

EMPLOYMENT STANDARDS TRIBUNAL

An application for reconsideration
pursuant to section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113 (as amended)

- by -

Cheam Taxi Ltd.

- of a Decision issued by -

The Employment Standards Tribunal

PANEL: Carol L. Roberts

FILE No.: 2022/128

DATE OF DECISION: July 27, 2022

DECISION

SUBMISSIONS

Dustin G. Ellis

counsel for Cheam Taxi Ltd.

OVERVIEW

1. This is an application by Cheam Taxi Ltd. (“Cheam”) for a reconsideration of 2022 BCEST 32 (the “Original Decision”), issued by the Employment Standards Tribunal (the “Tribunal”) on June 14, 2022.
2. On February 24, 2020, a former employee of Cheam filed a complaint with the Employment Standards Branch alleging that Cheam had contravened the *Employment Standards Act* (“ESA”). Following an investigation, the Director of Employment Standards (the “Director”) issued a determination finding that Cheam had contravened sections 40, 45 and 63 of the *ESA* and ordering Cheam to pay the employee \$2,194.11 in outstanding wages (the “Determination”). The Director also imposed four \$500.00 administrative penalties for Cheam’s contraventions of the *ESA* and section 46 of the *Employment Standards Regulation*.
3. Cheam appealed the Director’s Determination on all three statutory grounds of appeal. In the Original Decision, Tribunal Member Kenneth Wm. Thornicroft (the “Tribunal Member”) found that the appeal had no prospect of succeeding, and dismissed the appeal under section 114(1)(f) of the *ESA*.

BACKGROUND

4. In his complaint form, the former employee claimed that he worked for Cheam as both a dispatcher and a taxi driver and that he was entitled to wages. The Director’s delegate (the “delegate”) found that the complaint was filed within the statutory six-month limitation period and dismissed Cheam’s argument that, while working as a taxi driver, the employee was an independent contractor. The delegate further determined that the employee was not entitled to overtime pay with respect to his work as a taxi driver but was entitled to some overtime pay for his work as a dispatcher. The delegate decided that the employee was owed an amount for statutory holiday pay. The delegate determined that the employee’s claim for unlawful wage deduction had not been proven. Finally, the delegate found that the employee was entitled to compensation for length of service. The delegate imposed monetary penalties on Cheam based on her findings that Cheam had not paid the employee earned overtime pay, statutory holiday pay and compensation for length of service. The delegate also imposed a monetary penalty for Cheam’s failure to comply with a demand for production of certain employment records.
5. Cheam’s Appeal Form indicated that it was appealing the Determination on all three statutory grounds of appeal – that is, that the Director erred in law, failed to observe the principles of natural justice in making the Determination, and that evidence had become available that was not available when the Determination was being made. Cheam did not attach any reasons or arguments in support of any of the grounds of appeal. The Appeal Form, which was prepared by Cheam’s legal counsel, indicated that Cheam would provide the reasons for appealing the Determination by April 7, 2022. On April 7, 2022, Cheam’s counsel contacted the Tribunal to advise that he would not likely submit those reasons by the end of the

day. On April 8, 2022, counsel submitted a 121-page document which consisted largely of various internal records. It did not include any submissions supporting any of the asserted grounds of appeal. Counsel indicated that full submissions would be filed no later than 4:30 p.m. on April 11, 2022. Counsel filed the submissions on April 14, 2022. The Tribunal Member found that those submissions did not set out with any degree of clarity the specific arguments Cheam advanced under each ground of appeal and attempted, on his own initiative, to extract what appeared to be the relevant arguments.

6. The Tribunal Member summarized those arguments as follows:
 - The delegate erred in law in determining that the employee was an employee rather than an independent contractor;
 - The delegate erred in law in determining that the employee was terminated from his employment. The Tribunal Member noted that counsel asserted that the employee was not permitted to return to work following a motor vehicle accident that resulted in his medical leave because it was concerned about his health and wellbeing as well as “public safety;”
 - The delegate erred in law by finding that the complaint was not time-barred;
 - The delegate failed to observe the principles of natural justice in failing to consider information that it had provided after the delegate had given a deadline for providing further information during the course of the investigation;
 - The delegate failed to notify Cheam that she was considering an award for compensation for length of service since it had never been informed that the employee had advanced such a claim;
 - The delegate’s reasons did not meet the “transparent, intelligible and justified” standard;
 - The submissions contained numerous documents that Cheam contended met the test for new evidence, including payroll statements. The Tribunal Member found that most of the documents ought to have been delivered to the Director in accordance with the section 85 demand for employment records, a demand that Cheam essentially ignored.
7. The Tribunal Member found that the new evidence did not meet the Tribunal’s test for new evidence. Referring to the Tribunal’s decision in *Davies et al. (Merilus Technologies Inc.)* BC EST # D171/03, the Tribunal Member found that Cheam did not address the criteria outlined in *Davies et al.*, nor did it specifically identify what “new evidence” it wished to appeal. The Tribunal Member found that all the documents were available during the investigation and could have been submitted to the delegate. The Tribunal Member noted that Cheam neither complied with the Director’s demand for records nor provided a response to a preliminary investigation report in a timely manner even after being invited to do so. The Tribunal Member also noted that Cheam did not identify how the documents were relevant to the issues raised in the appeal and determined that the new documents were not admissible on appeal.
8. The Tribunal Member found the delegate properly instructed herself to the legal principles governing the test of whether the employee was an independent contractor or employee and that her conclusion was “entirely reasonable” in light of the evidence and applicable statutory provisions.

