

An Application for Reconsideration

- by -

Meher Trucking Ltd.
("Meher")

- 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.: 2020/029

DATE OF DECISION: March 17, 2020

DECISION

SUBMISSIONS

Harpreet Singh Madaan

on behalf of Meher Trucking Ltd.

OVERVIEW

1. Meher Trucking Ltd. (“Meher”), through its principal, Harpreet Singh Madaan (“Madaan”), applies for a reconsideration of a decision of the Tribunal dated December 24, 2019, and referenced as 2019 BCEST 138 (the “Appeal Decision”).
2. The Appeal Decision was the result of an appeal by Meher of a determination (the “Determination”) issued by a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) on August 29, 2019.
3. The Determination followed a complaint to the Employment Standards Branch filed by Sahib Singh (the “Complainant”), claiming that Meher owed him unpaid wages and expenses.
4. The Delegate determined that Meher had contravened the *Employment Standards Act* (the “ESA”) and that it owed the Complainant \$4,029.99 for regular wages, overtime, statutory holiday pay, annual vacation pay, and interest. The Delegate also imposed \$3,000.00 in administrative penalties, for a total owed by Meher of \$7,029.99.
5. Meher appealed the Determination on the grounds that the Delegate had erred in law and that evidence had become available that was not available at the time the Determination was being made.
6. The Appeal Decision dismissed the appeal and confirmed the Determination.
7. Meher’s application for reconsideration contains a submission on the merits. It also seeks an extension of the time for the filing of its application, as it delivered its application to the Tribunal outside the thirty-day period from the date of the Appeal Decision which is mandated by subsection 116(2.1) of the *ESA*.
8. I have before me Meher’s appeal form and application for reconsideration, its submissions delivered in support, the Determination and its accompanying Reasons, the Appeal Decision, and the record the Director was required to deliver to the Tribunal pursuant to subsection 112(5) of the *ESA*.

FACTS

9. I accept, and incorporate by reference, the facts set out in the Determination and the Appeal Decision. What follows is a summary of what I perceive to be the more salient of the facts.
10. Meher operates a delivery business in the Lower Mainland. At all material times, Madaan was an officer and director of the company. He was also the individual who was identified as being responsible for its day-to-day operations and its dealings with the Complainant.

11. Following an investigation, the Delegate found that the Complainant was employed by Meher as a helper to assist with deliveries, from July 20, 2018, until October 2, 2018.
12. The record reveals that Meher, through Madaan, was made aware of the particulars of the complaint, and was provided with ample opportunity to respond, yet failed to do so. Meher did not reply to a demand for its payroll records. Madaan did not attend a hearing of the complaint as scheduled, and Meher did not respond to a preliminary assessment forwarded to it by the Delegate.
13. In the absence of any pertinent submission presented on behalf of Meher, the Delegate relied on the unrefuted evidence of the Complainant to support the conclusions recorded in the Determination.
14. On appeal, Meher asserted that the Determination should be cancelled. He argued that:
 - the Complainant was never employed by Meher. Instead, he was hired as a subcontractor to provide services when needed, and was paid daily, either in cash or by cheque;
 - the Determination was made absent an opportunity for Meher to present evidence or an explanation, which was unfair; and
 - the Complainant owed Madaan money for tools and a truck rental.
15. The Tribunal Member who issued the Appeal Decision declined to accept any of the submissions presented by Meher.
16. Regarding the submission that the Complainant was never an employee, the Tribunal Member referred to statements made by Madaan to the Delegate which might have been interpreted as questioning the Complainant's employment position with Meher, but noted that the argument the Complainant was a subcontractor only appeared in a formal way in Meher's material filed in the appeal. In addition, Meher presented no documents or other evidence in the appeal which supported its position, apart from the assertion by Madaan that the Complainant was, in fact, a subcontractor.
17. The Tribunal Member also noted that the other evidence presented to the Delegate supported a conclusion that the Complainant worked under the control and direction of Meher as a helper, and that there was no evidence that the Complainant was acting in business for himself.
18. In conclusion, the Tribunal Member decided that while Meher disagreed with the Delegate's conclusions, it had failed to establish that the Delegate had made any factual errors that might be construed to have resulted in his having committed an error of law. To the contrary, the Tribunal Member concluded that the Delegate's findings regarding the Complainant's employment status were in no way perverse or inexplicable, nor did they reveal any misapplication of the relevant law.
19. Meher's appeal form did not assert as a ground subsection 112(1)(b) of the *ESA*, which permits an appeal on the basis that the Director failed to observe the principles of natural justice in making the Determination. Nevertheless, as I have noted, Meher contended, on appeal, that the Delegate had acted unfairly, and so it was appropriate for the Tribunal Member to address this issue.
20. Contra the position stated by Meher, the Tribunal Member concluded that the company did, in fact, receive particulars of the complaint, yet it failed to provide the documents and information the Delegate

requested, and offered nothing of substance in response to the Complainant's allegations until the Determination was issued. Accordingly, the Tribunal Member decided that Meher's fairness submission was without merit.

21. Meher also claimed on its appeal form that evidence had become available that was not available at the time the Determination was being made. Again, the Tribunal Member decided that there was no merit to the company's submission, as it had provided no evidence in its appeal submission that could not have been presented to the Delegate.
22. The Appeal Decision was issued on December 24, 2019. Subsection 116(2.1) of the *ESA* required that Meher file its application for reconsideration within thirty days thereafter. Meher filed its application for reconsideration on February 14, 2020. It will be seen, then, that Meher filed its application approximately three weeks late.

ISSUES

23. Should the Tribunal extend the time for Meher to file its application for reconsideration?
24. If the Tribunal extends the time, and considers Meher's application, there are two further issues the Tribunal must decide:
 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?

DISCUSSION

The application to extend the time for filing the application for reconsideration

25. Under subsection 109(1)(b) of the *ESA*, the Tribunal has a discretion to extend the period for requesting an appeal or applying for a reconsideration even though the period for doing so has expired.
26. In *Serendipity Winery Ltd.*, BC EST # RD108/15, the Tribunal enumerated the following factors it should consider when deciding whether a time period should be extended:
 - there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
 - there has been a genuine and on-going *bona fide* intention to appeal, or apply for a reconsideration;
 - the respondent parties, including the Director, must have been made aware of this intention;
 - the respondent parties will not be unduly prejudiced by the granting of an extension; and
 - there is a strong *prima facie* case in favour of the appellant or applicant.

27. For reasons to which I will refer later in this decision when I address Meher's application for reconsideration, I have decided that Meher has failed to establish a strong *prima facie* case that its application will succeed.
28. I have no information that would assist me to decide whether an extension would, or would not, unduly prejudice another party in the manner contemplated in the list of factors set out above.
29. Meher has presented no evidence that might sustain its request for an extension having regard to the other factors I have identified, with the exception of a statement from Madaan advising that there was a "family issue" that required travel to Toronto, and so the company missed the deadline.
30. In my view, the reasons given for the late filing are vague, and therefore unconvincing. They should have been accompanied by more specific details in order to establish the reasonable and credible explanation that would warrant an extension. Further, the applicant here is Meher. The corporate search conducted by the Delegate shows that the company has another officer and director. No explanation is given why that other corporate actor could not have filed the application for reconsideration in a timely way, or why some other arrangements for filing could not have been made after the need for travel became apparent.
31. Balancing the factors, I have decided that Meher has failed to meet the burden on it to establish that the Tribunal should exercise its discretion and extend the time for filing its application for reconsideration.

The application for reconsideration

32. If I am incorrect in deciding that no extension of the time for the filing of Meher's application should be granted, I will now turn to an analysis of Meher's application in substance.
33. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116 of the *ESA*, the relevant portion of which reads as follows:
- (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.
34. As the Tribunal has stated repeatedly, 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.
35. 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 statute. It is also derived from a desire to preserve the integrity of the appeal process mandated in section 112.

36. 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 who wishes to have the Tribunal's appeal decision overturned.
37. 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 has asked the Tribunal to reconsider. The Tribunal then considers whether the matters raised in the application warrant a reconsideration of the decision at all. The prerequisite for the Tribunal to decide that they do is that the applicant must raise questions of fact, law, principle or procedure flowing from the appeal decision which are so important that they warrant a reconsideration (see *Re Milan Holdings*, BC EST # D313/98).
38. In general, the Tribunal will be disinclined to reconsider if the primary focus of the application is to have the reconsideration panel re-weigh arguments that failed in the appeal. It has been said that reconsideration is not an opportunity to get a "second opinion" when a party simply does not agree with an original decision of the Tribunal (see *Re Middleton*, BC EST # RD126/06).
39. If the applicant satisfies the requirements of 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.
40. In this case, Meher's application may be resolved at the first stage of the analysis. In the result, the application must be dismissed. It raises no questions of fact, law, principle or procedure flowing from the Appeal Decision which are so important that they warrant a reconsideration.
41. Meher's submissions on this application either repeat the same arguments that were rejected in the Appeal Decision or offer arguments that are of no probative value when addressing the issues which arise under section 116 of the ESA.
42. The principal argument of substance presented by Meher is the statement that the company paid the Complainant in full for his work. Meher also contends that no one would work for a period of months without receiving pay.
43. Notwithstanding these assertions, and for the reasons I have stated, the evidence presented to the Delegate convinced her that Meher owed the amounts set out in the Determination. The Appeal Decision concluded that the Determination revealed no legal error regarding this point. A bald statement to the effect that all amounts owed to the Complainant were paid, and so the Determination is wrong, is insufficient to warrant the Tribunal's intervention by way of reconsideration.
44. Madaan, the author of Meher's submission delivered in support of its application, also refers to several other circumstances he asks the Tribunal to consider. These include statements that Meher is a small company with but one truck that Madaan himself drives, the Complainant only worked for a short period of time, the Complainant is a truck operator himself, the Complainant failed to return equipment after his termination, the penalties imposed in the Determination will force the company to shut down, the company has hired no one since May 2019, and the Complainant failed to make a reasonable settlement.

45. No doubt these matters are of concern to Meher, but in my view they do not raise questions of fact, law, principle or procedure flowing from the Appeal Decision which are so important that they warrant a reconsideration under section 116 of the *ESA*. The reason for this is that they refer to matters which are not pertinent to the specific issues arising from the complaint the Delegate was required to consider and determine, or that were reviewable on appeal. Those issues concerned the Complainant's contention that Meher had failed to pay him all his wages. The Delegate also had a statutory duty to impose penalties when warranted. It is not apparent from Meher's submission that the concerns expressed by Meher could have assisted the Delegate to resolve the issues that were properly before her. The same may be said for the proceedings leading to the Appeal Decision, and the proceedings on the application now before me.

ORDER

46. Meher's application for reconsideration is denied. Pursuant to section 116 of the *ESA*, the Appeal Decision, 2019 BCEST 138, is confirmed.

Robert E. Groves
Member
Employment Standards Tribunal