Citation: Western Watershed Designs Inc.
2019 BCEST 8

An Application for Reconsideration

- by -

Western Watershed Designs Inc.
(the "Applicant")

- 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:** Robert E. Groves

**FILE No.:** 2018A/125

**DATE OF DECISION:** January 14, 2019

# DECISION

## SUBMISSIONS

Lance McCulloch — on behalf of Western Watershed Designs Inc.

## OVERVIEW

1. Pursuant to section 116 of the *Employment Standards Act* (the "*ESA*"), Western Watershed Designs Inc. (the "Applicant") applies for a reconsideration of Tribunal Decision 2018 BCEST 107 (the "Appeal Decision"), issued by the Tribunal on November 7, 2018.

2. On November 16, 2017, a complainant (the "Complainant") alleged that the Applicant had contravened the *ESA* when it failed to pay him regular wages, overtime, statutory holiday pay, and vacation pay.

3. A delegate (the "Delegate") of the Director of Employment Standards conducted a hearing of the complaint on March 27, 2018, at which the Complainant and representatives of the Applicant attended and gave evidence. The Delegate then issued a determination dated May 14, 2018 (the "Determination"), stating that the Applicant owed the Complainant overtime wages, statutory holiday pay, annual vacation pay, and accrued interest in the amount of $771.63. The Determination also ordered the Applicant to pay $1,000.00 in administrative penalties.

4. The Complainant appealed the Determination on the grounds that the Delegate erred in law and that evidence had become available that was unavailable at the time the Determination was being made. In particular, the Complainant alleged that the Delegate had erred in calculating the amount of the overtime wages that were owed to him.

5. The Applicant did not appeal the Determination.

6. Following receipt and review of the appeal material filed by the Complainant, the Tribunal requested, and received from the Delegate, revised calculations of the amount of overtime wages owed to the Complainant. In his response to the requests made by the Tribunal, the Delegate acknowledged an error in the calculation of the overtime wages found to be owed in the Determination. The Delegate re-calculated the overtime wages owed and stated that $3,207.63 was the correct figure. This meant that the amount of wages owed to the Complainant as at the date of the Determination, was $3,840.99, rather than $771.63.

7. The Tribunal requested submissions from the Complainant and the Applicant concerning the Delegate's re-calculation of the wages owed. Neither party responded by delivering a submission to the Tribunal.

8. The Tribunal then issued the Appeal Decision, varying the Determination to account for the Delegate's re-calculation of the wages owed at $3,840.99, together with accrued interest.

9. The Applicant now asks for a reconsideration of the Appeal Decision and requests that the complaint be referred back.

10. Pursuant to Rule 30(4) of the Tribunal's *Rules of Practice and Procedure,* I must assess the Applicant's application for reconsideration, and I may dismiss it, in whole or in part, without seeking submissions from the parties. In this case, I do not feel it necessary to request submissions from any other party.

**ISSUE**

11. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:

1. Does the request meet the threshold established by the Tribunal for reconsidering a decision?
2. If so, should the decision be confirmed, cancelled, varied or referred back to the original panel, or another panel of the Tribunal?

**THE FACTS AND ANALYSIS**

12. I accept, and incorporate by reference, the relevant facts set out in the Determination and in the Appeal Decision.

13. By way of summary, the Applicant manages construction projects. The Complainant was employed by the Applicant as a supervisor of a construction project from August 15, 2017, until October 13, 2017, when his employment was terminated.

14. The evidence at the hearing of the complaint revealed that the Complainant submitted his time sheets for his hours worked. Notwithstanding that the Applicant alleged the Complainant was "scamming" it by submitting wage claims for hours that the Complainant had not, in fact, spent at work, it paid him for the hours he had recorded. It was, as the Delegate characterized it, "too generous" and "overlooked" the Complainant's claiming "fraudulent hours". Then, at the hearing, the Applicant asserted that since the Complainant had been overpaid, he should repay the Applicant for the hours he did not work.

15. The Delegate declined to accept the Applicant's submission. Part of the dilemma the Delegate faced in reaching this conclusion is captured in the following excerpt from the Delegate's Reasons for the Determination, at R6:

> Section 28 of the Act requires employers to keep records for each employee including "the hours worked by the employee on each day, regardless of whether the employee is paid on an hourly or other basis." The Employer provided its record of hours worked by the Complainant. These records are, at least at first glance, evidence of his hours. The Director should be able to rely on the accuracy of these records that the Employer is implicitly saying are accurate. To be fair to the Employer, it is a rebuttable presumption that the records are accurate. The onus is the Employer's to provide satisfactory evidence that its own records do not accurately record the Complainant's hours to allow me to conclude that he worked fewer hours than the records indicate.
>
> Where an employer unknowingly submits payroll records and later discovers, and satisfies the Director, that they are inaccurate or fraudulent, it would be unfair to rely on them in determining if wages are owed. This is not the Employer's situation. The Employer says that despite knowing that its records were inaccurate, it paid the Complainant based on them. The Employer knowingly

paid the Complainant for all of his recorded hours of work even though it had apparently concluded that he was claiming hours that he had not worked.

16. The Applicant did provide other evidence, apart from its records, to support its contention that the Complainant had been overpaid. That evidence consisted of oral testimony of representatives of the Applicant, and a witness, to the effect that the Complainant was absent from the construction site he was hired to supervise on occasions when his timesheets indicated he was at work.

17. The Delegate considered this testimony and concluded it was insufficient to rebut the presumption of accuracy that was to be attributed to the Applicant's own payroll records. The Delegate stated that much of the evidence given regarding the Complainant's absences was hearsay and that the evidence of the witness who testified concerning the Complainant's alleged failures to attend at the construction site lacked sufficient specificity. He also noted that the existence of other evidence of witnesses and photographs showing the activities of the Complainant was referred to by the Applicant but was not produced at the hearing. Finally, the Delegate observed that it was necessary, at times, for the Complainant to be absent from the construction site in order to assist with the procurement of material and supplies.

18. In the result, the Delegate determined that the evidence failed to support a conclusion that the Applicant's payroll records should be found to be unreliable, or that any wages owed to the Complainant should be calculated on the basis of the other evidence presented by the Applicant.

19. As I have stated, the appeal focused on the calculation of the overtime wages owed to the Complainant. Although invited to do so, the Applicant made no submission relating to the merits of the Complainant's appeal.

**ARGUMENT**

20. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116, the relevant portion of which reads as follows:

> 116 (1) On 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.

21. The reconsideration power is discretionary and must be exercised with restraint. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal.

22. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *ESA*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the *ESA*. It is also derived from a desire to preserve the integrity of the appeal process mandated in section 112 of the *ESA*.

23. With these principles in mind, the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party seeking to have the Tribunal's appeal decision overturned.

24. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal considers the applicant's submissions, the record that was before the Tribunal in the appeal proceedings, and the decision the applicant seeks to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. In order for the answer to be "yes", the applicant must raise questions of fact, law, principle or procedure flowing from the appeal decision which are so important that they warrant reconsideration.

25. If the applicant satisfies the requirements in the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.

26. In its application for reconsideration, the Applicant repeats its assertions made to the Delegate that the Complainant's claim for unpaid wages is fraudulent, due to the fact that the Complainant was regularly absent from the construction site at times when he was required to be present and working. The Applicant says that the Complainant must prove his whereabouts while employed and that he should be compelled to produce his cellphone records for this purpose. It states the belief that the production of these records will demonstrate that the Complainant was not, in fact, at the construction site, but elsewhere, at the relevant times.

27. I reject these submissions, for several reasons.

28. The issue of the Complainant's attendance at work was examined in detail by the Delegate at the hearing of the complaint and in the Delegate's Reasons for the Determination. Indeed, it appears to have been the principal basis for the answer to the complaint offered by the Applicant throughout the complaint process.

29. The requirement that the Complainant produce his cellphone records is also a repetition of a posture adopted by the Applicant during the proceedings leading to the hearing of the complaint before the Delegate. However, there is no indication the Applicant pursued this evidentiary avenue at the hearing. Rather, it appears from the Delegate's Reasons for the Determination that the Applicant preferred to rely on the oral evidence of its witnesses as proof that the Complainant did not attend at work as required. As I have stated, the Delegate weighed that evidence with care, and decided that it was insufficient to overcome the factual conclusions to be drawn, of necessity, from the Applicant's own payroll records. I see nothing in the evidentiary material that was before the Delegate, or in his Reasons for the Determination, that would lead me to conclude the Delegate erred in law in making his factual findings on this issue. In addition, the Applicant submitted nothing in the appeal proceedings, or in its application for reconsideration, that suggests the Delegate rendered a decision on the facts, based on the evidence presented, which no reasonable person, acting judicially and properly instructed as to the relevant law, would have made in the circumstances (see *Gemex Developments Corp. v. B.C. (Assessor)* (1998) 62 BCLR 3d 354; *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331).

30. It is important to repeat that the Applicant did not appeal the Determination. As I have also indicated, the Applicant made no submissions in the appeal proceedings generated by the Complainant, although it was invited to do so. It follows that the Tribunal Member deciding the appeal was not asked and did not, therefore, consider whether the Delegate's factual findings relating to the Complainant's attendance at work revealed an error.

31. Since the Applicant is now asking the Tribunal to reconsider the Tribunal's Appeal Decision on the basis of a submission that was never made, or adjudicated, in the appeal proceedings, I have decided that the Applicant has failed to meet the threshold requirements necessary for a reconsideration of the Appeal Decision under the *ESA*. Quite simply, the Applicant has not raised any pertinent questions of fact, law, principle or procedure flowing from the Appeal Decision which are so important that they warrant reconsideration.

32. It is trite to say, in addition, that appeals, and applications for reconsideration, are not intended to generate hearings *de novo* where factual findings of a delegate of the Director are ignored and the Tribunal considers a complaint afresh. Nor do they constitute an opportunity for a party disappointed at the outcome set out in a determination to have the complaint re-investigated in the hope that the Tribunal will affirm a different result. Rather, proceedings before the Tribunal involve an exercise in error correction, with the burden on the party commencing proceedings to show that an error has been committed, within the statutory parameters prescribed in Part 13 of the *ESA* (see *Abbotsford Concrete Products Ltd.*, BC EST # RD085/10; *MSI Delivery Services Ltd.*, BC EST # D051/06).

33. No such errors have been identified by the Applicant. Accordingly, the application for reconsideration cannot succeed.

**ORDER**

34. The Applicant's application for reconsideration of the Appeal Decision, 2018 BCEST 107, is denied.

**Robert E. Groves**
**Member**
**Employment Standards Tribunal**