9. The Tribunal Member further found that the delegate properly considered the employee's claim for compensation for length of service in light of the employee's complaint that he was improperly terminated. The Tribunal Member also noted that although Cheam was invited to respond directly to the complaint during the investigation, it never did so until after it filed the appeal. The Tribunal Member decided that there was no credible evidence that Cheam had just cause for dismissal or that the employee abandoned his employment.
10. The Tribunal Member found that the delegate's reasons for concluding that the complaint was not filed out of time were sound and that there was no credible evidence that the employee's employment was terminated after he ceased working as a dispatcher.
11. The Tribunal Member was not persuaded that the Director failed to comply with the principles of natural justice or with section 77 of the *ESA* which imposes a duty on the Director to make reasonable efforts to give a person under investigation an opportunity to respond. The Tribunal Member found that Cheam knew, or ought to have known, that the employee was seeking compensation arising from his dismissal since he was effectively constructively dismissed. The Tribunal Member noted that the issue was raised both in the original complaint as well as in the Director's investigation report which was provided to Cheam. The Tribunal Member also noted that the employee's claims for overtime and statutory holiday pay were specifically set out in the complaint and that Cheam was invited to respond to them prior to the Determination being issued.
12. The Tribunal Member also found the delegate's reasons were entirely transparent, intelligible, and properly justified in light of the evidence before her.

ARGUMENTS

13. Cheam's submissions are, in essence, a restatement of the grounds of appeal. Cheam submits that the Tribunal Member failed to address a number of arguments advanced on appeal. Specifically, Cheam says that:
 - the Determination failed to consider the "lack of evidence and falls short"; and
 - the delegate applied "circular logic" and failed to consider the issue of whether the employee was an independent contractor or an employee in relation to the facts.

ISSUES

14. The two issues on this reconsideration application are:
 1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?
 2. If so, should the decision be cancelled or varied or sent back to the Tribunal Member?

ANALYSIS

15. The *ESA* confers an express reconsideration power on the Tribunal. Section 116 of the *ESA* provides:
- (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.

The Threshold Test

16. 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 section 2(d) of the *ESA*: “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act.”
17. In *Milan Holdings Inc.* (BC EST #D313/98), the Tribunal established 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.
18. 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 T. Kiss*, BC EST #D122/96)
19. 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.

Has Cheam met the first stage of the Milan reconsideration test?

20. I am not persuaded that the issues raised in the application are an appropriate case for the exercise of the reconsideration power. The application does not raise any significant questions of law, facts, principle or procedure that have significant implications for future cases. Rather, the application suggests that the Tribunal Member failed to address certain arguments it advanced on appeal.
21. In my view, the application is an attempt to re-argue points raised, and addressed, in the appeal. Although all three grounds of appeal were checked off on the Appeal Form submitted by Cheam, I agree with the Tribunal Member that Cheam's appeal submissions did not support the specific statutory grounds of appeal. The Tribunal Member addressed the arguments as he understood them. I am not persuaded that the Tribunal Member misunderstood or overlooked the arguments advanced by counsel for Cheam or that his analysis was incorrect.
22. The reconsideration power is not meant to afford an appellant the opportunity to re-state or reargue matters that may not have been properly articulated at first instance, particularly where a party is represented by counsel.
23. The issues of whether the employee was in fact an employee or an independent contractor were addressed by the Director's delegate at first instance, and confirmed in the Original Decision. Similarly, the issue of whether or not the "new evidence" met the Tribunal's test for new evidence was fully and properly addressed in the Original Decision.
24. The application also does not address any of the factors outlined in *Zoltan T. Kiss*.
25. I find that Cheam has not met the threshold test.

ORDER

26. The request for reconsideration is denied. Pursuant to section 116(1)(b) of the *ESA*, I confirm the Original Decision.

Carol L. Roberts
Member
Employment Standards Tribunal