

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

Balwinder S. Hari carrying on business as Golden Drywall Company
("Golden Drywall")

- 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.: 2021/035

DATE OF DECISION: May 13, 2021

DECISION

SUBMISSIONS

Balwinder S. Hari on his own behalf carrying on business as Golden Drywall Company

OVERVIEW

1. Balwinder S. Hari carrying on business as Golden Drywall Company (“Golden Drywall”) seeks reconsideration of a decision of the Tribunal, 2021 BCEST 27 (the “original decision”), dated March 15, 2021.
2. The original decision considered an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 7, 2020 (the “Determination”).
3. The Determination was made by the Director on a complaint filed by a former employee, who had alleged Golden Drywall had contravened the *Employment Standards Act* (the “ESA”) by making by failing to pay wages owed to him for a period covering June and July, 2019.
4. The Determination found Golden Drywall had contravened Part 3, sections 17 and 18 of the *ESA* and ordered Golden Drywall to pay the former employee wages, including interest under section 88 of the *ESA*, statutory holiday pay, and concomitant annual vacation pay in the amount of \$5,465.68 and administrative penalties in the amount of \$1,000.00.
5. An appeal of the Determination was filed by Golden Drywall alleging the Director had failed to observe principles of natural justice in making the Determination and that new evidence was available that was not available when the Determination was being made.
6. The Tribunal Member making the original decision found there was no basis for the natural justice ground of appeal, which alleged unfairness and bias, and that Golden Drywall had not met the conditions for allowing the new evidence to be admitted. The Tribunal Member considered and dismissed the appeal under section 114(1) (f) of the *ESA*, finding there was “no reasonable prospect” the appeal would succeed.
7. The original decision confirmed the Determination.
8. This application seeks to have the original decision reviewed and changed by a reconsideration panel of the Tribunal.

ISSUE(S)

9. 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.

ARGUMENT(S)

10. The submission made by Golden Drywall in support of their application for reconsideration does not substantially differ from the arguments made in the appeal, reasserting the Determination was unfair and biased. Golden Drywall adds that the Tribunal Member in the original decision wrongly ignored the “new evidence” provided with the appeal.
11. Golden Drywall says the original decision should be changed and would like the Tribunal to consider the evidence submitted with the appeal as “new evidence” and make a finding on the complainant’s claim. Golden Drywall says this evidence is better evidence than that provided by the complainant during the complaint process, and the Tribunal should confirm the position Golden Drywall took with the Director in response to the claim that the complainant did not work for Golden Drywall after May 31, 2019 and was owed no wages.
12. The application does not address the reasoning in the original decision in any meaningful way, but merely re-submits the grounds of appeal, which were dismissed in the original decision.

ANALYSIS

13. 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, or*
 - (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.*
14. 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 Valoroso)*, 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.

15. 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 also made of the merits of the original decision. The focus of a reconsideration application is, generally, the correctness of the original decision.
16. 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.
17. 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 application.
18. I find this application does not warrant reconsideration.
19. I view this application as nothing more than an effort by Golden Drywall to have this panel re-visit the appeal and alter the original decision by allowing the “new evidence” presented and varying the Determination to show no wages were owed. Golden Drywall 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.
20. It is not 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.

21. 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. Based on the material before the original panel, I completely endorse the disposition of the grounds of appeal chosen and the arguments advanced in the appeal by Golden Drywall.
22. Having failed to show any error in the original decision, Golden Drywall has failed to show any reason for exercising my discretion in favour of reconsideration.
23. This application is denied.

ORDER

24. Pursuant to section 116 of the *ESA*, the original decision, 2021 BCEST 27, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal