

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

Inderjit Aulakh, a Director of TRASBC Freight Ltd.
("Inderjit Aulakh")

- 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.: 2020/164

DATE OF DECISION: February 10, 2021

DECISION

SUBMISSIONS

Inderjit Aulakh on his own behalf as a Director of TRASBC Freight Ltd.

OVERVIEW

1. Inderjit Aulakh, a Director of TRASBC Freight Ltd. (“Inderjit Aulakh”), seeks reconsideration of a decision of the Tribunal, 2020 BCEST 128¹ (the “original decision”), dated November 13, 2020.
2. The original decision considered an appeal by TRASBC Freight Ltd. of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 17, 2020.
3. The Determination was made by the Director on a complaint filed by a former employee, who had alleged TRASBC Freight Ltd. had contravened the *Employment Standards Act* (the “ESA”) by failing to pay wages, overtime wages, statutory holiday pay, annual vacation pay and compensation for length of service.
4. The Determination found TRASBC Freight Ltd. had contravened Part 3, sections 17, 18, 27 and 28, Part 5, section 45, Part 7, section 58, Part 8, section 63 of the *ESA* and section 37.3 of the *Employment Standards Regulation* and ordered TRASBC Freight Ltd. to pay the former employee wages, including interest under section 88 of the *ESA* and concomitant annual vacation pay, in the amount of \$13,852.18 and administrative penalties in the amount of \$4,000.00.
5. An appeal of the Determination was filed by TRASBC Freight Ltd. alleging the Director had failed to observe principles of natural justice in making the Determination. TRASBC Freight Ltd. requested the Tribunal set aside the Determination and refer the matter back to the Director for a new investigation or hearing.
6. The Tribunal Member making the original decision found there was nothing in the appeal that indicated the Director failed to comply with principles of natural justice and dismissed this ground of appeal.
7. The Tribunal Member making the original decision reviewed the appeal submission and concluded the arguments of TRASBC Freight Ltd. raised allegations that the Director had made errors of law – described in the appeal submission as failing to review the employer’s documents in their entirety, failing to understand the evidence provided by the employer and preferring the evidence of the former employee over that of the employer – and analyzed the merits of the appeal on that basis.
8. The Tribunal Member making the original decision found TRASBC Freight Ltd. had not shown there was any error of law and, in sum, dismissed the appeal under section 114 of the *ESA*, finding there was “no reasonable prospect” the appeal would succeed.

¹ The decision number is mistakenly referred to in the Reconsideration Application Form as #2020/123 and has been corrected by the Tribunal to refer to 2020 BCEST 128.

9. TRASBC Freight Ltd. had also submitted material with the appeal that had not been provided to the Director during the complaint investigation and, for the reasons set out in paragraph 60 of the original decision, the Tribunal Member refused to accept or consider it.
10. The original decision confirmed the Determination.
11. The Reconsideration Application Form was delivered to the Tribunal by Inderjit Aulakh on December 1, 2020, and does nothing more than request an extension of the statutory period for filing a reconsideration application, found in section 116(2.1) of the *ESA*, to January 30, 2021. The statutory reconsideration period expired on December 14, 2020.
12. The section 112(5) record (the “record”) shows Inderjit Aulakh is the sole director of TRASBC Freight Ltd., and while given the right to make an application for reconsideration – see section 116(2) of the *ESA* – that right does not provide Inderjit Aulakh with any different considerations than what would be provided to TRASBC Freight Ltd. if this application had been made in their name.
13. On January 28, 2021, the Tribunal received a 5-page submission and 46 pages of supporting documents – much of which had been provided to the Director during the complaint investigation and is found in the record, but included material that does not appear to have been provided to the Director and is not in the record. This material comprises what the reconsideration submission refers to as “digital data” which it says has been extracted from “an independent GPS software called ‘drive smart’”. There is other reference to “digital data”, which Inderjit Aulakh says was extracted from TRASBC Freight Ltd.’s internal software, in the reconsideration submission. A concern is that no attempt is made in the reconsideration submission to identify what has been extracted from TRASBC Freight Ltd.’s internal software, which the Director found to be “unreliable” as evidence, and what is from the “independent” source. There appear to be few pages in the documents that can be traced to the “independent GPS software”.
14. The material that is not part of the record or a part of the material which TRASBC Freight Ltd. sought to include in their appeal was not before the Tribunal Member when the original decision was made.
15. TRASBC Freight Ltd. had provided digital data to the Director from their internal software during the investigation of the complaint. In respect of that digital data, the Director found the information in this material was “not reliable”, stating “the accuracy of the information generated by the software is only going to be as reliable as the data entered into it.” The Director determined “[TRASBC Freight Ltd.] entered inaccurate information into its software system”. The finding and conclusion of the Director was challenged in the appeal and addressed in the original decision as follows:

The Employer also contends that the delegate erred in finding the Employee’s documentation to be reliable, and in preferring the Employee’s handwritten trip records over the Employer’s digital trip records. I am unable to find that the delegate acted without any evidence, or that his conclusions were not rationally supported by the evidence before him. The delegate found that the software could only record information that was input into it. Although the Employer argues that employees are responsible for submitting information into the digital program, a failure to input information into the “system” does not lead to a conclusion that the Employee’s handwritten records were inaccurate or unreliable. (at para. 54)

16. This application seeks to have the original decision reviewed and changed by a reconsideration panel of the Tribunal.

ISSUE

17. 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 this panel of the Tribunal should cancel the original decision. Included in a consideration of that question is the matter of the timeliness of the application for reconsideration.

ARGUMENT

18. The submission made by Inderjit Aulakh reiterates the argument made to the Director by TRASBC Freight Ltd. during the investigation, and in the appeal of the Determination, that the former employee did not start working for TRASBC Freight Ltd. on February 7, 2019, as found in the Determination, but in March 2019.
19. Inderjit Aulakh also argues the digital data shows the former employee falsified the time records he provided to the Director. As indicated above, the veracity of the digital data was considered by the Director in the Determination and commented on by the Tribunal Member in the original decision.

ANALYSIS

20. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally. Section 116 of the *ESA* reads:

- 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.*
- (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.*

21. 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 *Director of Employment Standards (Re Giovanni (John) and Carmen Valaroso)*, 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.

22. 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 made of the merits of the original decision. The focus of a reconsideration application is, generally, the correctness of the original decision.
23. There was considerable delay in filing this application. The *ESA* imposes a time limit for reconsideration applications. While the Reconsideration Application Form was delivered by Inderjit Aulakh within the reconsideration period, the reasons and argument for the request and the supporting documents – both essential aspects of a reconsideration request – were not delivered to the Tribunal until January 28, 2021.
24. Inderjit Aulakh has asked for an extension of the reconsideration period.
25. The Tribunal approaches requests for extensions of the reconsideration time period consistent with the approach taken to extensions of time in appeals. In *Serendipity Winery Ltd.*, BC EST # RD108/15, the Tribunal stated:

I see no reason to deviate from the criteria [set out in *Re Niemisto*, BC EST # D099/96] when considering requests for an extension of the time period for filing reconsideration applications. However, the question of whether there is a strong *prima facie* case must take into account that the Tribunal’s discretionary authority to reconsider under section 116 of the *Act* is exercised with restraint – see *The Director of Employment Standards (Re Giovanni (John) and Carment Valaroso [sic])*, BC EST # RD046/01 – and must remain consistent with the approach taken by the Tribunal in deciding whether reconsideration is warranted. (at para. 21)
26. The central considerations in this request for an extension of time are whether there is a reasonable and credible explanation for the delay and whether there is a strong *prima facie* case for reconsideration. The substance of the explanation provided is that time was required to allow Inderjit Aulakh to gather new evidence. The explanation does not address why, if this evidence is considered important and relevant, it was not provided to the Director by TRASBC Freight Ltd. during the investigation, rather than seeking it out more than a year after the Demand for Employer Records was made on October 22, 2019. That does not strike me

as a reasonable basis for extending the time period. I shall address below the strength of the case presented for reconsideration.

27. 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.
28. 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.
29. I find this application does not warrant reconsideration.
30. First, I am not persuaded there should be an extension of the reconsideration time period in this case. I find the reasons for seeking the extension of time do not satisfy the criteria identified in *Re Niemisto, supra*.
31. Even if I were to grant an extension of the reconsideration appeal period, I would still reach the conclusion that this application does not warrant reconsideration. I am completely satisfied, based on the material before the Tribunal Member in the appeal, there was no error made in the original decision such as to warrant its reconsideration.
32. I view this application as nothing more than an effort by Inderjit Aulakh to have this panel re-visit the appeal and find some basis for altering the original decision. Except for whatever effect the "new" digital data might have if accepted in this application, Inderjit Aulakh simply makes the same arguments, based on the same evidence as was made by TRASBC Freight Ltd. to the Director during the complaint investigation.
33. The foundation for the reconsideration request is grounded exclusively on this panel of the Tribunal receiving the "new" digital data presented with the reconsideration submission and accepting it has the evidentiary effect Inderjit Aulakh asserts for it. It is not, however, the function of a reconsideration panel to change the original decision unless the applicant can demonstrate some manifest error in it that justifies intervention and correction. Inderjit Aulakh has not met that burden.
34. The Tribunal Member deciding the original decision addressed the argument made in the appeal that the Director erred in finding TRASBC Freight Ltd.'s records unreliable. That conclusion is not changed by

seeking to introduce additional, unverified evidence accompanied by unsubstantiated assertions about its value.

35. Had TRASBC Freight Ltd. sought to introduce the additional digital data in the appeal, an application of the test from *Re Directors and Officers of Merilus Technologies Inc.*, BC EST # D171/03, would not have allowed this material to be accepted and considered: it is not “new” evidence; there is no reason to assume it is any more credible than the records the Director found to be “unreliable”; and there is no basis for finding it would have led the Director to a different conclusion. The same result is justified in this application.
36. Nothing in the submission of Inderjit Aulakh persuades me that this so-called “new” evidence falls within one of the circumstances where the Tribunal might exercise its discretion in favour of reconsideration. Inderjit Aulakh has not shown this material is either significant or that it was not available to be provided to either the Director or the Tribunal Member making the original decision.
37. Inderjit Aulakh does nothing in this application that advances the merits of the appeal or show there was any mistake in the view of the Tribunal Member in the original decision, that there was “no reasonable prospect” the appeal could succeed.
38. No error in the original decision, or other circumstance that requires intervention, has been shown and I am completely satisfied the original decision was correct.
39. Inderjit Aulakh has failed to meet the time limits for filing a reconsideration application, has failed to show any error in the original decision, and has failed to show a strong *prima facie* case or any other reason for exercising my discretion in favour of reconsideration.
40. This application is denied.

ORDER

41. Pursuant to section 116 of the *ESA*, the original decision, 2020 BCEST 128, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal