

An Application for Reconsideration

- by -

Ajay Chahal carrying on business as Zip Cartage  
("Zip Cartage")

- of a Decision 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:** Robert E. Groves

**FILE No.:** 2014A/158

**DATE OF DECISION:** January 7, 2015

## DECISION

### SUBMISSIONS

Ajay Chahal on his own behalf carrying on business as Zip Cartage

### OVERVIEW

1. This is an application brought by Ajay Chahal carrying on business as Zip Cartage (“Zip Cartage”). The application has been brought pursuant to section 116 of the *Employment Standards Act* (the “*Act*”).
2. Zip Cartage requests a reconsideration of a decision of a Member of the Tribunal (the “Member”) dated November 21, 2014, and numbered BC EST # D109/14 (the “Original Decision”).
3. The Original Decision resulted from an appeal by Zip Cartage of a determination (the “Determination”) issued by a delegate of the Director of Employment Standards (the “Delegate”) on August 1, 2014. The Delegate issued the Determination after conducting a hearing of a complaint against Zip Cartage filed by one of its former employees, Blair Scott (the “Complainant”).
4. The Delegate determined that Zip Cartage had contravened sections 17, 18, 21, 45 and 46 of the *Act* and section 37 of the *Employment Standards Regulation* in respect of the Complainant’s employment. The Determination ordered that Zip Cartage pay wages to the Complainant in the amount of \$2,726.17. It also ordered Zip Cartage to pay administrative penalties in the amount of \$3,000.00. The total found to be owed, therefore, was \$5,726.17.
5. The Original Decision confirmed the Determination.
6. I have before me the Determination, the Reasons for the Determination, the record supplied to the Member by the Director pursuant to subsection 112(5) of the *Act*, a submission and documents delivered in the appeal proceedings, the Original Decision, and the application for Reconsideration delivered by Zip Cartage.
7. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings on applications for reconsideration. Having reviewed the materials before me, I find I can decide this application based on the written materials filed, without an oral or electronic hearing.

### FACTS

8. Zip Cartage operates a local truck delivery service in the lower mainland region of the province.
9. The Complainant drove a Zip Cartage truck from July 22, 2013, until November 16, 2013. Shortly thereafter, the Complainant filed a complaint with the Director alleging that Zip Cartage had contravened the *Act* by failing to pay him regular wages, annual vacation pay and statutory holiday pay.
10. Zip Cartage responded that the Complainant had been hired as an independent contractor, and not as an employee. It argued that since the Complainant was a contractor, his claim did not fall within the purview of the *Act*, and so it should be dismissed in its entirety.

11. In her Reasons for the Determination, the Delegate conducted a thorough review of the facts relevant to an understanding of the legal status of the Complainant vis-a-vis Zip Cartage. She concluded that the Complainant was an employee.
12. Zip Cartage appealed the Determination on all three of the grounds set out in section 112 of the *Act*. It alleged that the Delegate erred in law, and failed to observe the principles of natural justice. It also asserted that evidence had become available that was not available at the time the Determination was made.
13. The Member rejected all the grounds of appeal relied upon by Zip Cartage.
14. Zip Cartage now applies for reconsideration. A review of the material it has provided reveals that its stated ground for reconsideration is that the Member disregarded the facts of the case, or relied on erroneous facts, with the result that the Member erred in law because he acted on a view of the facts which could not be reasonably entertained.

## ISSUE

15. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:
  1. Does the request meet the threshold established by the Tribunal for reconsidering a decision?
  2. If so, should the decision be confirmed, cancelled, varied or referred back to the original panel, or another panel of the Tribunal?

## ANALYSIS

16. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116, the relevant portion of which reads as follows:
  - 116 (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.
17. The reconsideration power is discretionary, and must be exercised with restraint. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal.
18. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *Act*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is also derived from a desire to preserve the integrity of the appeal process described in section 112 of the *Act*.
19. With these principles in mind, the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party seeking to have the Tribunal's appeal decision overturned.
20. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal considers the applicant's submissions, the record that was before the Tribunal in the

appeal proceedings, and the decision the applicant seeks to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. In order for the answer to be “yes” the applicant must raise questions of fact, law, principle or procedure flowing from the appeal decision which are so important that they warrant reconsideration.

21. In general, the Tribunal will be disinclined to reconsider if the primary focus of the application is to have the reconsideration panel re-weigh arguments that failed in the appeal. It has been said that reconsideration is not an opportunity to get a “second opinion” when a party simply does not agree with an original decision (see *Re Middleton*, BC EST # RD126/06).
22. If the applicant satisfies the requirements in the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal’s decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.
23. Here, Zip Cartage’s submission on its application fails to persuade me that reconsideration is warranted. This is clearly a case where Zip Cartage is seeking to have a reconsideration panel review findings of fact appearing in the Reasons for the Determination, and re-weigh arguments that failed in the appeal.
24. The Zip Cartage submission rests principally on the assertion that it rented an asset, a truck, to the Complainant on the basis that the Complainant would then secure hauling contracts on his own account and split the revenue earned from them with Zip Cartage.
25. Zip Cartage states that it was the Complainant who approached a local cartage company, Claddagh Services Inc. (“Claddagh Services”), and arranged for haulage jobs using the Zip Cartage truck. This submission is meant to show that the Complainant acted in a way that suggests he understood he was in business for himself, with control over his own profits and losses, and that he was not operating as an employee under the control of Zip Cartage.
26. It is a submission that Zip Cartage argued unsuccessfully on appeal. As with other arguments made and rejected on appeal, it challenged findings of fact made by the Delegate. Regarding the factual assertion that I have just described, for example, the Reasons for the Determination, at R9, state that it was Zip Cartage which arranged for the contracts with the cartage companies who made use of the Complainant’s driving services.
27. It is trite that the Tribunal cannot interfere with the Delegate’s findings of fact, unless it can be said that her findings were erroneous in a way that constitutes an error of law. That will only be so if it can be said that the errors of fact are palpable and overriding. In my view, Zip Cartage has failed to meet this burden.
28. The Member’s discussion in the Original Decision relating to the Complainant’s dealings with Claddagh Services was intertwined with his comments addressing the fact that Zip Cartage had tendered new evidence on appeal on which it relied to shore up its contention that it was the Complainant who arranged for the Claddagh Services work, and not Zip Cartage. In the appeal, Zip Cartage produced an email from a representative of Claddagh Services to the effect that it dealt with the Complainant, and not Zip Cartage. In addition, Zip Cartage produced a services agreement between Claddagh Services and “Dependant Contractor” signed by both Mr. Chahal and the Complainant, with Zip Cartage identified as the “Company” supplying the truck that was the subject of the agreement. Neither of these documents was produced to the Delegate.

