

An Application for Reconsideration

- by -

Hassan Torfisaedi
("Mr. Torfisaedi")

- 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.: 2019/180

DATE OF DECISION: November 28, 2019

DECISION

SUBMISSIONS

Hassan Torfisaeydi on his own behalf

OVERVIEW

1. Hassan Torfisaeydi (“Mr. Torfisaeydi”), seeks reconsideration of a decision of the Tribunal, 2019 BCEST 99 (the “original decision”), dated September 16, 2019.
2. The original decision considered an appeal of a Determination issued by Shannon Corregan, a delegate of the Director of Employment Standards (the “Director”), on May 23, 2019.
3. The Determination was made by the Director on a complaint filed by Mr. Torfisaeydi, who alleged he was owed wages by Nancy Market Ltd. (“Nancy Market”). The Determination concluded Mr. Torfisaeydi was not an employee for the purposes of the *ESA* and denied the complaint.
4. An appeal of the Determination was filed by Mr. Torfisaeydi, alleging the Director had failed to observe principles of natural justice in making the Determination. Mr. Torfisaeydi sought to have the Determination referred back to the Director.
5. The Tribunal Member making the original decision dismissed the appeal and found that the Director did not fail to observe principles of natural justice. The Tribunal Member also considered whether there was an error of law in the Director’s finding that Mr. Torfisaeydi was not an employee under the *ESA* and found there was not, accepting there was evidence before the Director that reasonably supported the conclusion reached in the Determination.
6. The original decision then confirmed the Determination.
7. This application seeks to have the original decision revisited and varied to allow his appeal of the Determination and to have the matter referred back to the Director.

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 this panel of the Tribunal should vary the original decision.

ARGUMENT

9. In support of his application for reconsideration Mr. Torfisaeydi raises the following points:
 - i. Nancy Market did not submit evidence to the Director because that evidence would have contradicted their position;

- ii. If some of the evidence presented by the parties during the complaint process was “ambiguous” or confusing it was the responsibility of the Director to ask for more evidence and the failure to do that was a breach of natural justice;
- iii. The Director relied on facts that were not significant in analyzing whether Mr. Torfisaeydi was an employee;
- iv. The Director incorrectly mixed up Mr. Torfisaeydi’s wage claim with issues relating to his “loan” agreement;
- v. The Director made the Determination on a wrong theory and a baseless analysis premised on the monies paid to Nancy Market being an investment in ownership;
- vi. The Director failed to share relevant documents with Mr. Torfisaeydi; and
- vii. The Director failed to specify which purposes of the *ESA* were used to conclude Mr. Torfisaeydi was not an employee.

ANALYSIS

- ^{10.} I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally. As a result of amendments to the *ESA* made in the *Administrative Tribunals Statutes Amendment Act, 2015*, parts of which came into effect on May 14, 2015, section 116 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, 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.} 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 *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.

12. 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.
13. 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.
14. 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.
15. I find this application does not warrant reconsideration. I am satisfied there was no error made in the original decision and I view this application as nothing more than an attempt by Mr. Torfisaeydi to have this panel re-visit his appeal, change the original decision in his favour and refer the matter back to the Director.
16. Looking at that matter, I find the reasons given in the original decision for denying the appeal were reasonable and correct.
17. Mr. Torfisaeydi has done nothing in this application that has persuaded me the original decision was wrong in its approach or conclusion or otherwise warrants reconsideration.

18. This application is denied.

ORDER

19. Pursuant to section 116 of the *ESA*, the original decision, 2019 Bcest 99, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal