

An Application for Reconsideration

- by -

Lei Wang
("Ms. Wang")

- 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.: 2018A/6

DATE OF DECISION: January 31, 2018

DECISION

SUBMISSIONS

Lei Wang on her own behalf

OVERVIEW

1. Lei Wang (“Ms. Wang”) seeks reconsideration of a decision of the Tribunal, BC EST # D119/17 (the “original decision”), dated December 6, 2017.
2. The original decision considered an appeal of a Determination issued by Dan Armstrong, a delegate of the Director of Employment Standards (the “Director”), on July 26, 2017.
3. The Determination was made by the Director on a complaint filed by Ms. Wang, who had alleged Huamei Holdings Ltd. (“HHL”) had contravened the *Employment Standards Act* (the “ESA”) by failing to pay all wages owing to her.
4. In the Determination, the Director found there had been no contravention of the *ESA* and that no wages were owing to Ms. Wang.
5. An appeal of the Determination was filed by Ms. Wang alleging the Director had erred in law, failed to observe principles of natural justice in making the Determination, and there was evidence that had become available that was not available when the Determination was being made.
6. The Tribunal Member dismissed the appeal under section 114 of the *ESA*, concluding the appeal had no reasonable prospect of succeeding.
7. At the root of both the Determination and the original decision is the conclusion that Ms. Wang’s testimony was not credible or reliable and the documents supporting her claim were not probative.
8. This application was delivered to the Tribunal on January 5, 2018. The application seeks to have the original decision varied or cancelled and the matter referred back to the original panel.

ISSUE

9. 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 the Tribunal should cancel the original decision and refer the matter back to the original panel or, if more appropriate, to the Director.

ARGUMENT

10. Ms. Wang has done nothing more in this application than resubmit substantially the same arguments made unsuccessfully to the Director and, also without success, to the Tribunal Member making the original decision.

ANALYSIS

11. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally.

12. 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.*

13. 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 *The Director of Employment Standards (Re Giovanni (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 best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

14. 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. Delay in filing for reconsideration will likely lead to a denial of an application. 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.
15. 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.
16. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively re-visit the original decision and come to a different conclusion.
17. 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.
18. I find this application does not warrant reconsideration.
19. This application is a clear example of circumstances where the Tribunal will not grant reconsideration.
20. This application does nothing more than reframe and reiterate the claim Ms. Wang has advanced throughout the process, seeking to have this reconsideration panel of the Tribunal re-visit the result of the original decision and come to a different conclusion without demonstrating any error in the original decision.
21. Her arguments in this application – defending the accuracy of her evidence and her translation and disparaging the character and submissions of the representative for HHL during the complaint process – only reflect her continuing refusal to accept the conclusion of the Director, that her evidence was not credible or reliable and her claim was not established. That conclusion was found in the original decision to be adequately grounded in the Director's analysis and assessment of the evidence presented by Ms. Wang.
22. The application is denied.

ORDER

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David B. Stevenson
Member
Employment Standards Tribunal