

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

Adilis Josefina Gonzalez Marroquin,
Gilberta Elizabeth Cuc Buch, Irma de Jesus Morales Anavisca,
Jeidy Azucena Beltran Varela, Milvian Alejandrina Quintanila-Damian,
Mirna Noelia Castillo Moran, Norma Cutzal-Cate, Sara Marinela Callejas-Quexel
(collectively, the “Individual Applicants”)

- of a Decision issued by -

The Employment Standards Tribunal

PANEL: Jennifer Glougie

FILE NO.: 2022/117 – 2022/124

DATE OF DECISION: August 25, 2022

DECISION

SUBMISSIONS

Raul Gatica	on behalf of Dignidad Migrante Society (“Dignidad”) representing the Individual Applicants
Suzan El-Khatib	counsel for GERI Partnership, comprised of the partners Francesco Aquilini, Paolo Aquilini, Roberto Aquilini, CPI-Cranberry Plantation Incorporated, Global Coin Corporation, and Lewis and Harris Trust Management Ltd., carrying on business as Golden Eagle Farms
Jordan Hogeweide	delegate of the Director of Employment Standards

OVERVIEW

1. The Individual Applicants apply under section 116 of the *Employment Standards Act* (the “*ESA*”) for reconsideration of Tribunal Decision Number 2022 BCEST 28 (the “2022 Appeal Decision”) issued by Member Kenneth Wm. Thornicroft (the “Member”) on May 25, 2022.
2. The 2022 Appeal Decision dismisses the Applicants’ appeal of a determination made by a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) on December 24, 2021 (the “2021 Determination”). The Member dismissed the appeal because he found the Individual Applicants had no standing to bring it (2022 Appeal Decision, para. 45).
3. Much of the background to this dispute is set out in the 2022 Appeal Decision and in 2020 BCEST 90 (the “2020 Appeal Decision”). The 2020 Appeal Decision concerned a determination made against an entity identified as “GERI Partnership”, which consisted of the following individuals and corporations: Francesco Aquilini, Paolo Aquilini, Roberto Aquilini, CPI-Cranberry Plantation Incorporated, Global Coin Corporation, Lewis and Harris Trust Management Ltd., and Geri Partnership carrying on business as Golden Eagle Blueberry Farms (collectively, the “Employer”) (the “2019 Determination”).
4. The 2019 Determination was issued after Dignidad filed a complaint against the Employer on behalf of 12 of the Employer’s employees and the BC Federation of Labour filed a similar complaint on behalf of an additional 170 employees (2020 Appeal Decision, para. 7). The delegate undertook an investigation which resulted in the 2019 Determination that establishes the *ESA* entitlements for a total of 185 of the Employer’s employees.
5. Dignidad appealed (the “2020 Appeal”) the 2019 Determination on behalf of 52 of the 185 affected employees (the “Appellants”).
6. In the 2020 Appeal Decision, the Tribunal found that, in making the 2019 Determination, the delegate failed to observe the principles of natural justice. It referred the matter back to the Director under section 115(1)(b) of the *ESA* (2020 Appeal Decision, para. 230). While it did not limit the scope of the referral back

to just the Appellants, it directed that the Director’s review should “at a minimum” consider the rights and entitlements of those individuals (2020 Appeal Decision, para. 230). Otherwise, for the 133 individuals on whose behalf no appeal was filed, it confirmed the entitlements as they were set out in the 2019 Determination (2020 Appeal Decision, para. 228).

7. None of the Individual Applicants were Appellants for the purposes of the 2020 Appeal: three of the Applicants were not identified as employees in the 2019 Determination at all (the Group 3 individuals, 2022 Appeal Decision, para. 2) and ten were included in the 2019 Determination but did not appeal that determination with Dignidad’s assistance or otherwise (Group 2 individuals, *ibid.*).
8. Before the Delegate, Dignidad argued the referral back should include a consideration of the *ESA* entitlements of a broader group of employees – including the Individual Applicants - and not just the Appellants. Specifically, Dignidad argued that the Individual Applicants’ *ESA* entitlements should be considered as part of that process.
9. The Delegate disagreed, finding that only the Appellants had outstanding issues to be addressed as part of the referral back. As a result, the Determination establishes *ESA* entitlements for the Appellants, but the orders and entitlements set out in the 2019 Determination (and confirmed in the 2020 Appeal Decision) bind the rest of the employees, including the Individual Applicants.
10. The Individual Applicants appealed the Delegate’s decision, both with respect to the merits of the Determination and the decision to limit the scope of the referral back to only the Appellants. The Member dismissed the Individual Applicants’ appeal on the basis they lacked standing to bring it (2022 Appeal Decision, para. 45).
11. The Member acknowledged that the referral back order in the 2020 Appeal Decision did not strictly limit the Director’s new investigation or hearing to a consideration of the Appellants’ entitlements. However, he notes that he did not direct that a new investigation or hearing consider the *ESA* entitlements of other non-Appellant employees (2022 Appeal Decision, para. 34). The Member found that the Delegate considered whether to expand the scope of the Determination beyond the Appellants and concluded otherwise.
12. The Member noted that three of the Individual Applicants (the Group 3 employees) never filed a complaint against the Employer at all (2022 Appeal Decision, para. 44). None of the rest (the Group 2 employees) either appealed the 2019 Determination or sought an extension of time to do so (2022 Appeal Decision, para. 43).
13. As a result, the Member concluded that none of the Individual Applicants had standing to appeal the Determination and that it would be an abuse of process for the Tribunal to adjudicate their appeals in the circumstances (Appeal Decision, para. 45).

ISSUES

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

ARGUMENTS

15. While the Individual Applicants take issue, both on appeal and on reconsideration, with the Delegate's decision to limit the scope of the Determination in a way that excluded them, the focus of their argument is on the merits of the Determination. In their view, the Determination is inconsistent with the spirit of, and findings made in the 2020 Appeal Decision. They say this is evidence of bias on the Delegate's part.
16. In terms of the 2022 Appeal Decision, they reiterate the argument they made before the Member that "those workers [that] were part of the whole determination in 2019" should be entitled to appeal it, especially "considering the part of the EST mentioned that the benefits won't be limited just to the 52".
17. The Individual Applicants say the words "at minimum" in the 2020 Appeal Decision must mean something; in this case, they say, those words mean the Delegate was required to consider *ESA* entitlements for a broader range of employees than just the Appellants. The Individual Applicants say the Delegate's conclusion to the contrary was both wrong and unfair.

ANALYSIS

18. The Tribunal has the authority, under section 116 of the *ESA*, to reconsider any order or decision of the Tribunal. There is no right to reconsideration; 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 deciding whether to exercise its discretion: *Re: Eckman Land Surveying Ltd.*, BC EST #RD413/02.
19. The Tribunal takes a two-step approach in considering whether to exercise its reconsideration powers. The first step is to consider whether the matters raised in the application warrant reconsideration. As part of this analysis, the Tribunal will consider, among other things, whether the application has raised questions of law, fact, principle, or procedure which are so significant that they should be reviewed: *Milan Holdings inc.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97).
20. In the present case, I am not satisfied that the Individual Applicants have established an arguable case of sufficient merit to warrant reconsideration. The Individual Applicants primarily take issue with the merits of the Delegate's decision, but also with the Member's finding that they have no standing to appeal it.
21. On appeal of the 2021 Determination, the Member found it was open to the Delegate to limit the scope of the referral back. While the Member acknowledged that the referral back order did not confine the Director to considering the *ESA* entitlements for only the 52 Appellants, the 2020 Appeal Decision left it open to the Director to decide whether to expand the scope of its determination under the referral back.

22. The Member found that the Delegate heard from, but disagreed with, Dignidad as to why the referral back should include a consideration of the Individual Applicants' *ESA* entitlements. The Delegate found that none of the Individual Applicants' *ESA* entitlements were affected by the 2020 Appeal Decision. As a result, the Delegate found the Individual Applicants did not have a live issue in dispute such that their *ESA* entitlements were properly within the scope of the referral back. The Member found no basis on which to interfere with the Delegate's decision in this regard.
23. I am not persuaded that the Member erred when he agreed with the Delegate that the Individual Applicants' *ESA* entitlements were established in the 2019 Determination and that they, therefore, did not have a right to appeal the 2021 Determination. I find that, on reconsideration, the Individual Applicants are raising the same argument before me that they made before the Member, and that the Member rejected.
24. There is no dispute that the Individual Applicants were either not identified as employees for the purpose of the 2019 Determination (the Group 3 individuals) or were identified as employees but did not appeal that decision (the Group 2 individuals). Either way, none of the Individual Applicants appealed the 2019 Determination. I am not persuaded the Member erred when he concluded that it was open to the Delegate to limit the scope of the referral back to only the named Appellants. As a result, I am not persuaded that the Member erred in rejecting Dignidad's appeal of the 2021 Determination on the basis the Individual Applicants have no standing to bring it.
25. In the circumstances, I find no basis on which to interfere with the Member's finding that it would be an abuse of the Tribunal's processes to consider the merits of the Group 2 and Group individuals' appeals.

ORDER

26. The requests for reconsideration are denied. Pursuant to section 116(1)(b) of the *ESA*, I confirm the 2022 Appeal Decision.

Jennifer Glougie
Chair
Employment Standards Tribunal