

EMPLOYMENT STANDARDS TRIBUNAL

An Application for Reconsideration

- by -

Rong Lu  
("Ms. Lu")

- 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.:** 2022/093

**DATE OF DECISION:** March 10, 2022

## DECISION

### SUBMISSIONS

Rong Lu on her own behalf

### OVERVIEW

1. Pursuant to section 116 of the *Employment Standards Act* (the “ESA”), Rong Lu (“Ms. Lu”) seeks reconsideration of Tribunal decision 2022 BCEST 10 issued on January 27, 2022 (the “original decision”).
2. The original decision considered an appeal of a determination issued by Abraham An, delegate (the “Delegate”) of the Director of Employment Standards (the “Director”), on September 17, 2021 (the “Determination”).
3. The Determination was made by the Director on a complaint filed by Ms. Lu, a supervisor and barista, employed with Caspersnoopy Enterprises Ltd. and Shanshan Café Enterprises Ltd. carrying on business as La Cuisson Café (the “Employer”), from October 10, 2017, that the Employer owed her regular wages, annual vacation pay, statutory holiday pay and compensation for length of service (the “Complaint”). The Delegate investigated the Complaint and determined that the Complaint was not made within the time limit specified in section 74 of the *ESA* and declined to proceed with the Complaint pursuant to section 76 of the *ESA*.
4. Ms. Lu appealed the Determination pursuant to section 112(1)(b) of the *ESA* on the sole ground that the Director failed to observe the principles of natural justice in making the Determination.
5. On January 27, 2022, Tribunal Member Jenny Ho (the “Tribunal Member”) denied Ms. Lu’s appeal on the basis that it lacked any merit and there was no prospect it would succeed.
6. While Ms. Lu’s appeal was based solely on the natural justice ground of appeal, the Tribunal Member also considered the error of law ground. The Tribunal Member noted that the onus is on Ms. Lu to establish if the Director erred in law or failed to observe principles of natural justice in making the Determination.
7. With respect to the error of law ground of appeal, the Tribunal Member found nothing in the appeal submissions, or the section 112(5) record (the “record”), that would support a finding that the Director erred in law.
8. With respect to the natural justice ground of appeal, the Tribunal Member notes that Ms. Lu questioned why it took over a year since she filed the Complaint for the Delegate to contact her. Ms. Lu also disputed and challenged the Delegate’s exercise of his discretionary power to refuse to investigate the Complaint under section 76(3) of the *ESA*. With respect to the latter, the Tribunal Member pointed out that the Tribunal has demonstrated considerable reluctance to interfere with the exercise of discretion by the Director, only doing so in exceptional and very limited circumstances. Referring to the Tribunal’s decision in *Inderpal Singh*, 2021 BCEST 94, the Tribunal Member noted that the threshold for interfering with discretionary decision of the Director is very high and the Tribunal will not overturn discretionary decisions unless:
  - (a) the exercise of discretion was in bad faith or an abuse of power;
  - (b) the delegate erred in interpreting the limits of their discretionary authority;

- (c) there was a procedural error in the delegate’s exercise of discretion; or
- (d) the discretionary decision was “unreasonable,” in the sense that it was based on irrelevant considerations, or the delegate failed to consider relevant factors or exercised their discretion arbitrarily.

See *Li Zheng; Mark Bridge*, BC EST # RD044/09; *Joda M. Takarabe et al.*, BC EST #D160/98

9. In this case, the Tribunal Member did not find Ms. Lu to have established any of the bases in *Inderpal Singh* above for overturning the Director’s discretionary decision. The Tribunal Member also did not find Ms. Lu to have discharged the onus on her to provide some evidence in support of her allegation that the Director breached the principles of natural justice.

10. In concluding that the Delegate considered factors that were relevant to the questions being considered – namely, if the Complaint was filed outside the time limit and, if so, whether he should exercise his discretion to refuse to investigate it under section 76(3) of the *ESA* – and made the Determination within the legal framework of the *ESA*, the Tribunal Member observed:

... the Delegate considered the following:

- a) one of the purposes of the *ESA* is to provide fair and efficient procedures for resolving disputes and that purpose is met by requiring timely filing of complaints;
- b) section 76(3) of the *ESA* confers the Delegate the discretion to refuse to investigate an untimely complaint unless there are compelling reason[s] to explain why the complaint was filed late;
- c) Ms. Lu relied on the information provided by her friends, that “she could file an ESB complaint anytime”;
- d) it was Ms. Lu’s obligation to clarify the requirements of the *ESA*. The information could be obtained either by calling the Branch’s information line or looking on the Branch’s website; and
- e) although Ms. Lu’s complaint was not filed substantially late (i.e. less than one month), there was no compelling reason to continue the investigation.

11. Accordingly, the Tribunal Member refused to interfere with the Delegate’s decision not to exercise his discretion in favour of investigating the Complaint on its merits.

12. The Tribunal Member next considered Ms. Lu’s contention that the Director did not investigate the Complaint for more than a year after she had filed the Complaint. The Tribunal Member observed that the record showed that Ms. Lu filed the Complaint on October 27, 2020, and that the Delegate contacted her by telephone and e-mail on September 10, 2021, some ten and a half (10.5) months later. In refusing to cancel the Determination because of this delay, the Tribunal Member noted that the Tribunal has refused to cancel determinations where there were far greater delays but not serious prejudice (*Ecco Il Pane Bakery Inc.* BC EST # D396/00; *Re Tung* BC EST #D028/01; *Blencoe v. British Columbia (Human Rights Commission)* 2000 SCC 44). In this case, the Tribunal Member found Ms. Lu did not provide any evidence that showed that the delay of ten and a half (10.5) months showed serious prejudice to the complaint investigation process or to her.

13. The Tribunal Member also noted *other* arguments Ms. Lu advanced against the Employer in the appeal that were not raised before the Director in her Complaint including that the employer mistreated their employees by: asking them to work without pay, failing to pay them vacation pay, failing to pay them statutory holiday pay, failing to pay them overtime pay, failing to give them Record of Employment letters in a timely fashion, charging them to prepare a ROE letter, failing to give them their T4 slips and erring in the amount of amount of withholding submitted to Canada Revenue Agency.
14. The Tribunal Member also noted that Ms. Lu submitted copies of her paystubs for several years - 2017, 2018 and 2020 – and parts of her work schedule previously not submitted with her Complaint. While the Tribunal Member does not expressly say so, it appears she did not consider Ms. Lu’s other arguments and any of the documents previously not submitted with the Complaint.
15. The Tribunal Member also notes that Ms. Lu, in her written appeal submissions, apologizes for her lack of legal knowledge and failure to file the Complaint in a timely fashion and requests that her situation be considered by the Director in deciding whether to exercise the discretion to investigate her late filed Complaint.
16. In dismissing Ms. Lu’s appeal and confirming the Director’s Determination, the Tribunal Member states:
- While Ms. Lu’s claims may have been meritorious, and I make no finding in that regard, she was also required to provide a compelling basis for her request to the Director to investigate her late-filed complaint. After considering her reasons for filing late, the Delegate was not persuaded this was an appropriate case to investigate. I have reviewed the submissions before the Director and the Tribunal, and I am not persuaded the Delegate erred or breached procedural fairness in the exercise of his discretion.

## 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 vary or cancel the original decision.

## SUBMISSIONS

18. In support of her reconsideration application, Ms. Lu submits that she does not agree with the Determination because “there are some key elements in [her] case that needed [sic] to be clarified and reconsidered”. I have carefully reviewed all of Ms. Lu’s submissions and the crux of her argument does not concern any misstep by the Tribunal Member in the original decision. Instead, Ms. Lu’s submissions focus on when the 6 months’ time limit to file the Complaint began. More particularly, she questions how the Director decided “when is the 6 months time limit to deliver the complaint”. She states that her last day at work with Employer was March 21, 2020, when the Employer told her that due to Covid 19 its business was poor, and she would not be scheduled for work in the subsequent week but would be called back to work if the business gets better.
19. She states the Employer should have issued her ROE by March 26, 2020, but the Employer did not. She states that the Employer charges \$50 for issuing the ROE and because she did not make the payment, the

Employer did not issue her the ROE. She also says she could not find her ROE when looking at her CRA account because the Employer did not submit the ROE.

20. She also says, based on her understanding of the information on the CRA website, the Employer, in her case, failed to do what it was required to do when laying off an employee. That is, she says, the Employer did not pay her final wages nor issue her the ROE. The Employer also did not give her “a period of working notice”. Therefore, she questions: “how to judge my employment has terminated?”. She contends that, in the circumstances, “[t]he employee-employer relationship between me and [the Employer] is deemed to exist.”
21. She also adds that under the *ESA*, the employer-employee relationship is deemed to exist where “the employee retains the right to be recalled to work.” Since the Employer told her “to come back to work if the business was getting better”, she was not terminated from her employment or laid off but only temporarily laid off.
22. She questions how the Delegate could have made the decision that her last day of work was March 26, 2020, when she told him that her last day of work was March 21, 2020. She says that in the ROE the Employer showed her (but did not give her) the last day she was paid shows “null” (presumably she means “nil”) and the final pay period ending date is March 26, 2020. It appears that Ms. Lu is trying to suggest why the Delegate may have thought her last day of employment was March 26, 2020.
23. She also submits a document from CRA entitled “List of all slips for tax year 2020” that shows 2020 T4 Statements of remuneration paid to her by Caspersnoopy Enterprises Ltd. and Shanshan Café Enterprises Ltd. She points out that box 57 in both T4 slips shows some employment income for the period March 15 to May 9. She contends that this means she still had “employment income” from the Employer. In the circumstances, she questions how the Director could have concluded that her last day of employment with the Employer was March 26, 2020, if she is shown in the T4 slips as receiving employment income in the period March 15 to May 9.
24. She then says that “[a]ctually, at that period, I already got temporary laid off [sic] and I didn’t receive any employment income from [the Employer].” She says that the Employer “made fake information to CRA” to apply for Covid benefits from the government and she understands from her coworkers that “[the Employer] did the same things to them”. She states the income showing in Box 57 of the T4 slips is “Covid benefit from Government” (which she did not receive).
25. She concludes her submissions suggesting that the Director erred in deciding when the 6 months time limit to deliver the Complaint started; that her employment was not terminated by the Employer; and she was only temporarily laid off. She asks the Tribunal to “reconsider [her] complaint and do the investigat[ion]”.

## ANALYSIS

26. 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.

27. A review of the decisions of the Tribunal reveals certain broad principles applicable to reconsideration applications have consistently been applied. The following principles bear on the analysis and result of this reconsideration application.

28. 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).

29. *In Director of Employment Standards (Re Giovanni (John) 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.

30. In *Re: British Columbia (Director of Employment Standards) (sub nom) Milan Holdings Ltd.*, BC EST # D313/98, 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.
31. Having delineated the parameters governing reconsideration applications, both statutory and in the Tribunal's own decisions, I find Ms. Lu's application does not warrant the exercise of the Tribunal's discretion in favour of a reconsideration of the original decision.
32. Ms. Lu's application fails to meet the requirements in the first stage of the analysis in *Milan Holdings Ltd., supra*. The application fails to make out an arguable case of sufficient merit to warrant a reconsideration; it does not raise any important questions of law, fact, principle, or procedure of importance to the parties and/or their implications for future cases. It also does not show *any* error in the original decision, or present other circumstances that requires this panel to intervene.
33. The reconsideration application raises a completely new argument that was not raised by Ms. Lu in her appeal, that is, that her employment was not terminated or that she was on "lay-off" after March 21, 2020. The Tribunal discourages new arguments being raised for the first time on reconsideration. More particularly, the Tribunal's reconsideration power under section 116 of the *ESA* is not intended to allow a party to augment submissions made on appeal nor to advance new arguments which could have been made to the original panel on appeal. This view is consistent with section 2(d) of the *ESA* which states that one of the purposes of the *ESA* is to provide fair and efficient procedures for resolving disputes and with section 110 of the *ESA* which emphasizes the notion of finality to Tribunal decisions (see *Director of Employment Standards (Re)*, 2003 CanLII 89344 (BC EST)).
34. While I need not consider Ms. Lu's new argument for the reasons set out above, I note that her argument is devoid of any merit. In her Complaint form, Ms. Lu states that her last day worked is March 21, 2020, and she is seeking wages including *compensation for length of service*. A claim for compensation for length of service presupposes termination of employment without cause under the *ESA*. She is contending she was but laid off temporarily by the Employer after her last day of work on March 21, 2020, because the Employer said to her that she would return to work if business improved. She seems to conflate this with

the language in s. 1 (e) of the *ESA* that provides that an “employee” includes “a person who has a right to recall”. Section 1(e) does not apply in the circumstances of this case. It is referring to a person who has recall rights under a collective agreement. Such a person remains an employee until those rights expire or are terminated by the employee. Ms. Lu was not an employee with recall rights under a collective agreement.

35. Also, Ms. Lu contends that the T4 slips (see paragraph 23 above) show, in box 57, that she had employment income during March 15 to May 9, 2020, with the employer. In the circumstances, she argues how could the Director “think that [her] last day is March 26, 2020?” Clearly, Ms. Lu is attempting to extend her period of employment or the termination date of her employment so as to extend the deadline for her to file her Complaint. However, she admits she was never paid by the Employer after her last day of employment on March 21, 2020, and the income showing in box 57 of the two T4 slips is only “fake information to CRA” from the Employer because the latter “appl[ied] [for] the Covid benefit from the government”. In the circumstances, it would be stretching credulity to believe that Ms. Lu was not aware that her employment was not terminated after her last day of employment, on March 21, 2020, as recorded in the ROE, or, at the latest, March 26, 2020, the end of her last pay period and the date by which she should have received all her wages but did not.

36. I also note, as an aside, that while Ms. Lu is contending that she was only laid off temporarily from work, there is no evidence of any written contract of employment between Ms. Lu and the Employer that allows the Employer to temporarily layoff Ms. Lu.

37. I find that Ms. Lu 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 decision in favour of reconsideration.

38. Ms. Lu’s reconsideration application is denied.

### **ORDER**

39. Pursuant to section 116 of the *ESA*, the original decision, 2022 BCEST 10, is confirmed.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**