

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

Joseph Theriault  
("Mr. Theriault")

- 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.:** 2022/001

**DATE OF DECISION:** January 31, 2022

## DECISION

### SUBMISSIONS

Joseph Theriault on his own behalf

### OVERVIEW

1. Joseph Theriault (“Mr. Theriault”) seeks reconsideration of a decision of the Tribunal, 2021 BCEST 106 (the “Original Decision”), dated December 23, 2021.
2. The Original Decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director’s delegate”) on August 23, 2021.
3. The Determination was made by the Director’s delegate on a complaint filed by Mr. Theriault, who alleged Harcharan Sekhon (“Mr. Sekhon”) had contravened the *Employment Standards Act* (the “ESA”) by failing to pay regular and overtime wages owed to him for a period from August 6, 2019 to November 20, 2019 and by making unauthorized deductions.
4. The Director’s delegate found Mr. Theriault was not an employee under the *ESA* and, exercising the authority granted in section 76 of the *ESA*, decided not to proceed with his complaint.
5. An appeal of the Determination was filed by Mr. Theriault alleging the Director’s delegate had erred in law and 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 dismissed the appeal and confirmed the Determination.
7. This application seeks to have the Original Decision reviewed and changed by a reconsideration panel of the Tribunal.

### 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 cancel or vary the Original Decision.

### ARGUMENTS

9. Mr. Theriault lists four bases upon which this application for reconsideration is grounded:
  - 1) New evidence that was not accepted by the Director’s delegate conducting the complaint investigation;
  - 2) That the Determination contradicts federal legislation;

- 3) That the Original Decision contradicts federal legislation; and
  - 4) The Tribunal Member deciding the Original Decision did not have sufficient experience to make a correct decision.
10. The application also contains a threat to “expose” a multitude of persons directly or indirectly associated with Mr. Theriault’s complaint and to commence legal action in the Federal Court of Canada.
11. The “new evidence” is identified as:
- correspondence and documents relating to a claim by Mr. Theriault for employment insurance benefits; and
  - correspondence between a representative from WorkSafeBC and the Employment Standards Branch (the “Branch”), dated August 5, 2021, between WorkSafeBC and Mr. Theriault, dated August 17, 2021, September 8, 2021, and October 22, 2021, and between various persons within the Branch and Mr. Theriault between August 6, 2021 and September 2, 2021.
12. Much of the latter “new” evidence was referred to in Mr. Theriault’s appeal, and discussed by the Tribunal Member making the Original Decision. While few documents within this group were included with the appeal, the Tribunal Member making the Original Decision questioned how any of the documents that were provided, or the general assertions and allegations made relating to communications with WorkSafeBC, advanced Mr. Theriault’s appeal, finding the material and submissions Mr. Theriault had provided were not shown by him to be either relevant or probative.
13. The argument that the Director’s delegate and the Tribunal Member making the Original Decision contradicted federal legislation re-iterates an assertion made to the Director’s delegate – that his status as an employee of Mr. Sekhon had been decided in the context of a claim for employment insurance benefits – and the submission made by Mr. Theriault in the appeal, that neither the Director nor the Director’s delegate had “authority or jurisdiction to oppose/defy/contradict the Employment Insurance decision that declared me employee [sic] of the Sekhon’s”.
14. Several aspects of the arguments made by Mr. Theriault in this application also contain allegations made, and addressed, in the Original Decision, including a failure to investigate; continued allegations of bias against the Director’s delegate; and accusations of improper outside influence in the Determination.
15. The arguments made in this application do not address the reasoning in the Original Decision in any meaningful way, but merely restate the same points that were made in the appeal submission and which were considered by the Tribunal Member making the Original Decision in dismissing the appeal.

## ANALYSIS

16. 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 an 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.*

17. 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.

18. 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. 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.

19. 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.

(*Zoltan T. Kiss*, BC EST #D122/96)

20. 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.
21. I find this application does not warrant reconsideration.
22. I view this application as nothing more than an effort by Mr. Theriault to have this panel re-visit the appeal and alter the Original Decision to find he was an employee of Mr. Sekhon under the *ESA*. I find the Original Decision, and the Determination, to be consistent with the legal approach the Tribunal has mandated under the *ESA* for determining employee status. There is nothing in this application that advances the merits of the appeal or shows there was any mistake by the Tribunal Member in the Original Decision.
23. 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.
24. 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 Mr. Theriault. The argument that the Tribunal Member making the Original Decision was not sufficiently experienced to correctly decide the appeal is both offensive and baseless.
25. I will underscore one aspect of Mr. Theriault's position that has been raised at every level of the proceedings under the *ESA* initiated by his complaint, which is whether the Director's delegate and the Tribunal Member making the Original Decision committed an error of law in deciding, and confirming, that Mr. Theriault was not an employee for the purposes of the *ESA*. This position relates to what Mr. Theriault says was a decision by Services Canada to allow his application for employment insurance benefits based on what he said was employment with Mr. Sekhon.
26. I will make two points. First, the Tribunal Member making the Original Decision, responding to this part of the appeal, stated: "The Appellant [Mr. Theriault] has not provided any documents, either to the Delegate or to this Tribunal, relating to any claims in other forums." That is an accurate statement of what was presented in the appeal to support this argument.
27. Second, even if Mr. Theriault had provided documents to the Director's delegate, showing a claim for employment insurance benefits based on his representation to Services Canada that he was an employee of Mr. Sekhon, that would not decide the matter for the purposes of a claim under the *ESA*. It is well established that the context of employment standards legislation is distinguishable from other legislative contexts with respect to the issue of employee status; terms such as "employee" and "employer" must be decided in their statutory context, even though the result may lead to different conclusions as to the

nature of the relationship for the purpose of different statutory regimes. In *Beach Place Ventures Ltd. and Black Top Cabs Ltd.*, 2019 BCEST 61 (judicial review dismissed, 2021 BCSC 1463), a reconsideration panel of the Tribunal made the following statement, at para. 57:

. . . in our view, it is clear that the Tax Court judge and the Delegate each looked at the evidence before them through the lens of the particular statutory regime in which the issue of employment relationship arose before each of them. They then each came to a conclusion with respect to whether there was an employment relationship for the purpose of the particular legislative context in which each was deciding that issue. The fact that a different conclusion was reached does not mean that either was wrong as far as each decision goes (that is, in its particular statutory context). As the Supreme Court of Canada noted in *McCormick v. Fasken Martineau Dumoulin LLP*, 2014 SCC 39 (“*McCormick*”), an individual may be an “employee” in one statutory context but not in another.

28. The Director’s delegate was quite correct when he advised Mr. Theriault that the Branch would conduct its own investigation on his status under the *ESA* and the Tribunal Member making the Original Decision was also quite correct to question the relevance of his claim for employment insurance benefits on his claim for wages under the *ESA*.
29. Mr. Theriault’s effort to introduce correspondence and documents relating to his claim for employment insurance benefits, even if allowed in this application for reconsideration, is entirely unhelpful to the question of whether he was an employee of Mr. Sekhon for the purposes of a claim under the *ESA*.
30. Having failed to show any error in the Original Decision, Mr. Theriault has failed to show any reason for exercising my discretion in favour of reconsideration.
31. This application is denied.

## **ORDER**

32. Pursuant to section 116 of the *ESA*, the original decision 2021 BCEST 106, is confirmed.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**