Citation: Colin White
2025 BCEST 13

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 -

Colin White

- of a Decision issued by -

The Employment Standards Tribunal

PANEL:	Carol L. Roberts
SUBMISSION:	Colin White
FILE NUMBER:	2024/153.ESA.AP
DATE OF DECISION:	January 29, 2025

DECISION

OVERVIEW

1. This is an application by Colin White for a reconsideration of 2024 BCEST 97 (the "**Original Decision**"), issued by the Tribunal on October 18, 2024.

2. Mr. White was employed by Columbus Meat Market Ltd. (the "**Employer**") as a butcher until February 17, 2022. On March 15, 2022, Mr. White filed a complaint with the Employment Standards Branch alleging, among other things, that his employer had contravened the *Employment Standards Act* (***ESA***) in failing to pay him compensation for length of service. A delegate of the Director of Employment Standards (the "**Investigator**") investigated the complaints and on May 16, 2023, issued an Investigation Report ("**Report**") which identified several issues and the parties' positions on those issues. Both Mr. White and his employer were provided with a copy of the Report and invited to provide any clarifications or further evidence they believed to be relevant. Only the Employer did so.

3. On March 4, 2024, a delegate (the "**Delegate**") of the Director of Employment Standards (the "**Director**") issued a determination which found, among other things, that the Employer had failed to pay Mr. White compensation for length of service and ordered the Employer to pay Mr. White $6,986.88 as compensation for length of service, associated vacation pay and statutory interest (the "Determination").

4. The Employer appealed. Although the Employer identified all three statutory grounds of appeal, the Tribunal Member found only one—that the Director erred in law—to be applicable. The Member concluded that the Director had erred in law in awarding Mr. White compensation for length of service and cancelled the Determination.

BACKGROUND

5. The facts outlined in the Report were not challenged by Mr. White. Furthermore, in the Original Decision, the Member noted that the parties generally agreed on the essential facts relating to Mr. White's termination.

6. On February 17, 2022, Mr. White attended the workplace to begin his shift. One hour into his shift, one of the Employer's owners, Eugenio Masi, instructed employees to wear a mask while they were working in accordance with British Columbia's public health mandate. Mr. White refused, informing Mr. Masi that he believed the policy was ineffective and applied inconsistently. Mr. White continued to work for another hour before taking a break. Mr. Masi asked to speak with Mr. White in his office, where Mr. White continued to argue against using a mask. After Mr. Masi told Mr. White that his employment was suspended, Mr. White collected his personal belongings and left the workplace.

7. On March 9, 2022, the Employer issued a Record of Employment (**ROE**) stating that Mr. White would not be returning to the workplace due to a "shortage of work/end of contract or Season." On March

27, 2022, the Employer emailed Mr. White, informing him that his employment had not been terminated. The Employer wrote that they had not heard from Mr. White since February 17, 2022, and were waiting to hear whether he intended to return to work. The Employer indicated that the ROE was issued after not hearing from Mr. White and invited Mr. White to call or meet with them to discuss his return to work.

8. On March 28, 2022, Mr. White emailed the Employer stating that he believed his employment was no longer possible and took issue with the sudden suspension and lack of communication regarding the duration of the suspension. Mr. White also took issue with the Employer's claim that he had not contacted them since February 17, 2022, stating that he had emailed them on March 11, 2022, after the mask mandate had been lifted.

9. Mr. White took the position that his employment had been terminated due to a change in his conditions of employment while the Employer took the position that Mr. White had resigned due to his unwillingness to comply with a public health order. According to the Employer, Mr. White refused to comply with the Employer's request to put his mask on, telling Mr. Masi that he was not "putting that fucking mask on again. I refuse to put it on so go ahead and fire me." The Employer's position was that Mr. White was suspended due to his refusal to wear a mask. On March 27, 2022, the Employer stated that it contacted Mr. White to plan his return to work, but Mr. White refused to make any arrangements.

10. The Member noted that the primary basis for the Delegate's conclusion that Mr. White was entitled to compensation for length of service was based on his finding that the Employer's February 17, 2022, decision to suspend Mr. White constituted a "deemed termination" under section 66 of the *ESA*. The Member noted the Delegate's findings that the Employer reduced Mr. White's hours "from 40 hours per week to zero hours" without Mr. White's consent. The Member found that

> ...these findings completely miss the point that if the employer had just cause to suspend the complainant, whether the complainant consented to, or otherwise accepted, the suspension it is wholly irrelevant. (Para. 35)

11. The Member also noted that there was no dispute that the Employer was obliged to enforce a "masking rule" for all its employees, including Mr. White. The Member observed that there was no evidence before the Delegate on which he could find that the Employer could have accommodated Mr. White by making "special arrangements" and there was no evidence to support Mr. White's assertion that he was not required to abide by the mask mandate while at work.

12. The Member found that:

> The employer's uncontested evidence is that the complainant *was* complying with the mask mandate until the events of February 17, 2022. The complainant's own evidence, as recorded in the delegate's reasons, was that he decided to refuse to continue wearing a mask because he believed the provincially mandated masking policy "was ineffective and applied inconsistently." There is no evidence in the record to demonstrate that the complainant had the requisite medical expertise to knowledgably comment on the

> policy's efficacy. The employer, of course, was legally bound to enforce the policy at its workplace. The complainant's refusal to abide by the masking policy, despite a clear and unequivocal direction from his employer, constituted major insubordination, particularly since his refusal placed his employer in serious legal jeopardy, and put his fellow employees', and the employer's customers', health at risk. Employees are not free to pick and choose what particular legally binding workplace orders they will follow. The Covid-19 global pandemic was a serious health emergency, one that ultimately caused thousands of deaths in British Columbia and in this context, legally binding public health orders were issued. The employer was required to enforce, and the complainant was legally obliged to follow, these health orders. (Para. 38)

13. The Member also noted that Mr. White did not dispute the Employer's evidence that, when directed to wear a mask, Mr. White responded that he was "not putting that fucking mask on again," and "I refuse to put it on so go ahead and fire me." The Member also noted that, "to make matters worse, the complainant then attempted to persuade other employees to also refuse to abide by the masking mandate." The Member further noted that, after a "cooling off" period, the Employer once again encouraged Mr. White "to abide by the masking mandate – but he adamantly refused." (Para. 39)

14. The Member concluded that, in his view, the Employer could have dismissed Mr. White with just cause at that point. The Member then noted that, rather than terminating Mr. White's employment however, it chose to suspend him:

> …In essence, the employer waived the complainant's repudiatory breach, continued the employment contract, and imposed a lesser sanction, namely, suspension. The suspension was necessarily for an indefinite period, given that the duration of the mask mandate was, as of February 17, 2022, not known. In the circumstances, a lengthy suspension…was called for. (Paragraph 40)
>
> Since the employer had just cause to dismiss the complainant on February 17, 2022, it inevitably follows that it had just cause to impose a lesser sanction. I find that the employer had just cause to suspend the complainant on February 17, 2022. That being the case, there was no section 66 "deemed termination" at that point in time, and I find that the delegate erred in law in concluding otherwise. This is not a situation where the *employer* breached the contract, since it had an extant contractual right to suspend the complainant for proper cause. … (Para. 41)
>
> As of February 17, 2022, the complainant's position was clear – he had no intention of returning to work if he was required to abide by the provincial health orders regarding wearing face coverings. At no time, while the mask mandate was in force, did he ever contact the employer to advise that he was willing to return to work and would abide by the mask mandate… (Para. 42)
>
> On March 11, 2022, the mask mandate governing the employer's workplace was lifted. On that day, the complainant sent an email to the employer querying his employment status: "since my suspension on February 17th, 2022 for not complying with your order to wear a face covering, I have not received any indications whether my suspension will

> continue and for how long, or, ultimately end in my termination of employment.... (Para. 43)
>
> On March 12, 2022, the complainant sent a short email to the employer: "In regards to my original question yesterday, could you please clarify my employment status." On March 27, 2022... the employer sent an email to the complainant which stated, in part, that the complainant was never terminated, and was welcome to return to work at the same job and at the same pay rate. The employer asked the complainant to contact it immediately to "have a discussion with the owner to resume [your] duties." (Para. 44)

15. Mr. White did not return, informing the Employer that it was "not an option," that the Employer's conduct "created a hostile work environment where I anticipate punishment, harassment, and the continued disregard for employment standards to occur if I return." The Member found that Mr. White's reply constituted a resignation and decided that it was at this point that the employment contract ended. As the Member concluded that Mr. White resigned, he found that the Employer was not obliged to pay section 63 compensation for length of service. The Member cancelled the Determination.

THE RECONSIDERATION REQUEST

16. In his one-page request for reconsideration, Mr. White asserts that the Member's decision was "not only biased and unprofessional," but that the Member failed to observe the principles of natural justice and did not fully consider all relevant facts and evidence.

17. Included with Mr. White's request was a statement from the Employer's former Office Manager. The document outlines the former Office Manager's view of Mr. White's suspension, alleged withholding of holiday pay, her view of the Employer's "manipulation of employee hours and disregard for labour standards" as well as "[Mr. Masi's] personal biases." The statement includes some information that was considered by the Delegate, and the Member on appeal. It also includes information that was not before the Delegate.

ISSUES

18. There are two issues on reconsideration:

1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?
2. If so, should the decision be cancelled or varied or sent back to the member?

ANALYSIS

19. The *ESA* confers an express reconsideration power on the Tribunal. Section 116 provides:

> (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.

...

(2.1) The application may not be made more than 30 days after the date of the order or decision.

20. The Tribunal uses its discretion to reconsider decisions with caution to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *ESA* detailed in section 2 "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act."

21. In *Milan Holdings (*BC EST # D313/98*)* the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the Tribunal to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. 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. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

22. The Tribunal may agree to reconsider a decision for several reasons, including:

- The member fails to comply with the principles of natural justice;
- There is some mistake in stating the facts;
- The decision is not consistent with other decisions based on similar facts;
- Some significant and serious new evidence has become available that would have led the member to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The decision contains a serious clerical error.

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

23. While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The reconsideration process was not meant to allow parties another opportunity to re-argue their case.

24. I find that Mr. White has not met the threshold test. I am not persuaded that Mr. White has raised significant questions of law, fact, principle or procedure. I am also not persuaded that Mr. White has made out an arguable case of sufficient merit to warrant the reconsideration power.

25. Although Mr. White sets out several grounds for the application which may be relevant, such as failure to observe principles of natural justice and bias, he does not provide any evidence or arguments as a basis for those assertions.

26. Attached to Mr. White's request is a document which includes information which was available during the investigation. A reconsideration application is not an opportunity to present information to the Tribunal for the first time unless there is "significant or serious new evidence." I note that not only were the essential facts surrounding the circumstances of the end of Mr. White's employment not in dispute, but that the information set out in the former Office Manager's statement was readily available at the time the Determination was made. Mr. White had every opportunity to present this information to the Investigator and failed to do so. A reconsideration application is not an opportunity for a party to submit any new evidence unless it meets the test for "significant or serious new evidence." I find the Office Manager's opinions about the workplace do not constitute either significant or serious new evidence.

27. I also find no evidence that the Member was biased against Mr. White. A party asserting bias must provide compelling evidence of such an allegation. Allegations of bias are serious and should not be made speculatively. The burden of demonstrating bias or a reasonable apprehension of bias lies with the person who is alleging its existence. Mere suspicions are not enough. The burden requires objective evidence from which a reasonable person, acting reasonably and informed of all relevant circumstances, would conclude the Member was biased. (see also R. v. S. (R.D)., [1997] S.C.C. 3 S.C.R. 484)

28. As this Tribunal has repeatedly stated, (see *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99 (Reconsideration of BC EST # D101/98)) the test for determining either actual bias or a reasonable apprehension of bias is an objective one and the evidence presented should allow for objective findings of fact:

> . . . because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: see *A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541.

29. There is no evidence that either supports or suggests that the Member exhibited a bias against Mr. White.

30. I also find nothing in Mr. White's submission that supports his argument that the Member failed to observe the principles of natural justice. I note that on August 27, 2024, the Tribunal informed the parties that the Member was not dismissing the Employer's appeal under section 114 of the *ESA* (that section which provides that Members may dismiss an appeal based solely on the written submissions of an appellant). Mr. White was invited to make submissions on the merits of the appeal and did so. I find no basis for Mr. White's argument in this respect.

31. I also find no basis for Mr. White's argument that the Member failed to consider all the facts and arguments before him. The Member noted that the facts were largely undisputed. The Member found that the Director erred in the application of the law to those facts.

32. There is nothing in the application that justifies the exercise of the reconsideration power. There is no evidence, or argument, that the Original Decision is not consistent with other similar fact decisions. I also find no error in the Member's analysis of the facts considering the law of termination.

33. I conclude that there is nothing in the submissions in the reconsideration application that raise 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.

ORDER

34. The request for reconsideration is denied. Pursuant to section 116(1)(b) of the *ESA*, I confirm the Original Decision.

/S/ Carol L. Roberts

Carol L. Roberts
Member
Employment Standards Tribunal