

An Application for Reconsideration

- by -

7974400 Canada Ltd. carrying on business as NoBull Contracting  
("NBC")

- 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.:** 2019/23

**DATE OF DECISION:** April 15, 2019

## DECISION

### SUBMISSIONS

Denis Pelletier

on behalf of 7974400 Canada Ltd. carrying on business  
as NoBull Contracting

### OVERVIEW

1. 7974400 Canada Ltd. carrying on business as NoBull Contracting (“NBC”) seeks reconsideration of Tribunal Decision Number 2019 BCEST 16 (the “original decision”), dated February 13, 2019.
2. The original decision considered an appeal of a Determination (the “Determination”) issued by John Dafoe, a delegate of the Director of Employment Standards (the “Director”), on October 11, 2018.
3. The Determination was made by the Director on a complaint filed by a former employee (“the complainant”) who had alleged NBC had contravened the *ESA* by failing to pay regular wages, overtime wages, and had made unauthorized deductions from wages.
4. In the Determination, the Director found NBC had contravened sections 17, 18, and 21 of the *Employment Standards Act* (the “*ESA*”). The Director found the complainant was owed wages under the *ESA* in the amount of \$8,908.66 plus interest and that NBC was liable for administrative penalties in the amount of \$1,500.00.
5. An appeal of the Determination was filed by NBC alleging the Director had 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 making the original decision dismissed the appeal under section 114(1) of the *ESA*, finding NBC had not shown a failure by the Director to observe principles of natural justice and the evidence NBC sought to submit as “new evidence” did not satisfy the considerations necessary for the Tribunal to exercise its discretion to accept such evidence, as it represented information that was in the possession of NBC during the complaint process and as such could and should have been disclosed under the Demand for Employer Records which was issued to NBC during the complaint process.
7. The application seeks to have the original decision varied or have the matter referred back to the original panel or another panel of the Tribunal.

### 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. This application is, in substance, no more than a reiteration of the appeal arguments made by NBC in seeking to challenge factual conclusions made in the Determination related to the calculation of wages owed to the complainant, which were affirmed in the original decision.
10. In this application, NBC submits that the Tribunal Member making the original decision was wrong to have concluded the information NBC sought to introduce into the appeal was available during the complaint process and wishes to have it considered. Specifically, NBC submits:
- The information provided for the appeal were not available at the time of the hearing. The photos and some of the documentation were payroll summaries and revisions to compensation of employees.
11. NBC says this information, which apart from the reference to the “photos” is not identified, was in the possession of a third-party pending resolution of a dispute between NBC and the third-party and only became available after the Determination was issued.

## ANALYSIS

12. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally.
13. 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, 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.*
14. 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.

15. 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.
16. 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.

[*Zoltan Kiss*, BC EST # D122/96]
17. 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.
18. 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.
19. I find this application does not warrant reconsideration.
20. I am not persuaded there is anything about this application that raises any circumstance which would mitigate in favour of reconsideration.

21. The focus of this application is the refusal in the original decision to accept “new” evidence presented with the appeal.
22. The decision to accept “new” evidence in an appeal is discretionary and is firmly rooted in a principled approach that addresses a number of considerations, including whether the material sought to be introduced into the appeal was reasonably available to be produced during the complaint process. The Tribunal Member reviewing the requested introduction of additional evidence with the appeal was satisfied the *information* that was submitted as new evidence was in the possession of NBC at the time disclosure under the *ESA* was required and, as a result, did not satisfy one of the key conditions for accepting it as “new” evidence. Beyond a reference to the photos and a vague reference to unidentified documents being withheld from NBC by a third-party, NBC has not addressed this point in this application.
23. Neither does the argument made by NBC address or answer a central point made in the original decision – that there is a statutory obligation on an employer, in this case NBC, to maintain accurate and up-to-date payroll records. NBC did not meet this obligation or provide the records which were required to be kept by the *ESA*: see sections 27 and 28 of the *ESA*. As noted in the original decision, “the failure to do so does not give rise to an avenue of appeal.”
24. Also, the Director notes, at page R5 of the Determination, that Denis Pelletier, who is the sole director of NBC, represented the employer in the complaint process and gave evidence on their behalf at the complaint hearing, agreed the time cards were an accurate reflection of the hours worked by the complainant. He appears to have withdrawn from that agreement following the issuance of the Determination, but accepting he may change the concession he made in the complaint hearing would be inappropriate.
25. Finally, it should also be noted that NBC, for the most part, paid the complainant based on the hours set out in the time cards, some of which are now challenged in this application. That is also an inappropriate position to advance.
26. In sum, there is nothing in this application has convinced me that the conclusion, and the resulting decision on the request to introduce that information as “new” evidence, was wrong.
27. I also completely agree with the result in the original decision and find NBC has demonstrated no reviewable error was made in it.
28. The application is denied.

**ORDER**

29. Pursuant to section 116 of the *ESA*, the original decision, 2019 BCEST 16, is confirmed.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**