

An Application for Reconsideration

- by -

0927468 B.C. Ltd. Carrying on Business as Peak H2O Purified Water Store  
(the “Employer”)

- 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:** Carol L. Roberts

**FILE No.:** 2020/012

**DATE OF DECISION:** February 7, 2020

## DECISION

### SUBMISSIONS

Paul Sekhon

on behalf of 0927468 B.C. Ltd. Carrying on Business as  
Peak H2O Purified Water Store

### OVERVIEW

1. This is an application by 0927468 B.C. Ltd. Carrying on Business as Peak H2O Purified Water Store (the "Employer"), for a reconsideration of 2019 BCEST 135 (the "Original Decision"), issued by the Tribunal on December 16, 2019.
2. A former employee of the Employer filed a complaint with the Employment Standards Branch alleging that he was owed wages. Following a hearing before a delegate of the Director of Employment Standards (the "Director"), the delegate concluded that the Employer had contravened the *Employment Standards Act* ("ESA") in failing to pay the employee wages and unpaid annual vacation pay. In the Determination the Director ordered the Employer to pay wages, vacation pay, overtime wages, and accrued interest in the amount of \$839.94. The Director also imposed three administrative penalties on the Employer for contraventions of the *ESA*.
3. The Employer appealed the Determination arguing that the Director erred in law and failed to observe the principles of natural justice in making the Determination. The Employer also contended that evidence had become available was not available at the time the Determination was being made. The deadline for filing an appeal of the Determination was 4:30 p.m. on July 8, 2019. The Employer's completed appeal was not submitted until September 3, 2019. The Employer also sought an extension of time in which to file the appeal.
4. In the Original Decision, the Tribunal denied the Employer's application for an extension of time to file the appeal.
5. The Employer seeks reconsideration of the Original Decision.

### ISSUE

6. There are two issues on reconsideration:
  1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?
  2. If so, should the decision be cancelled or varied or sent back to the Member?

## ARGUMENT

7. In the reconsideration request, the Employer outlines a number of issues, most of which consist of complaints about the conduct of the former employee as well as the delegate. A sampling of those comments are as follows:
- the determination “was given against the better knowledge of the delegate that conducted a discovery in the matter posed by the Complainant”;
  - the “Employment Standards Division failed so atrociously in the decision making process in regards to this application”;
  - The Determination “fails to uphold many constitutional principles but by far completely ignores to uphold the ‘Duty to Act Fairly’ as well as acting without prejudice and is completely biased in favour of the complainant. The complainant was inauthentic and lacked integrity which was clearly evident during the discovery”;
  - “It is appalling that with so many breaches of integrity displayed consistently by the complainant during the discovery that any of his information was afforded the respect to still be considered in the decision making process that completely favoured the complainant and further the business was made an example of by being given 3 penalty fines that are completely incorrect and unfair.”
8. The reconsideration application is largely a repetition of the submissions made on appeal and reiterates Mr. Sekhon’s personal circumstances around the time period of the appeal, including the passing of an aunt and cousin. He contends that the “Employment Standards Branch” failed to take these circumstances into consideration, “penalizing the business” and demonstrating a “lack of empathy and compassion for the business and the people attached to it.”
9. The sole new argument made by the Employer on reconsideration is that the appeal was “arbitrarily rejected on the basis of time and the actual merits of the file” and without any “compassion or empathy given in regards to the matter of the delay”.

## THE FACTS AND ANALYSIS

10. The *ESA* confers an express reconsideration power on the Tribunal. Section 116(1) of the *ESA* provides
- (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.

### 1. The Threshold Test

11. The Tribunal reconsiders a decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *ESA*

detailed in section 2 “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act.”

12. In *Milan Holdings*, BC EST # D313/98, the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the Tribunal to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.
13. The Tribunal may agree to reconsider a decision for a number of reasons, including:
  - The Member fails to comply with the principles of natural justice;
  - There is some mistake in stating the facts;
  - The Decision is not consistent with other Decisions based on similar facts;
  - Some significant and serious new evidence has become available that would have led the Member to a different decision;
  - Some serious mistake was made in applying the law;
  - Some significant issue in the appeal was misunderstood or overlooked; and
  - The Decision contains a serious clerical error.

(*Zoltan Kiss*, BC EST # D122/96)
14. While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The reconsideration process was not meant to allow parties another opportunity to re-argue their case.
15. After weighing these and other factors, the Tribunal may determine that the application is not appropriate for reconsideration. Should the Tribunal determine that one or more of the issues raised in the application is appropriate for reconsideration, the Tribunal will then review the matter and make a decision. The focus of the reconsideration panel will in general be with the correctness of the decision being reconsidered.
16. In *Valoroso*, BC EST # RD046/01, the Tribunal emphasized that restraint is necessary in the exercise of the reconsideration power:

... the *Act* creates a legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute.
17. 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” is not 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 favor 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.

18. The reconsideration request is, in effect, a request for the Tribunal to reconsider the Employer's arguments surrounding its failure to file the appeal within the statutory time period.
19. In the Original Decision dated December 16, 2019, Tribunal Member Grounds outlined the facts and the Employer's arguments. He noted that although the Employer submitted its appeal by email which identified the time as 4:30 on July 8, 2019, the appeal was not received by the Tribunal until July 9, 2019. The appeal was incomplete because it contained only a scanned copy of every second page of the appeal document. On July 11, 2019, the Tribunal contacted Mr. Sekhon to inform him that the appeal was incomplete because it lacked written reasons for the appeal, a complete copy of the Determination as well as written reasons for requesting an extension of the time to appeal the Determination. The Tribunal sent the Employer additional correspondence on July 15, 2019, informing it that it had not received the requested information, and extended the deadline for receiving the information to July 19, 2019. The Tribunal informed the Employer that if the requested information had not been received by that date, the file would be closed. On July 23, 2019, the Tribunal informed the Employer that because the requested information had not been received, the file had been closed.
20. The Tribunal received the requested information from the Employer on September 3, 2019.
21. In reviewing the Employer's reasons for extending the statutory time period for filing an appeal, Member Grounds considered the *Niemisto* (BC EST # D099/96) factors and concluded that the Employer had not provided a reasonable and credible explanation for failing to request an appeal within the statutory deadline, had not exhibited a genuine and on-going *bona fide* intention to file an appeal and had not made the Director or the employee aware of an intention to file an appeal.
22. Member Grounds also considered whether the Employer had made out a strong *prima facie* case on appeal. In reviewing the grounds of appeal, the Member noted that the Employer had included evidence that was not before the delegate at the time the Determination was being made. Applying the Tribunal's test for new evidence, Member Grounds considered that all of the evidence was in existence at the time of the hearing and had the Employer exercised due diligence, the evidence could have been presented to the delegate for consideration at the hearing. Accordingly, the Member determined that the evidence submitted by the Employer would not be admitted as part of the appeal.
23. Finally, the Member considered whether the Employer had demonstrated that the delegate had committed an error of law in making the Determination or failed to observe the principles of natural justice. After reviewing the evidence and considering the law, Member Grounds concluded that the Employer had not made out these grounds, and thus had not established a strong *prima facie* case.
24. Member Grounds dismissed the Employer's application to extend the time in which to file an appeal and confirmed the Determination.
25. I find that the Employer's application is not appropriate for reconsideration. As noted above, the reconsideration process is not meant to allow parties another opportunity to re-argue their case.

26. The Employer's request repeats the arguments made before the Tribunal on appeal and does not set out any basis for exercising the reconsideration power. There is no factual or legal basis to support the Employer's contention that Member Grounds "arbitrarily rejected" the appeal. The Employer's reasons for the appeal and the application to extend the time for filing an appeal were carefully considered in light of the law. Even had the Member extended the deadline for filing an appeal, the Member concluded that there was no prospect the appeal would succeed.
27. I conclude that the reconsideration request does not raise any questions of law, fact, principle or procedure that were not fully and properly addressed by the Member in the Original Decision.
28. The application is denied.

### **ORDER**

29. Pursuant to subsection 116(1)(b) of the *ESA*, the decision of Tribunal Member Grounds issued in 2019 BCEST 135 is confirmed.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**