

An Application for Reconsideration

- by -

All Right Trucking-99 Ltd.
("ART-99")

- 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: David B. Stevenson

FILE No.: 2019/155

DATE OF DECISION: September 23, 2019

DECISION

SUBMISSIONS

Harnav Nahal

on behalf of All Right Trucking-99 Ltd.

OVERVIEW

1. All Right Trucking-99 Ltd. (“ART-99”) seeks reconsideration of a decision of the Tribunal, 2019 BCEST 75 (the “original decision”), dated August 7, 2019.
2. The original decision considered an appeal of a determination (the “Determination”) issued by Megan Roberts, a delegate of the Director of Employment Standards (the “Director”), on April 5, 2019.
3. The Determination was made by the Director on a complaint filed by Gurmeet S. Dhillon (“the complainant”) who had alleged ART-99 had contravened the *ESA* by failing to pay regular and overtime wages, statutory holiday pay and vacation pay.
4. In the Determination, the Director found ART-99 had contravened several provisions of the *ESA* and section 37.3 of the *Employment Standards Regulation* (the “*Regulation*”). The Director found the complainant was owed wages under the *ESA* in the amount of \$7,923.86, including interest, and that ART-99 was liable for administrative penalties in the amount of \$3,000.00.
5. An appeal of the Determination was filed by ART-99 alleging the Director had failed to observe principles of natural justice in making the Determination.
6. The Tribunal Member making the original decision dismissed the appeal under section 114(1) of the *ESA*, finding ART-99 had not shown a failure by the Director to observe principles of natural justice in making the Determination.
7. In this application ART-99 seeks to have the “file reviewed and reconsidered for a fairer outcome” and the original decision varied – although the application does not indicate in what respect the original decision should be varied. The application submission alleges:

This decision [the appeal] failed to observe the principles of natural justice and making the right decision. We had concrete proof that Gurmeet Dhillon was not honest in this trial. There were many inconsistencies in Gurmeet’s claims, that were acknowledged and ignored.

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

ARGUMENT

9. In its submission supporting the application for reconsideration, ART-99 says the Tribunal Member making the original decision ignored evidence.
10. Taken in context, this application does nothing more than reiterate what was sought in the appeal, which is summarized in the original decision as follows:
- ... the Appellant seeks, in essence, to have the evidence that was considered by the Director re-examined by this Tribunal.
11. The Tribunal Member making the original decision declined the request by ART-99 to engage in such a re-examination stating, quite correctly in the circumstances, that:
- It is not the function of the Tribunal to re-examine the evidence heard by the Director, but rather to assess whether the Director failed to apply the principles of natural justice in reaching the Determination.
12. It is noted the appeal did not allege the Director committed an error of law on the findings of fact. Accordingly, it was not necessary to indicate in the original decision that an examination of alleged errors in findings of fact in the Determination required ART-99 to show the findings raise an error of law. The sole ground of appeal was failure to observe principles of natural justice.

ANALYSIS

13. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally.
14. Section 116 of the *ESA* reads:
- (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.*
15. 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 able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

16. 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.
17. 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.
18. 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.
19. 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.
20. I find this application does not warrant reconsideration.

21. I am not persuaded there is anything about this application that raises any circumstance which would mitigate in favour of reconsideration.
22. The focus of this application is not on the original decision but continues to be on the findings made in the Determination.
23. The grounds of appeal chosen by ART-99 was failure by the Director to comply with principles of natural justice in making the Determination. That ground was addressed in the original decision, where the Tribunal Member making the original decision found:
- The Appellant has provided no convincing evidence in support of its allegations that the Director failed to apply the principles of natural justice. On the contrary, I am satisfied the Director observed the principles of natural justice in conducting the hearing and in evaluating the testimony provided therein.
24. Based on an application of the provisions and principles that apply to appeals under the *ESA*, I completely agree with the result in the original decision and find ART-99 has demonstrated no reviewable error was made in it.
25. The application is denied.

ORDER

26. Pursuant to section 116 of the *ESA*, the original decision, 2019 BCEST 75, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal