

An Application for Reconsideration

- by -

Fresh Now Nutrition Inc.
("Fresh Now")

- 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.: 2019/188

DATE OF DECISION: December 16, 2019

DECISION

SUBMISSIONS

Donna Haely Lindau

on behalf of Fresh Now Nutrition Inc.

OVERVIEW

1. Fresh Now Nutrition Inc. (“Fresh Now”), seeks reconsideration of a decision of the Tribunal, 2019 BCEST 108 (the “original decision”), dated October 8, 2019.
2. The original decision considered an appeal of a Determination issued by Kristine Booth, a delegate of the Director of Employment Standards (the “Director”), on July 12, 2019.
3. The Determination was made by the Director on a complaint filed by a former employee of Fresh Now (the “complainant”), who had alleged Fresh Now had contravened the *ESA* by failing to pay regular and overtime wages, statutory holiday pay and profit share. The complainant also complained Fresh Now had contravened section 8 of the *ESA* by misrepresenting the wage rate of the position he was employed in.
4. The Determination found Fresh Now had contravened Part 3, sections 17 and 28, Part 4, section 40, Part 5, section 46 and Part 7, section 58 of the *ESA* and ordered Fresh Now to pay the complainant wages, including interest under section 88 of the *ESA* and concomitant annual vacation pay, in the amount of \$4,293.65 and administrative penalties in the amount of \$2,500.00.
5. Some elements of the complaint were not accepted and were denied.
6. An appeal of the Determination was filed by Fresh Now alleging the Director had failed to observe principles of natural justice in making the Determination. Fresh Now sought to have the Determination varied.
7. The Tribunal Member making the original decision dismissed the appeal under section 114 of the *ESA*, finding there was “no reasonable prospect” the appeal would succeed.
8. The Tribunal Member making the original decision found there was no basis for the natural justice ground of appeal, but for the reasons stated in the original decision, also considered whether the Director had committed an error of law in making the Determination. On her analysis of that ground of appeal, the Tribunal Member was not persuaded there was any error of law in the Determination, finding:

The Determination is based on factual findings which the delegate could reasonable [*sic*] make based on the evidence before her.
9. The original decision confirmed the Determination.
10. This application seeks to have the decision of the Director that the complainant was entitled to overtime wages cancelled and, presumably, have the Determination varied to reflect that result.

ISSUE

11. 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 cancel the original decision.

ARGUMENT

12. The submission supporting this application for reconsideration is based on one central contention: that the Director's finding that the complainant's record of hours worked were not credible ought to have resulted in a complete dismissal of his claim for overtime wages as the claim was based on him saying he worked overtime hours and was entitled to be paid for those hours.
13. Fresh Now contends the evidence relied on by the Director to find the complainant worked overtime hours and to calculate the number of overtime hours worked by the complainant – text messages and oral evidence provided by two former employees – do not support the findings made.
14. Fresh Now also takes issue with a comment in the original decision concerning whether Fresh Now took the position before the Director that the complainant had falsified his hours of work. Fresh Now contends it made such an argument to the Director.
15. I will note here, that whether the above contention is accurate or not – and there is certainly an indication in the Determination that the record of hours worked presented by the complainant to the Director was not credible – the Director did not rely on the record provided by the complainant. Rather, as indicated above, the Director relied on objective and oral evidence to make the findings on hours worked by the complainant. Fresh Now's disagreement with the comment in the original decision was not germane to the result of the original decision, nor is relevant or helpful in deciding this application.

ANALYSIS

16. 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.*

17. 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 able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

18. 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.

19. 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.

20. 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.

21. 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.
22. I find this application does not warrant reconsideration.
23. I am satisfied there was no error made in the original decision and I view this application as nothing more than an attempt by Fresh Now to have this panel re-visit submissions made in the appeal that were correctly assessed and dismissed in the original decision.
24. Fresh Now has done nothing more in this reconsideration application than re-argue against findings of fact made by the Director in the Determination, findings that the Tribunal Member in the original decision properly and correctly concluded were factual conclusions rationally supported in the evidence and, as such, were not an error of law and were not open to review by the Tribunal under section 112 of the *ESA*.
25. Fresh Now does nothing in this application that advances the merits of the appeal or show there was any mistake in the view of the Tribunal Member in the original decision, that there was “no reasonable prospect” the appeal could succeed.
26. This application is denied.

ORDER

27. Pursuant to section 116 of the *ESA*, the original decision, 2018 BCEST 108, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal