Employment Standards **TRIBUNAL**

Citation: The Dayton Boots Company Ltd. and Eric Hutchingame (Re)
2022 BCEST 69

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 -

The Dayton Boots Company Ltd. and Eric Hutchingame

\- of a Decision issued by -

The Employment Standards Tribunal

PANEL: Carol L. Roberts
Robert E. Groves
Kenneth Wm. Thornicroft

FILE NOS.: 2022/111 & 2022/112

DATE OF DECISION: November 1, 2022

DECISION

SUBMISSIONS

Nazeer T. Mitha, KC and Graeme A. Hooper	counsel for The Dayton Boots Company Ltd. and Eric Hutchingame
Tara MacCarron	delegate of the Director of Employment Standards

OVERVIEW

1. The Dayton Boots Company Ltd. ("Dayton Boots") and Eric Hutchingame ("Hutchingame"), jointly referred to as the "Applicants", have applied under section 116 of the *Employment Standards Act* (the "*ESA*") for reconsideration of 2022 BCEST 23, an appeal decision issued by the Employment Standards Tribunal (the "Tribunal") on April 8, 2022, (the "Appeal Decision"). The Appeal Decision dismissed all but one aspect of the Applicants' separate appeals of two determinations (collectively, the "determinations") issued by a delegate of the Director of Employment Standards (the "Delegate") on September 10, 2021. One determination, (the "Corporate Determination") was issued against Dayton Boots, and the second (the "Section 96 Determination") was issued against Hutchingame under section 96 of the *ESA*.

BACKGROUND

2. Hutchingame is the sole director of Dayton Boots, a shoe factory and store in Vancouver.

3. On October 2, 2020, two individuals filed confidential complaints under section 74 of the *ESA*, alleging Dayton Boots was deducting 50% of its employees' wages each pay period and "re-paying" these wages to the employees in the form of Dayton Boots store gift cards.

4. On January 20, 2021, the Delegate sent Dayton Boots a Notice of Investigation and Demand for Employer Records under section 76(2) of the *ESA.*

5. During the Delegate's investigation, Dayton Boots provided employment records which included wage statements for all employees for the period January 10 to December 26, 2020. Starting in June 2020, the wage statements showed a deduction being made from some employees' gross wages. These deductions were first labeled "other deduction", then "Dayton Card", and finally, "Dayton Gift Card". The deductions amounted to "either exactly half or all of the employees' wages" (Corporate Determination, p. D4).

6. On September 10, 2021, the Delegate issued both the Corporate Determination and the Section 96 Determination. The Delegate also issued separate "Reasons for the Determination", which were appended to each determination.

7. In the Corporate Determination, the Delegate stated that Hutchingame initially "explained Dayton Boots' employees are required to wear the store's products when at work, so Dayton Boots developed a way for the Employer to pay for the cost of the employees' clothing by incorporating it into their pay structure" (Corporate Determination, p. D3). The Delegate noted that, in a follow-up conversation, Dayton Boots

claimed their employees had agreed verbally to be paid a weekly salary of $600 plus a merchandise credit of $600 weekly (Corporate Determination, p. D3).

8. The Delegate noted in the Corporate Determination that section 20 of the *ESA* requires that all wages be paid in Canadian currency, and section 21 prohibits an employer from withholding or deducting all or part of an employee's wages. The Corporate Determination states that "[a]fter being educated about sections 20 and 21 of the Act, Dayton Boots claimed the deductions made from employees' wages for the gift cards was just a big misunderstanding and accounting error" (Corporate Determination, p. D3).

9. The Corporate Determination summarized Dayton Boots' explanation for the "payroll errors", and noted Dayton Boots' submission that it would be "unfair for Dayton Boots to have to pay all employees a straight 40 hours per week, unless that was in fact how many hours they worked'' but that Dayton Boots "did not keep records of the hours worked by employees and, accordingly, they had no way to verify how many hours employees actually did work" (Corporate Determination, p. D3).

10. The Delegate noted that Dayton Boots provided a written response to the complaints on July 22, 2021, submitted the wage statements of all employees on August 6, 2021, and was then provided with the Delegate's preliminary calculations of how much each employee was owed based on the deductions from their wages shown in the wage statements Dayton Boots had submitted (p. D4). The Delegate noted that after being provided with the preliminary calculations, Dayton Boots argued again that the gift cards "were never meant to be wages", and the "employees were never intended to receive the gross amount" shown as their salary on their wage statements (Corporate Determination, p. D4).

11. The Delegate found, however, that based on Dayton Boots' payroll records, "half or all" of employees' wages in a pay period were consistently deducted, without lawful written authorization, and then "paid back" in the form of a gift card, contrary to section 20 of the *ESA* (Corporate Determination, p. D5). The Delegate, noting that the "minimum rights provided under the Act cannot be waived", held that "regardless of whether employees knowingly, unknowingly, verbally or in writing consented to having their wages paid in Dayton Boots store gift card, this is not permitted under the Act" (Corporate Determination, p. D5), since wages must be paid only in a form permitted by section 20 of the *ESA*.

12. With respect to Dayton Boots' argument that in some cases, even without taking into account the value of the gift cards, it was still paying its employees minimum wage, the Delegate held that "Dayton Boots did not provide any employment agreements showing the employees' [sic] agreed to be paid minimum wage; rather, the only indication as to the employees' wage rate is that which is documented on their wage statements" (Corporate Determination, p. D5). The Delegate further noted the gift cards were listed as a deduction from wages, not a bonus, on the wages statements, and found this to be a breach of section 21 of the *ESA*, which states that "an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose".

13. The Delegate found that because the gift card amounts were "consistently being deducted, without authorization, from employees' wages each pay period, these unauthorized deductions are deemed outstanding wages" and as such "under the Act, they remain owing" (Corporate Determination, p. D5).

14. The Delegate also found that Dayton Boots breached section 17 of the *ESA* because "all wages earned in a pay period were not consistently paid to its employees" within the required time, and section 28, which

requires employers to keep payroll records, including the number of daily hours worked by employees (Corporate Determination, p. D6).

15. In the result, the Delegate determined that Dayton Boots contravened sections 17, 20, 21, and 28 of the *ESA* in respect of the employment of 71 employees, and ordered Dayton Boots to pay wages in the total amount of $610,417.68 including interest, and a further $2,000 in administrative penalties for the contraventions.

16. The Section 96 Determination found that Hutchingame, as the sole director of Dayton Boots at the time the wages were owed and should have been paid, was personally liable under section 96 of the *ESA* for up to two months wages for each of the employees, an amount totalling $545,688.86, plus interest in the amount of $10,349.59.

17. Dayton Boots and Hutchingame filed identical appeals of the determinations. Since both appeals raised all three statutory grounds of appeal and contained identical submissions, the Tribunal Member adjudicating both appeals issued a single decision (namely, the Appeal Decision issued on April 8, 2022).

18. In the Appeal Decision, the Tribunal Member dismissed the Applicants' argument that the Delegate failed to observe the principles of natural justice by conducting a deficient investigation, failing or refusing to consider all relevant evidence, thwarting Dayton Boots' efforts to obtain relevant evidence, and failing to maintain records necessary for the appeals. The Tribunal Member held that the Applicants were properly notified about the nature of the complaints and the subsequent wider investigation, and had opportunities during the more than seven-month long investigation to provide their response to matters arising during that period. The Tribunal Member concluded that the Applicants were afforded the opportunity to meaningfully respond, and that both the statutory requirements regarding the opportunity to respond (section 77) and the general common law principles of natural justice had been satisfied.

19. Addressing the Applicants' arguments that the Delegate's investigation was deficient, the Tribunal Member found that this allegation was "nothing more than an expression of disagreement with the result of the Director's investigation and analysis", adding:

> …it is worth repeating that the findings of the Director on the character of the Dayton gift card and the calculation of wages owing were made on information provided by Dayton Boots. While Dayton Boots and Mr. Hutchingame have attempted to distance themselves from the payroll records provided to the Director by them – arguing the wage statements were simply part of a misunderstanding and were issued by mistake – those wage statements were the product of the statutory obligation found in Section 28 of the *ESA*. While it is apparent on their face there was a failure to keep an accurate record of the Employees' wage rate or to record hours worked by each Employee for each day, that does not mean the Director may not rely on them in other respects. Dayton Boots and Mr. Hutchingame cannot resile from every element of the information that is contained in the payroll records provided, particularly where that information does indicate adherence to the statutory requirements listed in section 28.
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> Dayton Boots and Mr. Hutchingame have presented nothing that shows the information which was contained in the payroll records could not be taken at face value. There was a reference to an August 3, 2021 e-mail from Matthew Preston to Mr. Hutchingame which Dayton Boots said was confirmation "he did not do anything" for Dayton Boots and accordingly no wages were

> owed. I agree completely with the Director's response, dated August 23, 2021, that "if Dayton Boots claims he performed no work and, therefore, is not entitled to any wages, can you please explain why there are 2 wage statements created for Mr. Preston showing the payment of wages (and corresponding deductions of wages)?" That does not show an error or deficiency in the investigation, but a choice to accept objective evidence over other, less believable, information. (para. 77 and 78)

20. The Tribunal Member concluded that the Delegate had not erred in law in finding "that half or all of the employees' wages in a pay period were consistently deducted, without authorization, and then 'paid back' in another form other than Canadian currency" (para. 94). The Tribunal Member further held there was sufficient evidence allowing the Delegate to find the gift cards were paid as "wages", as defined in the *ESA*:

> The conclusion that the gift cards were a "wage" paid in another form other than Canadian currency is one the Director was entitled to make based on the evidence which was initially provided by Mr. Hutchingame in a telephone conversation with the Delegate on January 20, 2021, where he said the gift cards were developed as way for Dayton Boots to pay for the cost of the Employees' clothing by incorporating it into their pay structure, and then in his February 2, 2021 e-mail, which tied the payment of the "merchandise credit" to what would otherwise have been a "performance payment", described as, "production bonuses to factory staff and commission sales to store staff".
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> …
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> The amounts that include the gift cards are consistently shown in the wage statements provided by Dayton Boots as "salary" or "commission". There is no disagreement from Dayton Boots and Mr. Hutchingame that the amounts shown under those designations on the wage statement did include the Dayton gift card amounts.
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> There are frequent references by Dayton Boots to paying Employees' "wages", "commissions" and "salary", which is by definition paid for "work". It beggars belief and defies logic to suggest the amounts paid under the headings of "salary" and "commission" on the wage statements – which included the amounts which were deducted and repaid as Dayton gift cards – was not payment for "work".
>
> Based on the evidence, I find the Director committed no error of law in accepting the amounts paid to Employees as "salary" and "commission" included amounts which were to be deducted and paid out as Dayton gift cards and those amounts quite comfortably fit the definition of "wages" under the *ESA*.
>
> It also bears noting that the definition of "wages" is inclusive. Clearly the Dayton gift cards were not within those matters that are excluded from "wages" as defined. As well, while it may be trite, the Director, in issuing the Determinations, had to apply relevant provisions of the *ESA*. The fact the Dayton gift cards might be characterized as a taxable benefit under the federal *Income Tax Act* is irrelevant when determining if they constitute "wages" as defined in the *ESA*.
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> …
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> If it is not obvious, I re-state that the finding by the Director of the amounts paid in Dayton gift cards as "wages" was based on justifiable findings and conclusions of fact made by the Director,

adequately supported by the evidence, and was not a matter that depended on deciding the correct interpretation of the definition of “wages” in the *ESA*.

(Appeal Decision, paras. 95, 98-101, & 108)

21. The Applicants also contended that evidence had become available that was not available at the time the determinations were being made, submitting affidavits from Hutchingame and Dayton Boots’ current bookkeeper. However, the Tribunal Member found the appeal submissions did not specifically identify the specific evidence that was being submitted under this ground of appeal. The Tribunal Member noted that the appeal submissions contained assertions of fact that were not established as facts in the Corporate Determination, that the affidavits submitted as “new evidence” did not identify what material or information was being tendered under this ground of appeal, and that they did not address the criteria governing the admission of “new evidence” as set out in the Tribunal’s decisions. In particular, the Tribunal Member determined that the affidavits did not satisfy the conditions for the admission of “new evidence” as set out in *Davies and others (Merilus Technologies Inc.),* BC EST # 171/03 (“*Merilus*”). In short, the evidence tendered was not “new” evidence, nor was it credible or probative.

22. The Tribunal Member found one argument the Applicants advanced on appeal had presumptive merit: that the Delegate erred in including in the calculation of wages owing amounts for employees whose addresses indicated they resided outside of the Province (“out-of-Province Employees”).

23. In the result, the Tribunal Member confirmed the determinations under section 115 of the *ESA* with the amount owing to out-of-Province Employees to be determined following submissions from the parties.

24. The Tribunal Member received submissions from the parties and in 2022 BCEST 29 (the “out-of-Province Employees Decision”), the Tribunal cancelled the finding that wages were owed under the *ESA* to the out-of-Province employees. In 2022 BCEST 45 (the “Recalculation Decision”), the Tribunal Member confirmed the recalculations of the Director “to show the amount of wages owed by The Dayton Boots Company Ltd. to be $484,995.33 and the amount of wages owed by Eric Hutchingame to be $446,472.40, together with whatever interest has accrued on those amounts under section 88 of the ESA” (para. 8). No application for reconsideration was filed with respect to the out-of-Province Decision or the Recalculation Decision.

RECONSIDERATION SUBMISSIONS

25. The Applicants seek reconsideration of the Appeal Decision principally on the basis of “new evidence”, copies of which are attached to their application. The Applicants submit the attachments show that 36 of the 71 individuals who were awarded wages under the determinations were “Brand Ambassadors”, and not employees of Dayton Boots. The Applicants say that Dayton Boots “assumed that all Brand Ambassadors were employees” (para. 5), and this assumption explains why Dayton Boots disclosed payroll records, including wage statements, for the Brand Ambassadors to the Delegate. However, the Applicants now say, and submit new evidence which they say has now become available, that in fact the Brand Ambassadors performed no work for Dayton Boots, and therefore they were not Dayton Boots employees.

26. With respect to how the new evidence came into existence and into their possession, the Applicants say that on December 7, 2021, after the appeal submissions before the Tribunal Member had been completed

(but before the Appeal Decision was issued on April 8, 2022), the Canada Revenue Agency ("CRA") informed them that it had received a request for a determination from 19 individuals regarding whether the work they did for Dayton Boots was pensionable employment under *the Canada Pension Plan* (CPP), or insurable employment under the *Employment Insurance Act* (EI). The Applicants say that on February 22, 2022, CRA issued a determination (the "CRA Determination") with respect to 10 of the 19 individuals, finding that none of them was an employee of Dayton Boots in 2020, as none had done any work for Dayton Boots during 2020.

27. The Applicants list the names of the 10 individuals named in the CRA Determination, and say CRA has sought further information from Dayton Boots regarding the remaining nine individuals. The Applicants say that some of the 19 individuals also informed Dayton Boots by email, after the Corporate Determination and the Section 96 Determination were issued, that they had performed no work for Dayton Boots in 2020. The Applicants also say they have issued corrected T4 wage statements for some employees, which CRA has accepted, because the prior T4s relied on the same mistaken payroll records which the Delegate relied on when issuing the determinations.

28. The Applicants say that a reconsideration can be based on "new evidence", and they submit the new information they have provided meets the Tribunal's criteria for admitting new evidence. They say the information could not have been discovered prior to the determinations being made, is relevant to a material issue, is credible in the sense that it is reasonably capable of belief, and has high probative value – all relevant considerations as set out in *Merilus.*

29. The Applicants note the determinations were issued on September 10, 2021. With respect to the appeal process before the Tribunal, the Applicants say their deadline for providing submissions and supporting documents was October 4, 2021, and most of the new evidence was not available at that time. They submit that while some of the evidence "could have been produced had the matter proceeded to a hearing", because the Tribunal Member dismissed the appeal without conducting an oral hearing, they had no such opportunity. Accordingly, the Applicants submit the first criterion under *Merilus* is met.

30. The Applicants submit the new evidence demonstrates that "many" of the 71 individuals for whom they provided employment records to the Delegate "were not in fact employees because they did no work during the applicable period", and further "shows that the records relied on by the Delegate were unreliable indicators of the actual amounts paid in any event" (para. 39). They submit the new evidence is credible as it "comes from parties or entities that have no interests aligned" with them, including the CRA (para. 40). Finally, they submit the new evidence has high probative value because it "shows that the Brand Ambassadors did no work", and accordingly were not entitled to wages (para. 41). They further submit the new evidence raises a "jurisdictional" issue about the application of the *ESA* to the Brand Ambassadors since, if they were not employees – an issue not considered by the Delegate or the Tribunal Member – the Delegate had no authority under the *ESA* to issue the determinations. Accordingly, the Applicants submit the new evidence should be admitted.

31. The Applicants submit that another reason the new evidence should be admitted is because it shows Dayton Boots and certain of the individuals are facing "competing determinations from the Employment Standards Branch and the CRA with respect to whether those respondents are employees", and the Tribunal should therefore reconsider the "jurisdictional" issue of whether the Brand Ambassadors are "employees" within the meaning of the *ESA* (para. 46).

32. The Applicants submit that when the new evidence is considered, it shows the determinations must be set aside as they concern wages awarded to some of the Brand Ambassadors, because "the new evidence shows that the Brand Ambassadors did no work in exchange for the gift cards, and therefore were not employees under the Act" (para. 48). The Applicants, while acknowledging the new evidence only relates to some of the Brand Ambassadors, nonetheless submits it is "the best evidence regarding employment status for all Brand Ambassadors" (para. 48).

33. The Applicants submit that the "overriding" test for whether an individual is an employee under the *ESA* is whether they performed work. If no work was performed, and the individual is therefore not an employee, then the payment in gift cards would not be "wages" within the meaning of the *ESA*. The Applicants submit that wages are "amounts owed to an employee for work performed" relying on the definition of "wages" in the *ESA* (para. 51).

34. The Applicants submit that there was no evidence before the Delegate regarding what, if any, work the Brand Ambassadors performed, and the only evidence the Delegate relied on was "the fact that the paystubs used the labels 'commission' or 'salary' for certain payments" (para. 52). They submit the CRA has now determined "that every Brand Ambassador it audited performed no work". They submit that while "the CRA applies definitions for employment status under federal statutes, the common theme to those definitions and the definition under the Act is that an employee performs work for the employer" (para. 52). They submit "the CRA Determination is now directly at odds with the Determination, which assumes, without evidence, the opposite" (i.e., that the Brand Ambassadors performed work and were employees of Dayton Boots) (para. 52).

35. The Applicants further submit that they explained, both to the Delegate during the investigation and to the Tribunal Member during the appeal process, that the "paystubs" (presumably, the wage statements) they provided showed "deductions" not because the amounts were deducted from wages, but because they believed non-cash taxable benefits (the gift cards) "are required to be included when calculating source deductions" (para. 56). The Applicants submits that neither the Delegate nor the Tribunal Member addressed this "Source Deduction Issue" or its explanation regarding the information on the wage statements they provided to the Delegate. They say the Tribunal should now do so on reconsideration.

36. The Applicants submit the Source Deduction Issue "goes to the core of the calculation of wages owing not just for the Brand Ambassadors, but all alleged employees" (para. 60). They say they explained to the Delegate and presented affidavit evidence on appeal to the effect that the "deductions" were shown as such on the wage statements "as a matter of recommended payroll practices" (para. 61). They say that while the Tribunal Member declined to consider this evidence, "the argument remained: the gift cards were not being deducted from wages; they were only notionally being included in 'wages' to calculate source deductions and then deducted to avoid double payment" (para. 61).

37. The Applicants further submit the new evidence "establishes that regardless of whether payments were labeled as being for work, work was not being carried out" (para. 63). They say Dayton Boots "was issuing paystubs not because work was being done, but because of a mistaken belief that Brand Ambassadors were employees and that source deductions needed to be made on all taxable benefits, such as gift cards" (para. 63).

38. The Applicants submit the new evidence also shows that some individuals were awarded substantially more than they say they received in gift cards, and that this is a further reason to set aside the determinations and remit the matter "back to the Director to investigate the actual amount worked, if any, by all employees to determine the amount owed" (para. 67).

39. The Applicants submit the Delegate and the Tribunal Member were "understandably perplexed as to why the paystubs were structured the way they were if no work was taking place" (para. 69). They submit the "explanation lies in the Appellants' mistaken assumption that all the respondents were employees combined with the requirement to calculate source deductions on wages and other non-cash taxable benefits, such as gift cards (para. 69). They submit the determinations award "wages in amounts that are contradicted by other evidence, to individuals who in many cases appear to not even be employees" (para. 70). They submit the determinations should either simply be cancelled, or alternatively cancelled and the matter remitted back to the Director to "investigate the status of the Brand Ambassadors and the number of hours worked by all respondents and report back to the Tribunal" (para. 71).

40. In response to the application for reconsideration, the Delegate notes that the new evidence the Applicants seek to rely on includes the CRA Determination and ongoing CRA investigation, amended T4s, and emailed statements from six [sic] Brand Ambassadors.

41. With respect to the CRA Determination, the Delegate submits the objectives and purposes of the federal *Income Tax Act*, the *Employment Insurance Act* and the *Canada Pension Plan* are different from that of the *ESA*, and the question of whether a person is an "employee" within the meaning of those legislative enactments is not determinative of whether they are an employee within the meaning of the *ESA*: *Robert Cornelius* 2021 BCEST 74. The Delegate argues the new evidence is therefore not directly relevant to the issue before the Tribunal.

42. The Delegate further submits that "the evidence provided throughout the original investigation did in fact point to the effected [*sic*] individuals being employees". The Delegate adds that during the investigation the Applicants did not take the position that the Brand Ambassadors were not employees or did not perform work; it was only after the CRA audit that the Applicant has created this new argument. The Delegate submits the alleged new evidence "does not warrant a new investigation" and submits the Applicants have failed to show that new significant and pertinent evidence has come to light warranting the Tribunal reopening the matter. Accordingly, the Delegate submits the application for reconsideration should be dismissed.

43. The Tribunal received a submission from an individual respondent but has not considered that submission as it is not relevant to the issues on reconsideration.

44. In reply to the Delegate's submission, the Applicants submit the submission does not address the Source Deduction Issue, or suggest the Brand Ambassadors are subject to the *ESA*. The Applicants agree the CRA Determination is not binding on the Tribunal, or determinative of whether the Brand Ambassadors are employees under the *ESA*, but they submit it is "persuasive evidence that an examination of employment status, which did not take place, should have taken place" (para. 9).

ISSUES

45. The two issues before the Panel 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 or Director?

ANALYSIS

46. The *ESA* confers an express reconsideration power on the Tribunal. Section 116(1) provides:

> 116 (1) On application under subsection (2) or on its own motion, the tribunal may
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> (a) reconsider any order or decision of the tribunal, and
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> (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

The Threshold Test for Reconsideration

47. The Tribunal exercises its discretion to reconsider decisions under section 116 with caution in order to ensure finality of its decisions, and to promote efficiency and fairness of the appeal system for both employers and employees. This approach is consistent with one of the purposes identified in section 2 of the *ESA* "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act."

