

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

Ranjit Dulay

- 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.:** 2021/025

**DATE OF DECISION:** April 07, 2021

## DECISION

### SUBMISSIONS

Robert Doran

counsel for Ranjit Dulay

### OVERVIEW

1. This is an application by Ranjit Dulay for a reconsideration of 2021 BCEST 21 (the "Original Decision"), issued by the Tribunal on February 24, 2021.
2. Mr. Dulay is a director of R D Drywall Ltd. ("the Employer"). On July 19, 2019, a former employee of the Employer filed a complaint with the Employment Standards Branch alleging that the Employer had contravened the *Employment Standards Act* ("ESA") in failing to pay him wages and compensation for length of service, and in making unauthorized deductions from his wages.
3. On August 14, 2020, the Director of Employment Standards (the "Director") issued a determination against the Employer finding that wages and interest in the amount of \$42,447.26 were owed to the employee (the "Corporate Determination"). The Director also imposed \$5,000 in administrative penalties on the Employer for the contraventions of the *ESA*.
4. The Corporate Determination and a Notice to the company's directors and officers outlining their personal liability under the *ESA* were sent to the Employer's registered and records office, and to Mr. Dulay and his wife, Jaspreet Kaur Dulay, who were both directors of the Employer. The statutory appeal deadline for the Corporate Determination was September 21, 2020.
5. Also, on August 14, 2020, the Director sent a letter to Mr. Dulay and Mrs. Dulay as well as the Employer's registered and records office, containing preliminary findings regarding their personal liability for wages. The Director informed Mr. and Mrs. Dulay that because both were directors of the Employer at the time the employee's wages were earned and should have been paid, they were personally liable for wages pursuant to section 96 of the *ESA*. Although the Director invited Mr. Dulay's response to the preliminary findings, Mr. Dulay did not do so.
6. On October 23, 2020, the Director issued a determination against Mr. Dulay finding that he was personally liable in the amount of \$12,393.34 in wages and interest in the amount of \$573.73 (the "Personal Determination"). The Director also found that Mr. Dulay was personally liable to pay administrative penalties in the amount of \$5,000 for contraventions of the *ESA*. The deadline for filing an appeal of the Personal Determination was November 30, 2020.
7. On November 30, 2020, Mr. Dulay filed an appeal alleging that the Director erred in law and that evidence had become available that was not available at the time the Personal Determination was made. He also sought an extension of time in which to file that appeal on the grounds that he required additional time for his bank to produce records of cancelled cheques that had been issued to the employee. On December 31, 2020, Mr. Dulay's accountant, Harvey Sidhu, filed a second appeal form containing additional submissions. The grounds for the second appeal were the same as those identified in the first form. In

those appeal submissions, Mr. Dulay asserted that he was unable to participate in the Director's investigation because he was away from Canada and unable to return due to Covid-19 concerns, that all wages had been paid, the employee had quit working for the Employer and refused to come back to work, and that the employee had threatened Mr. Dulay.

8. The Tribunal Member reviewed the criteria established by the Tribunal in *Niemisto* (BC EST # D099/96) and decided that Mr. Dulay had not provided sufficient reasons to extend the time. The Member found that Mr. Dulay's explanation for seeking an extension of time was not reasonable or credible, noting that the information relating to the alleged payment of wages were relevant only to the Corporate Determination, not to the appeal of the Personal Determination. The Member also found that Mr. Dulay did not have a strong *prima facie* case on appeal. She found that the arguments and evidence Mr. Dulay presented on appeal did not address any of the matters relevant to his personal liability under section 96.
9. Finally, the Member found that although Mr. Dulay had not identified a failure to comply with principles of natural justice as a ground of appeal, he was well aware of the investigation into the employee's complaint and had full opportunity to respond. She noted that the Director's delegate had spoken to Mr. Dulay on August 14, 2020, about the investigation and her preliminary findings about his personal liability for the employee's wages. She also noted that Mr. Dulay was back in Canada by the end of August and could have responded to the delegate at that time. The Member further noted that Mr. Dulay could have responded to the Director's investigation from abroad earlier than his return to Canada.
10. The Member declined to grant Mr. Dulay's application for an extension of time to file the appeal under section 109(1)(b) of the *ESA*.
11. Mr. Dulay filed a reconsideration application on March 26, 2021, seeking to have the Original Decision cancelled and to have "all prior determinations and decisions...set aside."

## ISSUE(S)

12. 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 Original Decision be cancelled or varied or sent back to the Member?

## ARGUMENT AND ANALYSIS

13. The *ESA* confers an express reconsideration power on the Tribunal. Section 116(1) provides that

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

14. 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.”
15. 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.
16. 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)
17. 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.
18. 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.
19. In *Voloroso* (BC EST # RD046/01), the Tribunal emphasized that restraint is necessary in the exercise of the reconsideration power:
- .. the Act creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute...

20. 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 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.
21. I find that Mr. Dulay has not met the threshold test.
22. Although the Tribunal has issued a number of decisions on the test to be applied when considering whether to exercise the reconsideration power, counsel for Mr. Dulay has identified the three statutory grounds of appeal of a Determination as the basis for the reconsideration application. The application does not address any of the factors outlined in Tribunal decisions as grounds for the exercise of the reconsideration power.
23. Counsel’s submissions relate, in large part, on the issue of natural justice; that is, Mr. Dulay was not fully able to participate in the investigation. As the Tribunal has noted on many occasions, the reconsideration process is not an opportunity to re-argue a case that has already been fully considered by the Tribunal. Even though Mr. Dulay did not appeal the Determination on the grounds that the Director failed to observe the principles of natural justice, the Member nevertheless addressed this issue in the Original Decision.
24. There is nothing in the Determination or the submissions in the reconsideration application that address the factors outlined in *Zoltan Kiss, supra*.
25. I am not persuaded, on a review of the record, that the Member misunderstood or overlooked any of the issues on appeal, made a mistake in applying the law, failed to comply with principles of natural justice or that significant evidence has become available that would have led the Member to a different decision.
26. Counsel asserts that a “grave injustice” to the company and to Mr. Dulay “throughout the entirety of the handling of the original complaint...” Counsel asserts that Mr. Dulay was hospitalized from July 14, 2023 (sic) until July 23, 2019, with a recommendation that he refrain from any strenuous activity for six months from that date. I note on this point that the medical advice was that Mr. Dulay not perform any strenuous activities (lifting over 25 pounds) for a six-month period after July 23, 2019. There is nothing in the application to suggest that complying with the Director’s investigation or producing the records sought would be contrary to this advice.
27. Counsel also says that Mr. Dulay was away from Canada from February 20, 2020 until August 27, 2020, and that during that time, he was unable to participate in the complaint process or provide any documentation to the delegate. The record indicates otherwise. As the Member noted in the Original Decision, Mr. Dulay spoke with the delegate on at least one occasion on behalf of the corporate Employer. Mr. Dulay also corresponded with the delegate by email. There is no evidence the information Mr. Dulay provided would have been any different had he been in Canada during the investigation.

28. Furthermore, the records that were requested by the Director were physically located at the Employer's accountant's office in Canada. The delegate informed Mr. Dulay that he would need to instruct his accountant to send the records to her. That did not happen.
29. The delegate provided Mr. Dulay with the complaint as well as her preliminary findings and gave him full opportunity to respond.
30. Counsel makes several arguments relating to the Original Decision, including the "flawed" investigation which led to the Director's finding that Mr. Dulay was a director of the Employer.
31. These issues were considered by the Member on appeal.
32. The delegate issued the Corporate Determination on August 14, 2020. The appeal deadline was September 21, 2020. Mr. Dulay had returned to Canada by that time and the Employer had the opportunity to appeal the Determination within the 30-day appeal period. The Employer did not do so.
33. Counsel argues that even though the delegate gave Mr. Dulay until August 28, 2020, to respond to her preliminary findings, the final determination was "backdated" to August 14, 2020. Counsel also asserts that Mr. Dulay was not given a full 30 days to appeal the Determination. In fact, the Personal Determination was not issued until October 23, 2020, one month after the appeal period for the Corporate Determination had expired. The appeal period for the Personal Determination was November 30, 2020.
34. Once corporate liability has been established, directors cannot, through an appeal of a determination of Director liability, reargue the issue of a company's liability for wages unless they can establish fraud or fresh evidence that is decisive to the merits of the issue. (see *Steinemann*, BC EST # D180/96)
35. Mr. Dulay attempted to do just that through his appeal of the Personal Determination. I find that the Member was correct in deciding that the "new evidence" Mr. Dulay sought to introduce on appeal were not relevant to the appeal of the Personal Determination.
36. In my view, Mr. Dulay's reconsideration request has not raised questions of law, fact, principle or procedure that are so significant that they ought to be reviewed. I decline to exercise the reconsideration power.

## **ORDER**

37. Mr. Dulay's request for reconsideration of the Original Decision is denied.

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