence that he had, in fact, been able to pursue other claims arising from his dismissal within the six months timeframe, including his retaining legal counsel "to manage arbitration" with Lloyd's, and his processing claims with WorkSafeBC.

23. In his appeal, Mr. Choi contended he had presented evidence which should have convinced the Delegate that special circumstances existed entitling her to exercise her discretion to grant an extension of the time for him to file his Complaint with the Branch.

24. Mr. Choi supplemented his argument with further documentary evidence supporting his contention—contested by no one, I should add—that he suffered from the mental health challenges he had described. The Member declined to accept this evidence as “new” for the purposes of section 112(1)(c) because it existed at the time the investigation was being conducted and could, therefore, have been presented to the Delegate at that time. The Member also stated that none of the evidence was probative of the precise question posed by section 74(5): whether Mr. Choi’s family health issues precluded him from filing his complaint within the statutory period.
25. Mr. Choi also argued that the Delegate failed to conduct a fair hearing because she disregarded his evidence regarding his mental health challenges when considering whether an extension should be granted. The Member rejected this submission. He observed that the Delegate had informed Mr. Choi regarding the consequences of his filing the Complaint late, and that Mr. Choi had the opportunity to respond on the issue before the Determination was issued. The Member decided, too, that Mr. Choi had provided no support for his contention that the Delegate ignored, or failed to give due consideration to, the evidence presented by him, including the evidence of his mental health issues Mr. Choi tendered by way of explanation for his delay in delivering his Complaint.
26. Mr. Choi claimed, in addition, it was an error of law for the Delegate to decline to find that he had demonstrated special circumstances justifying an extension based on the evidence of the existence of his mental health issues Mr. Choi had presented. Again, the Member rejected Mr. Choi’s submission. The Member stated that the Delegate’s finding there were no special circumstances in this case was a finding of fact which the Tribunal has no jurisdiction to question, absent a determination that the Delegate’s finding constituted an error of law. Here, the Member decided Mr. Choi had failed to meet the stringent test for a determination that the Delegate’s finding was in error, and that it raised an error of law. Instead, the Member concluded the Delegate’s finding was not in error, because it was based on the evidence, it was rational, and it was not perverse or inexplicable.
27. The Application repeats many of the same arguments, noted above, that Mr. Choi presented in the appeal. At the same time, apart from repeating these arguments, and disagreeing with the result contained in the Appeal Decision, Mr. Choi offers nothing of substance to support an argument that the Member’s disposition of the appeal was in error. For these reasons, I am persuaded the Application must be dismissed.
28. That said, the Application includes a new argument that Mr. Choi did not raise before the Delegate or, indeed, during the appeal proceedings. Mr. Choi asserts that the Branch subjected him to an unjustifiable delay of eight months following the filing of his Complaint before it initiated an investigation. He submits that the delay means he was treated in a manner that was procedurally unfair, and discriminatory. He argues that his mental health condition required a resolution that was “timely,” and therefore more “sensitive” to his needs.
29. I disagree.
30. If Mr. Choi believed the Branch was taking too long to investigate his Complaint, he should have raised the issue with the Delegate before the Determination was issued. I do note, from the Record, Mr. Choi did, in May 2024, importune the Branch to address his Complaint in a timely way, due to his health concerns. The Branch responded, a few days later, advising that it was handling a large

volume of cases, resulting in a backlog, but that Mr. Choi's file should be assigned for investigation within a few short weeks. The communication thanked Mr. Choi for his patience.

31. Mr. Choi replied to the Branch communication later the same day. He expressed thanks for the update, and stated he was reassured his file would soon be assigned. He also said: "I understand that my complaint is being processed, and I appreciate that delays can occur due to the backlog and complexity of many cases. Thank you for doing your best under the circumstances." Mr. Choi said nothing about the "delay" being procedurally unfair, or discriminatory, and the record reveals no other communications from him in which allegations of this type were delivered to the Delegate before she issued the Determination less than two months later.
32. Since Mr. Choi did not raise the issue of delay as a prejudicial legal factor either during the investigation, or in his appeal, it cannot be a matter that I must consider for the first time in the Application. As stated earlier, reconsideration and, indeed, the Tribunal's appeal process, are exercises in error-correction. Since neither the Delegate, nor the Member, were asked to adjudicate an issue based on an allegation of undue delay, there is no error for me to correct on this basis.
33. All of that said, I am also of the view that the delay, if any, in the investigation and resolution of the Complaint by the Delegate, was not unreasonable in the circumstances. There is no evidence that the passage of time in this case was so unacceptable, or oppressive, that it tainted the outcome expressed in the Determination, and there is no relevant evidence of substance that Mr. Choi suffered serious prejudice in the presentation of his Complaint because of it (see: *Re Gulf Coast Materials Ltd.*, BC EST # D003/15; *Re Anna Brill-Edwards*, 2019 BCEST 56; *Re Aldergrove-Langley Taxi Ltd.*, 2022 BCEST 42).
34. A related argument included in the Application is Mr. Choi's claim that the result in the Appeal Decision has exacerbated his health issues. He states, in addition, that "[t]he lack of support and understanding demonstrated throughout this process has left me feeling dehumanized and disregarded, contrary to principles of compassion and justice."
35. I have no reason to doubt the sincerity of Mr. Choi's assertions, and I feel empathy when I read his statements regarding the challenges his dismissal has forced him to confront. However, I do not accept that a professionally delivered Appeal Decision, revealing no legal error, but setting out a result different from the one Mr. Choi desired, should be reconsidered solely on the basis that the outcome has caused him psychological distress. No compassionate person would wish for such a result. However, if the Tribunal were to decide appeals, or applications, on that ground alone, it would, in my opinion, have an effect that would be inconsistent with the proper application of the rule of law mandated in the *ESA*.

Did the Member act unjustly in failing to recognize, and to defer to, a Federal Court ruling granting Mr. Choi an extension of time in a separate proceeding?

36. In his appeal, Mr. Choi delivered a copy of an order of the Federal Court of Canada granting him an extension of time for the filing of an application for judicial review of a decision of the Labour Program, North West Pacific Region of Employment and Social Development Canada, declining his request for an extension of time to provide Lloyd's with a notice of an occurrence of harassment and violence under section 125(4) of the *Canada Labour Code*.

37. The Federal Court order was issued on August 30, 2024, some weeks after the issuance of the Determination. It could not, therefore, and it was not, a factor that might have influenced the Delegate when she decided how the Complaint should be resolved.
38. Mr. Choi's appeal materials contained a communication to the Tribunal in which he argued "[t]he Federal Court's acknowledgement of the merits of my case should prompt the Tribunal to re-evaluate any previous decisions or positions taken regarding my appeal. It underscores the importance of ensuring that all procedural and substantive rights are fully respected and considered." Later in the communication, Mr. Choi stated "[t]he Tribunal should continue to adjudicate my appeal with the knowledge that a higher court has found the issues raised to be of sufficient importance to warrant a judicial review. This supports the necessity of a thorough and fair hearing before the Tribunal."
39. The Member did not refer, specifically, to the Federal Court order in the Appeal Decision, or address its probative value in the context of the appeal. However, I am not persuaded that the absence of such a discussion reveals an error warranting a reconsideration.
40. In my view, there was no need for the Member to confront Mr. Choi's submissions regarding the order. The reason for this is that the Federal Court proceedings were irrelevant.
41. As the Tribunal has made clear on several occasions, rulings by other decision-makers considering dissimilar language in statutes embodying different policy goals are of limited, if any, persuasive value when they are offered for the purpose of interpreting the provisions of the *ESA* (see, for example: *Koivisto*, BC EST # D006/05).
42. Here, a reading of the Federal Court order reveals that the criteria for determining whether an extension was to be granted in that proceeding are different from the grounds permitting an extension in section 74(5) of the *ESA*. The Federal Court was required to consider whether Mr. Choi had a continuing intention to pursue his application, whether the application had merit, whether the respondent would suffer no prejudice due to the delay, and whether a reasonable explanation for the delay could be said to exist. Section 74(5) establishes criteria that are more stringent, in my view. The section states that the Director "may" extend the time to deliver a complaint if satisfied that "special circumstances" existed that "precluded the delivering of a complaint within the applicable time period" and "an injustice would otherwise result."
43. The Applicant's request for a reconsideration on this ground is denied.

What is the appropriate remedy?

44. The reconsideration power contained in section 116 of the *ESA* authorizes the Tribunal to confirm, vary, or cancel an appeal decision or refer it back to the member or to another panel of the Tribunal.
45. Since I have determined that the Application fails to establish grounds for a reconsideration, the Appeal Decision must be confirmed.

ORDER

46. Pursuant to section 116(1)(b) of the *ESA*, I order that the Appeal Decision referenced as 2024 BCEST 107 be confirmed.

/S/ Robert E. Groves

Robert E. Groves
Member
Employment Standards Tribunal