An application for Reconsideration

- by -

Super Save Disposal Inc. and Actton Transport Ltd.
("Super Save")

- of Decisions 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)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2006A/80

DATE OF DECISION: January 2, 2007

DECISION

SUBMISSIONS

Michael Weiler:	Counsel for Super Save
Richard Butler:	Counsel for the Director of Employment Standards

OVERVIEW

1. This is an application by Super Save Disposal Inc. and Actton Transport Ltd. ("Super Save", and "Actton", collectively, the "Applicants") for a reconsideration of Decisions #D128/05, D001/06 and D048/06 (the "Original Decisions"), issued by the Tribunal on August 24, 2005, January 5, 2006, and April 24, 2006, respectively.

2. The background to this reconsideration has been extensively set out in the Original Decisions, which I adopt, and need not be restated except in the most summary fashion.

3. Four former employees filed complaints with the Employment Standards Branch starting in April 1998. In May, 2003, a delegate of the Director of Employment Standards (the "Director") issued four separate but essentially identical Determinations finding Actton and Super Save to be jointly and separately liable to pay wages, overtime wages, statutory holiday pay and interest to the four employees, as well as compensation for length of service to two of the employees, as associated corporations under section 95 of the *Employment Standards Act* (the "*Act*").

D128/05

4. The Applicants appealed the Determinations on eight grounds. The same Tribunal Member ("Member") heard the appeals, and decided six of those grounds in his decision of August 24, 2005:

    1. Whether the Director erred in law in finding that the Branch had jurisdiction to adjudicate the complaints;
    2. Whether the Director erred in law in not following the directions of Member Peterson, and by not determining whether Super Save was the employer; and whether the Director erred in not finding that Actton was a federally regulated employer;
    3. Whether the Director erred in law and denied the Appellants natural justice by improperly finding Super Save and Actton to be associated, and whether the Director's decision was void for bad faith and actual bias;
    4. Whether the Director erred in adjudicating the complaints as the complaints were determined and the files closed prior to the Determinations;
    5. Whether the Director erred in delegating the files contrary to section 117 of the Act and the principles of natural justice and without jurisdiction to do so;
    6. Whether the complaints ought to have been dismissed due to undue delay between the filing of the complaints and the Determinations.

5. The Member left the two other grounds of appeal in abeyance pending the outcome of the appeal on the above issues.

6. After reviewing the Determinations and the submissions of counsel for the Applicants and the Director, the Member concluded that the Director properly had jurisdiction to adjudicate the complaints. After an extensive review of the law, the Member concluded that Actton's "wholly intraprovincial garbage collection business" was sufficiently distinct from its interprovincial and international truck transport and delivery business that it could be regulated provincially. The Member also addressed the Appellants' *res judicata/*issue estoppel arguments, and concluded that they had not demonstrated that the test for issue estoppel had been met.

7. With respect to the second issue, the Member was not persuaded that the Director had erred in concluding that the Appellants were associated corporations for the purposes of section 95 of the *Act*. The Member set out the evidence before the delegate and another Tribunal member and noted that the two firms shared common business offices, including records and registered offices as some equipment, services and personnel.

8. The Member relied on the BC Labour Relations Board decision in *Sky Chefs Canada Ltd.* (BCLRB No. B467/2000) in determining that although the Director could "associate" a federally regulated firm with a provincially regulated firm, he could do so only to the extent the firm employed persons whose work fell entirely within provincial jurisdiction. The Member upheld the Director's section 95 declaration to the extent that it related to the claims of the four employees whose employment relationships were wholly governed by provincial employment standards legislation.

9. With respect to the fourth issue, the Member concluded that although the Director's delegate appeared to initially accept Actton's assertion that one of the employee's complaint should be adjudicated under the federal employment standards legislation, the delegate did not issue a formal decision on the jurisdictional issue, and did not clearly and unequivocally communicate to the employee that his complaint was being dismissed for want of jurisdiction. After a review of the record, the Member decided that the delegate merely placed the files in abeyance while federal employment standards officials investigated the jurisdictional issue.

10. On the fifth issue, the Member noted that the Director's authority to act is presumed, and found no evidence that any of the delegates were not lawfully authorized to act. He further noted that although no fewer than six delegates had responsibility for investigating the complainants' unpaid wages claims, counsel for the Applicants never challenged any delegate's authority to act on behalf of the Director.

11. With respect to the final issue, the Member reviewed Tribunal decisions as well as *Blencoe v. British Columbia (Human Rights Commission),* [2000] 2 S.C.R. 307 and although he acknowledged that the dispute had not proceeded quickly, he found no basis to conclude that the Determinations should be cancelled on the basis that there was an abuse of process.

D001/06

12. In his decision of January 5, 2006, the Member addressed the two outstanding issues on the basis of the written submissions of the parties. Those issues were

1. Whether the Applicants were denied natural justice in the investigation and adjudication of the complaints, and

2. Whether the Director and or her agents acted improperly throughout the investigation and adjudication of the complaints, wrongly assuming that they owed a "fiduciary duty" to the complainants.

13. The Applicants asserted that these issues could only be decided following a full oral hearing, and that anything short of that constituted a denial of natural justice.

14. The Member took the view that the Applicants were seeking an oral hearing primarily, if not solely as a form of 'discovery', and was not persuaded that the Director had failed to disclose the section 112 (5) record. As such, he was satisfied that the issues could be determined on the basis of written submissions.

15. The Member addressed the nine instances referred to by the Applicants where the Director or the delegate allegedly failed to observe the principles of natural justice, and found them all to be either without merit or cured by the appeal process.

16. Finally, after reviewing the record and the submissions of the parties, the Member concluded that the Director investigated the complaints without any predisposition against the Applicants or in favour of the complainants.

17. The Member thus dismissed the appeal, and confirmed the four Determinations. He adjourned the matter of the Applicants' application to have the Director held in contempt in order to consider additional submissions.

D048/06

18. After setting out the history of the matter and the submissions of the parties, the Member determined that since the enactment of the *Administrative Tribunals Act ("*ATA*")* the Tribunal had no independent authority to punish for contempt; rather it had to make application to the B.C. Supreme Court to have the Director held in contempt. The Member concluded that whether the Director was in contempt of the Tribunal's order was a matter for the courts to determine, and dismissed the application.

TIMELINESS

19. The application for Reconsideration was filed June 21, 2006. Although the *Act* does not set out a time limit for the bringing of an application, the Rules provide that reconsideration applications should be brought within 30 days. This application was made approximately 60 days after the last decision was issued. The Director took no position on the timeliness of the application.

20. In *Director of Employment Standards*, (BC EST #RD046/01) the Tribunal set out the following principles to be considered relating to timeliness of applications:

- The Tribunal will properly consider delay in deciding whether to exercise the reconsideration discretion
- Where delay is significant, an applicant should offer an explanation for the delay…
- Delay combined with demonstrated prejudice to a party will weigh even stronger against reconsideration. In some cases, the Tribunal may presume prejudice based on a lengthy unexplained delay alone.
- Even in cases of unreasonable delay, the Tribunal ought to consider the merits, and retains the discretion to entertain and grant a reconsideration remedy where a clear and compelling case on the merits is made out.

21. In this case, the delay is significant and the applicant has not given a satisfactory explanation. However, as no party asserts prejudice or relies on lack of timeliness as an objection to the application, and given my determination on the merits in any case, I decline to dismiss the application for unreasonable delay.

ARGUMENT

22. Like the appeal documentation, the Applicants' application for reconsideration is lengthy and extensive. The Applicants say that they rely on "each and every submission made before the Tribunal" at first instance as well as all of the documents constituting the record. They say that, only after fully reviewing the documents and the submissions "that piece together the evidence of tainted and biased investigation and adjudication of these complaints" will the Reconsideration member "appreciate all 8 grounds of review and the application for contempt".

23. Counsel for the Applicants says that the proceedings have been unsatisfactory and have led the Tribunal to making fundamental errors of law and findings of fact, as well as denying the Applicants fairness and natural justice. The Applicants contend that the Tribunal has ignored "pertinent and important evidence and arguments".

24. The Applicants say that the Member erred in a number of ways, and failed to address a number of issues raised by the Appellants. They say that the Tribunal fundamentally erred in denying them a fair hearing by failing to hold an oral hearing, and in failing to order disclosure of documents. The Applicants also say that the Tribunal erred in law, fact, policy and issues of jurisdiction on all of the issues before the Member. The Applicants say that each ground of appeal raises significant questions of error of law, fact, principle and procedure that are so critical that they should be reviewed because of their importance not only to the parties be also their implications for future cases. The Applicants say that many of the issues involved questions of law which "must be reviewed for correctness", some of the errors are jurisdictional in nature, and others are issues of natural justice that are reviewable on the grounds of fairness.

25. The Applicants say that the issue of document disclosure is "central" to the issues of bad faith, natural justice and jurisdiction, and that it had not been "properly addressed" by the Tribunal. They say that the Tribunal erred in finding that the Director had made full and proper disclosure.

26. Counsel for the Director contends that the primary focus of the Applicants' submissions is to try to have the Reconsideration panel re-weigh the evidence and/or reconsider prior submissions on the evidence, including points previously decided. The Director submits that to revisit the entire case would be contrary to both the fundamental principles of law and procedure designed to allow finality of decision-making. Counsel further submits that the Applicants have failed to demonstrate that the Member decided the issues without a rational basis, or that the Member committed any errors of law.

27. The Director submits that the Applicants have failed to meet the threshold test set out in *Milan Holdings* such as to require reconsideration, and that, even if they had, the Member correctly dealt with all the matters before him.

ISSUES

28. There are two issues on reconsideration:

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 Member?

ANALYSIS

29. The *Employment Standards Act,* R.S.B.C. 1996 c. 113 confers an express reconsideration power on the Tribunal. Section 116 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

30. The Tribunal reconsiders a Decision only in exceptional circumstances. 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 the *Act* detailed in Section 2 "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act."

31. In *Milan Holdings (BCEST # D313/98)* the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. The primary factor weighing in favor 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.

32. 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 Kiss* BC EST#D122/96)

33. 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 simply re-argue their case.

34. After weighing these and other factors, the Tribunal may determine that the application is not appropriate for reconsideration. Should the Tribunal determine that one or more of the issues raised in the application is appropriate for reconsideration, the Tribunal will then review the matter and make a decision. The focus of the reconsideration member will in general be with the correctness of the decision being reconsidered.

35. In *Voloroso* (BC EST #RD046/01), the Tribunal emphasized that restraint is necessary in the exercise of the reconsideration power:

> .. the Act creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute…

36. 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" is not deprived of the benefit of an adjudicator's decision without good reason. A third is to avoid the image of a tribunal process skewed in favor 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.

37. Having considered the Applicants' submission, I am not persuaded that this is an appropriate case to exercise the reconsideration power for the following reasons.

1. No Re-Weighing the Evidence or Re-Hearing the Case

38. Much of the arguments of the Applicants are directed, in essence, to having the Tribunal re-weigh the evidence: "the Appellants rely on "each and every submission filed in these proceedings in support of this application for reconsideration". As noted above, the reconsideration power is not intended to allow a "second opinion" when a party does not agree with the factual findings of an original decision. Here, the Applicants seek to challenge the factual findings in the Original Decisions, yet nothing in the application

has directed me to any evidence showing those findings to be wrong. Absent a clear legal error, the Tribunal on reconsideration will not disturb factual findings or the weight given to evidence in an original decision.

2. No Error on Document Disclosure

39. The Applicants say that document disclosure is "central" to the issues in the case. However, none of the Decisions on which the Applicants seek reconsideration deal with document disclosure as a central issue. Indeed, the sufficiency of the section 112(5) record for the purposes of the appeals was dealt with by the Member in BC EST D100/04, which was varied slightly but otherwise upheld on reconsideration (RD172/04). The matter proceeded in light of those two decisions. They cannot now be made the subject of further reconsideration or review.

40. It is evident from the Original Decisions that, after the Director complied with the orders regarding document disclosure given in D100/04 (as varied in RD172/04), the Member found there had been adequate document disclosure for the purpose of adjudicating the appeals. I agree, and find no basis for reconsideration of the Original Decisions on the issue of document disclosure.

3. No Oral Hearing Needed

41. The Applicants further argue that the Tribunal erred in failing to hold an oral hearing, and repeat the arguments made before the Member at first instance. The Member was not required to hold an oral hearing (s. 103 *Administrative Tribunals Act* and *D. Hall & Associates* 2001 BCSC 575). The Applicants have not demonstrated how the Member erred in law or denied them natural justice when he determined that the matter could be properly adjudicated on the record. In this respect, the Applicants are simply attempting to have the Reconsideration panel "re-weigh" the evidence or reconsider prior submissions. I also note that, in his decision BC EST #D050/05, the Member decided that six of the issues could be decided on the basis of written submissions. The Applicants did not seek reconsideration of that decision.

4. No Procedural Unfairness

42. The Applicants say that the Member erred in and denied them natural justice in dealing with the issues separately in three distinct decisions. I find no merit to this argument. The Applicants raised a large number of grounds of appeal, and the Member dealt with the issues as he considered appropriate. The Member decided how he would address the issues in his decision BC EST #D050/05, on which, as noted above, the Applicants did not seek reconsideration. The Tribunal has the authority to control its own processes, and the Applicants do not demonstrate how they were denied natural justice when the Member proceeded as he did. I am also unable to discern any basis for this argument in the record or the submission.

5. No Jurisdictional Error

43. The Applicants say the Member erred in some of his factual findings, and in his application of the law. In particular, they say that the Member erred in determining that Actton was the employer, and that it was a provincially regulated employer *vis a vis* the complainants. The Applicants say that the facts and the law support a conclusion that the four complainants were employed by Actton and governed by federal

legislation. In support of their application, counsel for the Applicants provided, by way of background, a purported summary of the facts. This background is, in actuality, a blend of factual statements, assertions of fact, commentary and argument. Some of the assertions of fact do not accord with factual findings made in the original decisions. For example, counsel says that Actton "is a highly functionally integrated enterprise as outlined in the documents and submissions." In Decision #D128/05, the Member found:

> There is absolutely no evidence before me of functional integration as between Actton's garbage collection business and its interprovincial/international trucking operations.

44. Counsel for the Applicants has not identified what evidence supports the argument that the Member erred in this conclusion. This failure to identify evidence supporting alleged factual errors runs throughout the Applicants' submission. The Applicants make numerous assertions of errors without references to the evidence on file or any analysis of the alleged error. Further, the Applicants have not demonstrated a sound basis for exercising the reconsideration power in the absence of a legal basis to do so. To reiterate, the Tribunal will not "second guess" a decision, or "re-examine" the entire record without a foundation to do so. A disagreement with the result, in itself, is not a basis for re-examining the documents on reconsideration.

45. With respect to the assertion that the Member erred in law in finding that the Director had jurisdiction over the complaints, once again, the Applicants have provided no evidence or compelling argument to support that position. I have reviewed the Member's analysis and agree with it. The decision, in my view, accurately reflects the constitutional question of which level of government is empowered to enact laws regulating the employment relationship of the four complainants, who worked for a wholly intraprovincial operation, albeit one that was part of a business that was federally regulated in other respects.

6. No Other Bases for Reconsideration

46. The Applicants say they "rely on" the arguments and submissions made before the Member on issues 4, 5 and 6 above; that is, whether the Director erred in adjudicating the complaints as they had been already determined and the files closed, whether the delegate erred in delegating the files, and whether the complaints ought to have been dismissed for reasons of delay. The Member found no evidence that any of the delegates lacked authority to Act, or had abdicated their authority. The Member thoroughly addressed the issue of delay. Apart from repeating their arguments before the Member, counsel for the Applicants has provided no evidentiary basis or analysis of the errors in the application.

47. As noted above, a Reconsideration application cannot be used simply to re-argue the merits of a Decision. The application must raise 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. While contending that the application raises significant questions of law, fact, principle or procedure for the parties and their implications for future cases, I find this is not the case. The test is not based on the subjective perspective of the parties. The Applicants must make out an arguable case of sufficient merit to warrant the reconsideration. The Applicants have not demonstrated how the Member erred in his conclusions on these issues, nor have they persuaded me that the issues are so significant to either the Applicants or future cases that they should be reviewed. I find the application in this respect to be without merit.

7. No Error in Bias/Bad Faith Finding

48. The Applicants argue that the Member erred in his conclusion that the Director was not biased or acting in bad faith, and say that their submissions "clearly and unequivocally support" a finding of bias. The Applicants say the Member's analysis is in error as it fails to consider a March 10, 2003 letter in the context of the overall proceedings.

49. An allegation of bias against a decision maker is serious and should not be made speculatively:

> An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and doubt about integrity lingers even when eh allegation is rejected. It is the kind of allegation that is easily made but impossible to refute except by a general denial. It ought not be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound bias for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause (*Adams v. British Columbia (Workers' Compensation Board*), [1989] B.C.J. No 2478 (C.A.)

50. The Applicants have asserted, but failed to demonstrate, bias or bad faith on either the part of the Director or the Member. Differences of opinion do not support a finding of bias. I find no merit to this argument.

51. After a review of the original decisions, the materials in the file and the submissions, it is my view that the Applicants have not shown that it is appropriate to reconsider the conclusions reached by the Member in the original decisions.

ORDER

52. Pursuant to Section 116 of the *Act*, I deny the application for reconsideration and confirm the original decisions.

Carol L. Roberts
Member
Employment Standards Tribunal