

An Application for Reconsideration

- by -

Excellence Auto Glass Ltd.
("Excellence Auto Glass")

- 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.: 2019/40

DATE OF DECISION: May 13, 2019

DECISION

SUBMISSIONS

Seyed Fares Fani

on behalf of Excellence Auto Glass Ltd.

OVERVIEW

1. Pursuant to section 116 of the *Employment Standards Act* (the “*ESA*”), Excellence Auto Glass Ltd. (“Excellence Auto Glass”) seeks reconsideration of Tribunal Decision Number 2019 BCEST 22 (the “original decision”) dated March 12, 2019.
2. The original decision considered an appeal of a Determination (the “Determination”) issued by Jennifer Sencar, a delegate of the Director of Employment Standards (the “Director”), on November 22, 2018.
3. The Determination was made by the Director on a complaint filed by Ahmad Zia (“the complainant”) who had alleged Excellence Auto Glass had contravened the *ESA* by failing to pay him for 12 hours of work he performed for Excellence Auto Glass.
4. In the Determination, the Director found Excellence Auto Glass had contravened section 18 of the *ESA* and section 46 of the *Employment Standards Regulation* (the “*Regulation*”). The Director found the complainant was owed wages under the *ESA* in the amount of \$138.61 including interest and that Excellence Auto Glass was liable for administrative penalties in the amount of \$1,000.00.
5. An appeal of the Determination was filed by Excellence Auto Glass 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 Excellence Auto Glass had not shown a failure by the Director to observe principles of natural justice and the evidence Excellence Auto Glass 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 Excellence Auto Glass during the complaint process and, as such, could have, exercising due diligence, been presented to the Director during the complaint investigation process. The original decision also assessed whether there was an error of law in the Determination, as Excellence Auto Glass had challenged findings of fact made by the Director, and found no error of law in it.
7. The application seeks to have the original decision varied to cancel the imposition of an administrative penalty for failing to comply with section 46 of the *Regulation*.

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 this application, Excellence Auto Glass submits that the Tribunal Member making the original decision erred in not considering the argument raised in their appeal against the administrative penalty for contravening section 46 of the *Regulation*. Specifically, Excellence Auto Glass submits:

The Tribunal did not take into consideration what we wrote in our appeal previously:

- Contravention Section 46 (Reg): Inaccurate claim of contravention. An email was sent out to Brandi at Employment Standards with what was asked for before the deadline. Payroll documentation was asked for, but we never had a written or verbal contract of employment, therefore there were none. I did not know his full name, address, SIN, only that he went by the name Zia. Copy of job advertisement was asked for listed on craigslist, there was none. Text messages and emails were asked for, of which one email was sent by himself, to himself, and I attached one screenshot of our correspondence. I wrote these in clear terms via email.

10. Excellence Auto Glass argues, since it was not possible to provide the employment records (presumably because they did not exist) and the Employment Standards Branch was informed of this before the Demand deadline, no administrative penalty should have been imposed.

ANALYSIS

11. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally.

12. 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.*

13. 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.
14. 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.
15. 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 reasonably 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.
16. 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.
17. 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.
18. I find this application does not warrant reconsideration.

19. I am not persuaded there is anything about this application that raises any circumstance which would mitigate in favour of reconsideration.
20. The focus of this application is an alleged failure to address one of the arguments raised by Excellence Auto Glass in its appeal. That contention is incorrect.
21. It is relevant that the grounds of appeal chosen by Excellence Auto Glass was a failure by the Director to comply with principles of natural justice and “new” evidence. Both of these grounds were addressed in the original decision. In respect of the former, the Tribunal Member found: “[t]here is nothing in the Determination or the Record to support a finding that the delegate breached the principles of natural justice . . .”.
22. Nor is it correct for Excellence Auto Glass to argue the failure to maintain employment records for the complainant excuses a failure to comply with a demand for their disclosure. There is a statutory obligation in section 28 of the *ESA* to keep payroll records for each employee; section 46 of the *Regulation* requires those records be produced on demand. The failure to maintain the records required to be kept does not obviate the requirement to produce records on demand or allow avoidance of a finding of non-compliance with the demand. As an aside, the Director could also have imposed an administrative penalty for non-compliance with section 28 of the *ESA* as it is evident Excellence Auto Glass failed to maintain payroll records as required by that provision.
23. To reiterate, there is nothing in this application that has convinced me the imposition of an administrative penalty for contravening section 46 of the *Regulation* was not considered in the original decision, was an error in the Determination or that not cancelling that administrative penalty was an error in the original decision.
24. I also completely agree with the result in the original decision and find Excellence Auto Glass 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 22, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal