Employment Standards TRIBUNAL

Citation: Place-Crete Systems L.P. (Re)
2018 BCEST 108

An Application for Reconsideration

- by -

Place-Crete Systems L.P. carrying on business as Floor-Tech Systems
(the “Company”)

- 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)

**PANEL:** Shafik Bhalloo

**FILE No.:** 2018A/109

**DATE OF DECISION:** November 7, 2018

# DECISION

## SUBMISSIONS

Diane McGillis — on behalf of Place-Crete Systems L.P. carrying on business as Floor-Tech Systems

## OVERVIEW

1. Pursuant to section 116 of the *Employment Standards Act* (*"ESA"*), Place-Crete Systems L.P. carrying on business as Floor-Tech Systems (the "Company") has applied for a reconsideration of Tribunal Decision 2018 BCEST 94 (the "Original Decision"), issued by the Tribunal on September 19, 2018.

2. By way of background, the Company operates a concrete laying business and employed William McDermott Long (the "Complainant") as a site foreman from June 16, 2014, to August 17, 2017.

3. On September 25, 2017, the Complainant lodged his complaint against the Company with the Employment Standards Branch alleging that the Company had contravened the *ESA* in failing to pay him overtime wages, statutory holiday pay, and vacation pay (the "Complaint").

4. On December 11, 2017, a Delegate (the "Delegate") of the Director of Employment Standards (the "Director") conducted a hearing into the complaint, and following that hearing, issued a Determination (the "Determination") concluding that the Company had contravened sections 27 (wage statements), 40 (overtime), 45 (statutory holiday), and 46 (statutory holiday worked) of the *ESA* with respect to the Complainant and ordered the Company to pay him $4,338.90 in wages and interest. The Determination also levied $2,000 in administrative penalties against the Company pursuant section 29 of the *Employment Standards Regulation* (the "*Regulation*").

5. The Company appealed the Determination to the Tribunal on the grounds that the Director erred in law:

   i. For failing to find that the Complainant was a manager, and therefore excluded from Part 4 - Overtime Provisions of the *ESA* by virtue of section 34(f) of the *Regulation*.

   ii. For finding that travel time from the Company's shop to and from various worksites is payable at a rate above minimum wage and that "[t]he requirement of the law is that this travel time be paid at minimum wage."

   iii. For including in the calculation of hours worked by the Complainant a half an hour lunch break each day and not deducting the break time on account of the Company's Travel Policy (the "Travel Policy") that provided paid lunch breaks. More particularly, the Company contended that *if* the Director rejected the terms of the Company's Travel Policy that would otherwise have the effect of reducing the amount of overtime that would be payable to the Complainant, then the Director should also have rejected the benefit of the Travel Policy to the Complainant such as the entitlement to a paid break.

6. After varying the Determination to substitute the correct name of the Company, "Place-Crete Systems L.P. carrying on business as Floor-Tech Systems" in place of "Place-Crete Systems L.P. carrying on

business as Floor-Tech Systems Inc.", the Tribunal Member (the "Member") dismissed the appeal under section 114(1)(f) of the *ESA* as having no reasonable prospect of succeeding.

## ISSUES

7. In any application for reconsideration, there is a preliminary or a threshold issue of whether the Tribunal will exercise its discretion under section 116 of the *ESA* to reconsider the Original Decision. If the Tribunal is satisfied that the case is appropriate for reconsideration, the issue raised in this application is whether the Tribunal should cancel the Original Decision, vary it, or send it back to the Member.

## ARGUMENT

8. The Company is seeking a reconsideration of the Original Decision in part only. The Company is *not* asking for a reconsideration of the Member's decision that the Director correctly determined that travel time of the Complainant was part of "hours worked" and must be considered in calculating the Complainant's entitlement to overtime. Instead, the Company is asking for a reconsideration of that part of the Member's Original Decision that upheld the Director's decisions to:

   (i) reject the Company's contention that the Complainant was a manager, and therefore excluded from Part 4 - Overtime Provisions of the *ESA;* and

   (ii) include in the calculation of hours worked by the Complainant a half an hour lunch break each day on account of the Company's Travel Policy (when the terms of the same Travel Policy were rejected in reducing the overtime that would be payable to the Complainant).

9. I have carefully read the submission of the Company and they are substantially the same arguments (some of them verbatim) made unsuccessfully to the Director, and subsequently, on appeal, to the Member. I do not find it necessary to reiterate them here.

## ANALYSIS

10. Section 116 of the *ESA* confers an express reconsideration power on the Tribunal. It reads:

**Reconsideration of orders and decisions**

**116** (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) 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.

11. While the term "may" in subsection (1) indicates that the Tribunal's authority under section 116 of the *ESA* is discretionary, the Tribunal has exercised its discretion with restraint. In *Re Eckman Land Surveying Ltd.*, BC EST # RD413/02, the Tribunal stated:

> Reconsideration is not a right to which a party is automatically entitled, rather it is undertaken at the discretion of the Tribunal. The Tribunal uses its discretion with caution in order to ensure: finality of its decisions; efficiency and fairness of the appeal system and fair treatment of employers and employees.

12. In *The 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 best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

13. In *Milan Holdings Inc.,* BC EST # D313/98, the Tribunal set out a two-stage analysis in the reconsideration process. In the first stage, the Tribunal will decide whether the matters raised in the reconsideration application warrant reconsideration. In determining this question, the Tribunal will consider a non-exhaustive list of factors that include such factors as:

    i. whether the reconsideration application was filed in a timely fashion;
    ii. whether the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already provided to the adjudicator;
    iii. whether the application arises out of a preliminary ruling made in the course of an appeal;
    iv. 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; and
    v. whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

14. After weighing these and other factors delineated in the first stage above, the Tribunal may conclude that the application for reconsideration is not appropriate and reject it with reasons. Conversely, if the Tribunal finds that one or more issues in the application warrant reconsideration, the Tribunal will proceed to the second stage in the analysis, which entails an examination of the merits of the application. The focus of the reconsideration panel will, in general, be with the correctness of the decision being reconsidered.

15. In this case, having reviewed the Original Decision, the Reasons for the Determination, the very lengthy section 112(5) record, and the submissions of the Company, I find that this is not a case that warrants reconsideration. The reconsideration application does nothing more than reiterate the Company's arguments advanced in the appeal of the Determination - that the Complainant was a manager and therefore the overtime provisions of the *ESA* did not apply and calculation of hours worked should exclude the half hour lunch break each day (if the Travel Policy did not apply to reduce overtime payable to the Complainant). I find that the Company has not demonstrated any error in the Original Decision and it is simply trying to have the reconsideration panel of the Tribunal re-visit the result of the Original Decision and come to a different conclusion.

16. More particularly, I find myself persuaded by the reasoning of the Member in the Original Decision that the Company did not advance an argument before the Delegate at the hearing that the Complainant was a manager within the definition of the *Regulation,* and therefore, it is not appropriate for the Company to make such an argument, afresh, in the appeal of the Determination for the first time. I agree with the Member that this argument could have been presented to the Delegate prior to the Determination, and therefore, the Member was correct in dismissing the argument on appeal. I also find the Member was correct in concluding that only part of the Company's Travel Policy that is contrary to the *ESA* in relation to overtime calculation (because it waives the minimum standards) is void or has no effect. This does not interfere with any other provision of the Company's Travel Policy that is *ESA* compliant or provides greater benefits than the *ESA* such as the provision governing paid half hour meal breaks.

17. Finally, I do not find any error in the Member's conclusion (consistent with the Delegate in the Determination) that the evidence available suggested that the Complainant did not take regular meal breaks during which he was not working.

18. While the Company may disagree with the result in the Original Decision, this is not a basis for the Tribunal to exercise its reconsideration power.

19. The Company's application is denied.

## ORDER

20. Pursuant to section 116 of the *ESA*, the Original Decision, 2018 BCEST 94, is confirmed.

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**Shafik Bhalloo**
**Member**
**Employment Standards Tribunal**