48. In *Director of Employment Standards* (*Milan Holdings)* (BCEST # D313/98) the Tribunal established a two-stage analysis for the reconsideration process. At the first stage, the Tribunal decides 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. If the application passes the first stage, the Tribunal then undertakes a more searching inquiry into the merits of the application.

49. The Tribunal exercises the reconsideration power only in exceptional circumstances, with a focus on the correctness of the decision being reconsidered.

Have the Applicants Met the Threshold Test for Reconsideration?

50. In considering whether the Applicants have met the threshold test in relation to the Appeal Decision, we begin by noting the following uncontested matters. As stated in the Appeal Decision (para. 35), and as summarized above, the Applicants' appeals raised all three grounds of appeal available under section 112 of the *ESA* with respect to the determinations: error of law, failure to observe the principles of natural justice, and new evidence. The Appeal Decision addressed each of these grounds and, except for the

argument regarding the out-of-Province Employees, found them to be without merit. In their application for reconsideration, the Applicants do not challenge the Tribunal Member's analysis and findings regarding their grounds of appeal. Accordingly, in considering the Applicants' reconsideration application, we accept the unchallenged findings in the Appeal Decision that the Delegate did not err in law (except with respect to the out-of-Province Employees), or deny the Applicants natural justice in making the determinations, and further, that the Applicants' "new evidence" did not provide a proper justification for setting aside the determinations.

51. Rather than challenging the Appeal Decision's dismissal of all but one of their original grounds for appeal, the Applicants now rely on a body of entirely different "new evidence" as the foundation for their reconsideration application. They assert the documents attached to their reconsideration application satisfies the Tribunal's established test for admitting new evidence, and support their position that the determinations should be cancelled. As previously noted, this evidence is different from that presented on appeal; it is documentation the Applicants say came into their possession after the appeals submissions process closed. They say that because the Tribunal Member did not seek further submissions or hold a hearing after they filed their appeal, they had "no opportunity" to present the evidence on appeal, and therefore the first aspect of the *Merilus* test for admitting new evidence is met.

52. With respect to the first aspect of the *Merilus* test, we accept the fresh "new evidence" was not available before the determinations were issued on September 10, 2021. However, the Applicants are asking the Tribunal to reconsider the Appeal Decision on the basis of "new evidence", and accordingly must also demonstrate that this evidence, with the exercise of due diligence, could have been presented prior to the Appeal Decision being issued. The Applicants say they received notice from CRA regarding its audit on December 7, 2021, and received the CRA Determination on February 22, 2022. At that time, the Applicant's appeal was still before the Tribunal Member, who did not issue the Appeal Decision until April 8, 2022.

53. In our view, these circumstances do not establish that the Applicants had "no opportunity" to present the new evidence to the Tribunal Member. The Applicants could have, and if they deemed it sufficiently important should have, submitted this additional new evidence to the Tribunal Member when it came into their possession, explaining its recent provenance, and making the same submissions with respect to it that they now advance in their application for reconsideration of the Appeal Decision.

54. In our view, the Applicants have not met the first aspect of the *Merilus* test for admission of new evidence before the Tribunal: they have not shown the new evidence could not, with the exercise of due diligence, have been discovered and presented prior to the Appeal Decision being made.

55. In any event, even if we were to overlook the fact that the Applicants could have presented the new evidence to the Tribunal Member before the Appeal Decision was issued, but failed to do so, we find the new evidence does not meet the other required elements of the *Merilus* test. As the Applicants note, to be admitted the evidence must be both "relevant to a material issue arising from the complaint" and "have high potential probative value, in the sense that, if believed, it could, on its own or when considered with other evidence, have led to a different conclusion on the material issue".

56. As set out above, and not disputed by the Applicants, on January 20, 2021, the Delegate sent the Applicants a Notice of Investigation regarding the complaints and a Demand for Records, and in response,

the Applicants sent employment records for 71 individuals. This included sending the Delegate, on August 6, 2021, wage statements for all of those individuals for the period January 10, 2020 to December 26, 2020. Thus, Dayton Boots itself asserted it had 71 employees; during the entire course of the Delegate's seven-month investigation, there was no issue whatsoever regarding the status of these individuals as employees of Dayton Boots under the *ESA*.

57. The issue before the Delegate was whether Dayton Boots' payment of wages to its employees conformed with the requirements of the *ESA*. In particular, a central matter in dispute was whether only the dollar amounts listed on Dayton Boots employees' wage statements represented their wages, and whether the gift card amounts listed on the statements were also wages under the *ESA*. The Applicants took various positions in respect to the gift cards, as was recorded in the determinations. They also took the position that their employment records were inaccurate. However, they never took the position that the individuals in question were not their employees. This was simply not an issue before the Delegate, and accordingly not one the Delegate was required to address. The Applicants themselves had asserted and provided evidence that they had 71 employees, and that assertion and evidence was undisputed.

58. Indeed, even on appeal, the Applicants never asserted that the individuals for whom they provided employment records, including wage statements, were not their employees (except with respect to the out-of-Province Employees, for whom the Applicants' assertion related to their residency, not whether they performed work).

59. In an affidavit affirmed October 4, 2021 (the "Affidavit"), which the Applicants submitted in support of their appeal, Hutchingame affirmed that prior to 2020 Dayton Boots was "in the business of managing the manufacture and sales of high-quality boots and other clothing products" out of a retail store at a rented location which also housed another company, "107", that produced the boots. Dayton Boots had three employees on March 17, 2020, when the retail store was closed due to the Covid-19 pandemic public health emergency. Hutchingame affirmed that 107 "also closed, and laid off all its employees", but Dayton Boots "offered to hire these individuals as Dayton employees". Dayton Boots "proposed to pay the employees $600 a week…[and] also offered each a $600 a week gift card for Dayton products". He also affirmed the gift cards were "an incentive for employees to stay employed…". (our underlining)

60. In the Affidavit, Hutchingame specifically discussed the Brand Ambassadors, affirming that when the retail store closed, Dayton Boots "needed to shift exclusively to online sales", and accordingly, to promote online sales it developed a new program: "Under this program, new employees, called Brand Ambassadors, would give away Dayton Boots to frontline service workers" (our underlining), and perform other tasks which are set out in the Affidavit. Hutchingame further affirms in the Affidavit:

> Our intention was also that the Brand Ambassadors would act as a reservoir of online sales staff for when we were prepared to launch a commission-based sales program, where the Brand Ambassadors would receive commission for sales that they generated through online promotions. However, we had to delay the launch of that program several times.
>
> As the Brand Ambassadors were employees, any store credit that they received was treated as a taxable benefit, for which Dayton remitted all taxes and other source deductions. (our underlining)

61. Thus, the Applicants never argued, either before the Delegate or the Tribunal Member, that the individuals in general, and the Brand Ambassadors in particular, were not employees of Dayton Boots because they performed no work. To the contrary, the Applicants specifically and repeatedly asserted that they *were* employees. The material issue was whether those employees were owed wages under the *ESA*, and, in particular, whether the amounts paid by way of gift cards were properly characterized as wages.

62. The new evidence on reconsideration is not relevant to the issue of whether the gift cards should be characterized as "wages" under the *ESA*, and in any event is not probative with respect to that issue. The Applicants do not claim that it is. Rather, they claim that it is relevant to, and probative of, whether the Brand Ambassadors were employees within the meaning of the *ESA*. However, that question was never an issue in this case prior to this reconsideration application. As set out above, the Applicants themselves affirmed that the Brand Ambassadors were Dayton Boots' employees.

63. Accordingly, in our view, the Applicants' new evidence does not meet the Tribunal's test to be admitted as evidence in this application. It is not relevant to a material issue arising from the complaints, or the determinations, and it does not have high probative value, in the sense that it could have led the Tribunal Member to a different conclusion on a material issue. In these circumstances, we do not find it appropriate to admit this evidence in this reconsideration application.

64. Alternatively, even if we were to admit and consider the new evidence, we do not find that it establishes a proper basis for setting aside, or otherwise varying, the Appeal Decision. As previously discussed, the Applicants took the position throughout the Delegate's investigation, and in the ensuing appeal process, that the individuals in question, including the Brand Ambassadors, were their employees at the relevant time for purposes of the *ESA*. The only exception was with respect to the out-of-Province Employees, and that position was based on the out-of-Province residency of those individuals, not on any assertion that they did not perform work.

65. The new evidence the Applicants now submit includes the December 7, 2021 letter from CRA to Dayton Boots which states that the CRA "has received a request for a ruling on the insurability and pensionability of the work of the individuals named at the end of this letter", and asked Dayton Boots to call CRA to discuss the request. The Applicants say all of the 19 named individuals worked as Brand Ambassadors.

66. The new evidence also includes the CRA Determination, which was issued as a letter to Dayton Boots on February 23, 2022. The CRA Determination is brief, merely giving a one-sentence decision that "for the period under review" (which is not specified), the 10 individuals listed at the end of the letter "were not employees or self-employed workers with you". The CRA Determination adds a one-sentence "Explanation": "These individuals were not employees or a self-employed workers [*sic*] because services were not carried out and they were not paid". The CRA Determination adds that these rulings were based on "the information we received and they apply only for the period under review". No detail is given of what information the CRA received, and it does not appear that Dayton Boots was actively involved in the CRA's investigation.

67. The new evidence also includes seven e-mails from individuals to Dayton Boots. Four are dated September 8, 2021, one is dated September 13, 2021, and two are dated September 15, 2021. The e-mails do not show, and the Applicants do not explain, why or in what context they were sent. The Applicants assert that all seven individuals were Brand Ambassadors, although only three of the seven e-mails confirm this.

Accepting for purposes of this decision that all seven individuals were Brand Ambassadors, each e-mail is brief and merely contains statements to the effect that the writer did not work any hours for Dayton Boots in 2020.

68. The Applicants submit that, in total, the new evidence establishes that all of the 36 Brand Ambassadors did not perform any work for Dayton Boots during 2020, and therefore none of them was a Dayton Boots employee for purposes of the *ESA*. We find the evidence does not establish this proposition. As the Applicants acknowledge, the CRA Determination concerns only 10 individuals, and the e-mails are from only seven individuals. We find neither the brief, bare statements by the seven individuals, presented without the context in which they were made, nor the brief rulings in the CRA Determination, made in the context of different legislation, and on the basis of unspecified information the CRA received, establish that the 36 Brand Ambassadors were not employees of Dayton Boots for purposes of the *ESA* at the relevant time.

69. To the extent the Applicants rely on the new evidence to contradict their own consistent position, and their own evidence that they had 71 employees at the relevant time, including 36 Brand Ambassador "employees", we find that this evidence does not undermine the determinations. The new evidence does not establish that none of the 36 Brand Ambassador employees performed work for Dayton Boots. Furthermore, if in fact none of the 36 Brand Ambassador employees performed work for Dayton Boots, this is a simple and obvious point that the Applicants could have made to the Delegate during the investigation (and thereby wholly avoid any unpaid wage liability to such individuals). Instead of claiming that some employees did no work, or worked no hours, the Applicants' submission to the Delegate was that "some employees were actually only working between 15-25 hours a week; not the 40 hours for which they were paid" (Corporate Determination, p. D3). At no time did the Applicants assert that any of the individuals among the 71 for whom the Applicants submitted employment records were not employees because they did not perform any work at all.

70. We further observe that what might constitute "performing work" in the eyes of an individual, or by the CRA, does not necessarily determine what constitutes performing work under the *ESA*. As noted earlier, in his Affidavit, Hutchingame outlined duties the Brand Ambassador "employees" were expected to perform, which included promoting Dayton Boot's products through social media. We find it is unnecessary to decide what tasks the Brand Ambassadors actually performed. The point is simply that the circumstances which might lead an individual or the CRA to conclude that work was or was not performed, or that an individual was or was not an employee, are not determinative of that issue under the *ESA*.

71. For these reasons, we find the new evidence, even if we were to accept it meets the test for admission before the Tribunal on reconsideration (which we do not), does not provide a proper basis to reconsider the Appeal Decision. Further, we find it does not justify the alternative remedy suggested by the Applicants, namely, to refer this matter back to the Director for purposes of investigating the employment status of the Brand Ambassadors, or any of the other employees named in the determinations. Given the Applicants' consistent position, and their evidence provided to the Delegate and the Tribunal Member, any new investigation would, in effect, undermine and call into question the truthfulness of the Applicants' own statements that they had 71 employees, and employment records for all of those employees which they, in turn, provided to the Delegate. The Applicants repeatedly represented, and even affirmed, that the individuals, including the Brand Ambassadors, were their employees. The Delegate

and the Tribunal Member were entitled to rely on those statements and affirmations, and we do not find that the Applicants' new evidence casts those statements into any serious doubt.

72. With respect to the Applicants' Source Deduction Issue, we find this is merely another attempt to re-argue their position, previously considered and rejected by both the Delegate and the Tribunal Member, that the gift card amounts recorded on the employees' wage statements were not "wages" as defined in the *ESA*. We find the Delegate and the Tribunal Member were not required to expressly analyze the Applicants' explanation for why the wage statements recorded the gift card amounts in the way they did. The Applicants appear to be both defending their method of recording the gift card amounts on the wage statements as correct, and also arguing that the Delegate erred in relying on the wage statements, because they were not accurate. We find the Tribunal Member did not err in finding the Delegate looked fairly at all of the available evidence, including the Applicants' arguments as outlined in the Corporate Determination, and was entitled to conclude that the gift card amounts constituted "wages" within the meaning of the *ESA*. As noted earlier, the Applicants have not sought reconsideration of the findings in the Appeal Decision that the Delegate did not deny the Applicants a fair hearing, or that the Delegate did not err in law. We find the application for reconsideration provides no basis for interfering with the Appeal Decision.

ORDER

73. The applications for reconsideration of the Appeal Decision are dismissed. The determinations are confirmed as varied by the Out-of-Province Employees Decision and the Recalculation Decision.

Carol L. Roberts **Panel Chair** **Employment Standards Tribunal**	**Robert E. Groves** **Member** **Employment Standards Tribunal**	**Kenneth Wm. Thornicroft** **Member** **Employment Standards Tribunal**