

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

Cheam Tours Ltd. carrying on business as Airport Link Shuttle
("CTL")

- 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: Shafik Bhalloo

FILE No.: 2021/095

DATE OF DECISION: November 19, 2021

DECISION

SUBMISSIONS

Samuel Ferdinandusz on behalf of Cheam Tours Ltd. carrying on business as Airport Link Shuttle

OVERVIEW

1. Pursuant to section 116 of the *Employment Standards Act* (the “ESA”), Cheam Tours Ltd. carrying on business as Airport Link Shuttle (“CTL”) seeks reconsideration of a decision of the Tribunal issued on November 3, 2021 (the “original decision”).
2. The original decision considered an appeal of a Determination issued by the delegate of the Director (the “Director”) on July 7, 2021.
3. The Determination was made by the Director on a complaint filed by Carmen Back (“Ms. Back”), who alleged that CTL owed her regular wages and compensation for length of service. The Determination concluded that CTL was liable to pay to Ms. Back the sum of \$43,265.12 for wages, statutory holiday, annual vacation pay, compensation for length of service, unauthorized deductions and accrued interest. The Determination also levied \$3,000.00 in administrative penalties for violation by CTL of sections, 18, 21, 28, 45, 46 and 58 of the *ESA*.
4. CTL appealed the Determination on all three available grounds of appeal in section 112(1) of the *ESA* alleging that the Director erred in law in making the Determination, that the Director failed to observe the principles of natural justice in making the Determination, and that new evidence has become available that was not available at the time the Determination was being made. CTL sought to have the Determination cancelled.
5. The Tribunal Member making the original decision observed that while CTL did not make any express argument in support of its position that the Director erred in law, CTL was unrepresented by counsel and untrained in law, and therefore, he would be guided by the decision of this Tribunal in *Triple S Transmission Inc.*, BC EST # D141/03, and take a “large and liberal view” of the arguments advanced by CTL and consider whether there is *prima facie* indication of an error of law in the Determination. After reviewing all of the submissions of CTL, the Tribunal Member found there was no basis for the error of law, natural justice or the new evidence grounds of appeal and dismissed the appeal.
6. In the result, the original decision confirmed the Determination.
7. On November 8, 2021, the Tribunal received CTL’s Reconsideration Application Form and written submissions seeking to have the original decision reviewed and varied.

ISSUE

8. 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 vary or cancel the original decision.

SUBMISSIONS OF CTL

9. In support of CTL's reconsideration application, the director of CTL, Samuel Ferdinandusz ("Mr. Ferdinandusz"), submits that:
- a. The original decision is "unsatisfactory".
 - b. As a new director of CTL, when he took over directorship from Mr. Narinder Johal ("Mr. Johal") in October 2019, "it is [his] legal right to implement a corporate restructuring" and chart course in a "new direction" and he should not be held accountable for "past business practice and actions by a former employee- Ms. Back".
 - c. Ms. Back's complaint against CTL is because she is "upset" with Mr. Johal because the latter said he would sell her the business to her but "[w]hen specifics of the transaction did not fair well between them", he sold the business to him and he wanted to restructure the business.
 - d. When Ms. Back knew she was not going to get the business, she "harassed" him and Mr. Johal and made it clear "she would approach matters from every possible angle to ensure she was problematic".
 - e. In the appeal, when he explained that he was a new employer in a new business and not "tech savvy" to be able to have access to information such as scheduling, the delegate of the Director's "response showed more of a concern regarding [his] choice of words and how it reflected poorly on his personal character" when he was "simply stating the facts as known by [him] to be true".
 - f. If Ms. Back was not paid properly while CTL was under Mr. Johal's directorship, why did Ms. Back not raise the matter then? She waited until the directorship of CTL changed into his name because she did it "out of spite due to Mr. Johal making the decision to sell the business" to him.
 - g. He is aware that as a new director, he "takes(s) the responsibility of corporate liabilities" and is willing to "come to a satisfactory resolution" with Ms. Back but she has no interest in communicating with him and has decided to go through "a labour dispute process and tribunal for resolution".
 - h. Ms. Back, initially, said to Mr. Johal she was "willing to 'settle' for a lesser amount" but when he (Mr. Ferdinandusz) challenged Ms. Back's "work ethic and performance" she "became vindictive and stated she will be coming after him "for what's due". In his opinion, this is Ms. Back's "technique to 'squeeze' some extra money out of her employer" after she discovered the business was sold and that "her position was going to be phased out".
 - i. Ms. Back worked 'regular' hours under Mr. Johal, and she was "content" and did not have "any concerns" and was not treated unfairly. Ms. Back is owed some compensation before the ownership in the business changed hands but what is due to her is "far less than what's been determined" in the Determination and confirmed in the original decision.

- j. The reconsideration panel should further investigate both the outcome [in the Determination] and the original decision of the Tribunal Member as he is “eager to move forth with [his] business and put this matter and past employee issues behind [him]”.

ANALYSIS

10. Section 116 of the *ESA* delineates the Tribunal’s statutory authority to reconsider any order or decision of the Tribunal:

Reconsideration of orders and decisions

- 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.

11. Reconsideration is not an automatic right of any party who is dissatisfied with an order or a decision of the Tribunal. That said, reconsideration is within the sole discretion of the Tribunal, and the Tribunal must be very cautious and mindful of the objects of the *ESA* in exercising its discretion. (See *Re: Ekman Land Surveying Ltd.*, BC EST # RD413/02).

12. In *Director of Employment Standards (Re Giovanni (John) Valoroso and Carmen Valoroso)*, BC EST # RD046/01, the Tribunal explained the reasons why it should exercise reconsideration power with 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.

13. In *Re: British Columbia (Director of Employment Standards) (sub nom) Milan Holdings Ltd.*, BC EST # D313/98, the Tribunal delineated a two-stage approach for the exercise of its reconsideration power under section 116. In the first stage, the Tribunal must decide whether the matters raised in the application warrant reconsideration. In determining this question, the Tribunal will consider a non-exhaustive list of factors that include:
- (i) whether the reconsideration application was filed in a timely fashion;
 - (ii) whether the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already provided to the adjudicator;
 - (iii) whether the application arises out of a preliminary ruling made in the course of an appeal;
 - (iv) 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;
 - (v) whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. If the applicant satisfies the requirements in the first stage, then the Tribunal will proceed to the second stage of the inquiry, which focuses on the merits of the original decision.
14. Having delineated the parameters governing reconsideration applications, both statutory and in the Tribunal's own decisions, I am of the view that CTL's application does not warrant the exercise of the Tribunal's discretion in favour of a reconsideration of the original decision. I find that CTL's application fails to meet the requirements in the first stage of the analysis in *Milan Holdings Ltd., supra*. More particularly, CTL has failed to make out an arguable case of sufficient merit to warrant a reconsideration; it has not raised any important questions of law, fact, principle or procedure of importance to the parties and/or their implications for future cases. It has not shown any error in the original decision or presented other circumstances that requires this panel to intervene.
15. I find that CTL's application is nothing short of a transparent attempt to have this panel re-visit the appeal and vary the original decision. In the circumstances, this panel will not exercise its discretion in favour of reconsideration. CTL's application is denied.

ORDER

16. Pursuant to section 116 of the *ESA*, the original decision, 2021 BCEST 86, is confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal