

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 -

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Teresa Garcia-Pinzon, Wendy Roxana Lorenzana-Salazar, Yeison Mersai de
Paz, Delmy Alejandra Alonzo-Moreno,
Milton Erasmio Giron Godoy

(collectively, the “Individual Applicants”)

- of a Decision issued by -

The Employment Standards Tribunal

PANEL: Jennifer Glougie

FILE NOS.: 2022/132 - 2022/171

DATE OF DECISION: September 13, 2022

DECISION

SUBMISSIONS

Raul Gatica on behalf of Dignidad Migrante Society (“Dignidad”) representing the Individual Applicants

OVERVIEW

1. The Individual Applicants apply under section 116 of the *Employment Standards Act* (the “*ESA*”) for reconsideration of Tribunal Decision Number 2022 BCEST 44 (the “2022 Appeal Decision”) issued by Member Kenneth Wm. Thornicroft (the “Member”) on July 7, 2022.
2. The Individual Applicants appealed a determination made by a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) on December 24, 2021 (the “2021 Determination”). The Tribunal received the appeal, which included submissions on the merits as well as a request to extend the appeal period.
3. The 2022 Appeal Decision refuses the Individual Applicants’ request to extend the appeal period. It does so in part because the appeal had no reasonable prospect of succeeding on the merits in any event (2022 Appeal Decision, para. 70).
4. Much of the background to this dispute is set out in a series of Tribunal decisions including: 2020 BCEST 90 (the “2020 Appeal Decision”), 2022 BCEST 28, 2022 BCEST 54, and the 2022 Appeal Decision.
5. Briefly, in 2019, a delegate of the Director made a determination with respect to the employees of 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”).
6. The 2019 Determination established the *ESA* entitlements for 185 employees of the Employer. Of those, 52 appealed the 2019 Determination, which resulted in the 2020 Appeal Decision. The 2020 Appeal Decision refers certain matters back to the Director. The 2020 Appeal Decision notes that Dignidad originally filed its complaint on behalf of 12 individuals. The Tribunal specified in the referral back order that the Director was not to limit the scope of the referral back to only the 12 employees Dignidad represented in the original complaint. Rather, the Tribunal ordered that the Director consider “at a minimum” the “rights and entitlements under the *ESA* of the 52 employees represented by Dignidad” on appeal (2022 Appeal Decision, para. 17).
7. Not all of the entitlements established in the 2019 Determination were referred back to the Director as part of the referral back order. Those matters which were not referred back were confirmed as a result of the 2020 Appeal Decision and that decision constitutes a final order with respect to them (2022 Appeal Decision, para. 17).

8. The 2021 Determination concerns the matters referred back to the Director. The Delegate investigated only those issues that, in his view, were referred back under the terms of the referral back order for the 52 appellants who were subject to the 2020 Appeal Decision. In his view, only those 52 appellants had live issues that could properly be revisited under the referral back order. He found the specific issues referred back were: possible compensation for retaliation (section 83); minimum weekly pay; unauthorized deductions (section 21); and overtime pay (section 40) (2022 Appeal Decision, para. 25). He also considered the section 8 issue identified in the 2020 Appeal Decision. The Delegate found there to have been no breach of any of those provisions.
9. The Delegate initially made a determination on December 7, 2021, but he cancelled it a week later because it contained certain errors in how the wages were calculated (2022 Appeal Decision, para. 19). He reissued the 2021 Determination on December 24, 2021, after hearing from the parties as to how that calculation should be made. He then made a further amendment to the 2021 Determination in February 2022 to correct the spelling of some of the Individual Applicants' names (2022 Appeal Decision, para. 4).
10. The Individual Applicants appealed the 2021 Determination outside of the appeal period, alleging the Delegate erred in law and failed to observe the principles of natural justice. They also said they had new evidence that was not previously available to them (2022 Appeal Decision, para. 8). Finally, they alleged the Delegate was biased and acting on behalf of the Employer throughout the referral back process (2022 Appeal Decision, para. 69). They asked the Tribunal to extend the time period to bring their appeal.
11. The Member considered the Individual Applicants' appeal on the merits and found that several other arguments raised on appeal were not properly before him because they were outside the scope of the referral back order. These include new arguments raised before the Delegate for the first time as part of the "referral back" (2022 Appeal Decision, para. 63) and arguments made in an attempt to reargue issues that had been confirmed in the 2020 Appeal Decision (2022 Appeal Decision, paras. 61, 66). He found the Delegate did not err in refusing to hear those issues (2022 Appeal Decision, para. 38). He further found the new evidence on which the Individual Applicants sought to rely would only be relevant to a determination of issues beyond the scope of the referral back order and found, therefore, it did not meet the Tribunal's test in *Davies et al.*, BC EST #D171/03 (2022 Appeal Decision, para. 60).
12. With respect to the issues that were properly advanced on appeal, the Member considered the Delegate's reasoning and found the Individual Applicants failed to establish there was any basis on which to interfere with the 2021 Determination (2022 Appeal Decision paras. 62, 68). The Member found their assertion that the Delegate was "biased" to be "wholly untenable" and "entirely uncorroborated by any probative evidence" (2022 Appeal Decision, para. 69). He also found that:

... [d]uring the referral back process, Dignidad advanced several unfounded and inappropriate allegations regarding the integrity and competence of the [Delegate]. These allegations constitute nothing more than discreditable *ad hominem* attacks against the [Delegate]. It appears that Dignidad's "bias" allegation largely flows from the fact that the [Delegate] did not accept several of Dignidad's submissions about the proper scope of the referral back investigation. My review of the correspondence between the [Delegate] and Dignidad's representative (included in the section 112(5) record) leads me to conclude that much of the latter's frequently expressed frustration with the [Delegate] appears to have been based on his wholly erroneous view regarding the scope of my referral back order.

13. The Member found that the Individual Applicants' case for extending the appeal period was not particularly compelling on its own and, in light of the lack of merit to the appeals, refused the application to extend the appeal period (2022 Appeal Decision, para. 70).

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. The Individual Applicants continue to rely on a number of arguments they made before the Member on appeal. They say that the referral back order required the Director to consider "at a minimum" the *ESA* entitlements of the 52 appellant employees. They say the Delegate erred in restricting his investigation to only those 52 employees and none of the others affected by the 2019 Determination. They also say that the Delegate erred by not addressing the issues they identified as part of the referral back process, regardless of whether they were addressed in the 2019 Determination and 2020 Appeal Decision. They acknowledge that they did not apply for reconsideration of the 2020 Appeal Decision but say it is unfair to prevent them from challenging those findings now; they say their proof of abuse should outweigh any procedural irregularities.

ANALYSIS

16. 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.
17. 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).
18. In considering whether the Applicants have raised an arguable case of sufficient merit, I have taken into account that neither the Individual Applicants nor their representative has legal training. As such, I have considered the grounds for reconsideration in a large and liberal manner. I nonetheless find they do not establish an arguable case of sufficient merit to warrant reconsideration.
19. With respect to Dignidad's argument that the Delegate erred in limiting the scope of the referral back investigation to only the 52 appellants, the 2022 Appeal Decision notes that issue was decided in 2022 BCEST 28 (and was subsequently upheld on reconsideration in 2022 BCEST 54). I agree with the Member that that issue was not properly before him in the present appeal.

20. With respect to their submissions on the remaining issues, I am not persuaded that the Individual Applicants have raised significant questions of law that should be reviewed because of their importance to the parties or their implications for future cases. Rather, I find the Individual Applicants are simply attempting to re-argue their case in the hope of achieving a more favourable result.
21. I find, as the Member did, that much of the Individual Applicants' dissatisfaction with the Determination – and the 2022 Appeal Decision upholding it - is based on their misunderstanding about the scope of the referral back order. The referral back order was not an invitation to the Director to reopen the investigation into the Employer; rather, it was a direction to consider only those issues the Tribunal determined had not been properly decided in the 2019 Determination.
22. The Member found no error with how the Delegate interpreted the scope of his inquiry under the referral back order, and I find the Individual Applicants have not raised an arguable case that the Member erred in that regard. Neither the Delegate nor the Member accepted that the words “at a minimum” in the referral back order gave the Delegate *carte blanche* to consider issues that were not specifically referred back. As the Member explained, the Individual Applicants' recourse to challenge how those matters were decided was through an application for reconsideration. Having failed to do so, the Individual Applicants cannot now attack the findings made in the 2020 Appeal Decision through a challenge to the referral back order.
23. I am similarly not persuaded that the Individual Applicants have established an arguable case of sufficient merit that the Member erred in upholding the Delegate's conclusions about the entitlements that were properly within the scope of the referral back order. The Member considered the Delegate's reasoning in that regard and found no basis on which to interfere. While the Individual Applicants continue to take issue with the Member's conclusions, I find their arguments are an attempt to reargue their case and do not establish a proper basis for reconsideration.
24. The Individual Applicants continue to allege bias on the part of the Delegate – and now also the Member. As was the case on appeal, the bias allegations appear to flow from the fact that neither the Delegate nor the Member were persuaded by their submissions. I find the *ad hominem* attacks on both the Delegate and the Member are entirely without merit and do not establish a basis on which to reconsider the 2022 Appeal Decision.
25. In light of the above, I find the Member did not err in finding that the Individual Applicants' appeal lacked merit and had no reasonable prospect of success. As such, I find no basis on which to interfere with his refusal to extend the appeal period.

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