29. The Member was not persuaded that either of these documents should be accepted as new evidence, for two reasons. First, the Member was not convinced that Zip Cartage, acting diligently, could not have produced the evidence during the proceedings involving the Delegate. Second, the Member determined that the evidence focused on the parties' dealings with Claddagh Services, and so it was not sufficiently probative for the purposes of determining the true nature of the relationship between Zip Cartage and the Complainant. I am not persuaded that the Member was wrong in drawing these conclusions.
30. Zip Cartage makes exactly the same argument concerning the parties' dealings with Claddagh Services on this application for reconsideration that it made without success in the appeal. As in the appeal, it seeks to have the Tribunal accept its interpretation of the circumstances surrounding the parties' relationship with Claddagh Services in the hope that the Tribunal will re-visit the Delegate's findings of fact, which identified Zip Cartage as an employer, and the Complainant as its employee, for the purposes of the *Act*. In doing so, Zip Cartage is seeking the "second opinion" it is not the purpose of a section 116 reconsideration to provide.
31. In my view, Zip Cartage has failed to identify any questions of fact, law, principle or procedure flowing from the Original Decision which are so important that they warrant reconsideration. Instead, it persists in its attempts to have the Tribunal take a different view of the facts than the one adopted by the Delegate. That is not the purpose of an appeal, and so, *a fortiori*, it is not the purpose of a reconsideration.
32. Moreover, the focus of Zip Cartage on the parties' dealings with Claddagh Services misses the point of the Delegate's analysis in her Reasons for the Determination, and a significant portion of the Member's discussion in the Original Decision. The issue for the Delegate was to determine whether Zip Cartage was an "employer" and the Complainant was its "employee" for the purposes of the *Act*. The parties' dealings with Claddagh Services were but one aspect of the many elements that comprised the analysis of that issue.
33. In the Original Decision, the Member noted that the appeal submission of Zip Cartage revealed a mistake frequently made by appellants in that it failed to recognize that an individual's status as an employee under the *Act* must be determined by an application of the provisions of the statute, and not the principles that inform a resolution of that question at common law. This is not to say that the common law principles should be ignored, but it does mean that the role they play in proceedings under the *Act* is secondary.
34. A proper analysis must, therefore, focus on the definitions of "employee", "employer" and "work" found in section 1 of the *Act*. The definition of "employee", in particular, is quite broad, and includes a person "receiving or entitled to wages for work performed for another" and a person "an employer allows, directly or indirectly, to perform work normally performed by an employee". Similarly, the definition of "employer" includes a person "who has or had control or direction of an employee" or "who is or was responsible, directly or indirectly, for the employment of an employee". The term "work" is defined to mean "the labour or services an employee performs for an employer..."
35. Therefore, any common law principles which may appear to be of assistance having regard to the facts of an individual case must be utilized in a way that is subservient to the broad reach of the definitions within the *Act*. This must be so, in order for the policy objectives of the statute as benefits-conferring legislation to be fully realized. As stated by the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.* (1992) 91 DLR (4th) 491 at 507, in the context of an appeal concerning the equivalent of the *Act* in Ontario:
- ... an interpretation of the Act which encourages employers to comply with the minimum requirements of the Act, and so extends its protection to as many people as possible, is favoured over one that does not.

36. The Member observed that the appeal submission of Zip Cartage in no way addressed the Complainant's status having regard to the relevant definitions set out in the *Act*. The same can be said for Zip Cartage's argument in its application for reconsideration.
37. As the Member pointed out, the Delegate analyzed the evidence in light of the definitions in the *Act* and found, as a fact, that the Complainant performed work under the direction and control of Zip Cartage. For the Member, that was sufficient to dispose of the appeal. However, the Member also noted that the Delegate went on to assess the evidence in light of the common law tests. On this analysis, too, the weight of all the evidence supported factual findings that could lead, reasonably, to a conclusion that the Complainant was an employee.
38. The submissions of Zip Cartage on this application for reconsideration ignore the bulk of the findings in the Delegate's thorough analysis of the provisions of the *Act* and the relevant principles at common law. Instead, it selects a particular facet of the Complainant's dealings with Zip Cartage and Claddagh Services and makes use of new evidence that might have been tendered to the Delegate, but was not, all for the purpose of establishing that in this aspect of the case the evidence supports an interpretation, at common law, that the Complainant was in business for himself.
39. In my opinion, the Member was entirely correct in rejecting this approach, not only for the reason that the evidence was not "new", but also, in the case of the agreement with Claddagh Services, because it was, at best, ambiguous on the point for which Zip Cartage sought to rely on it. As for the email from the representative of Claddagh Services, I agree with the Member that it was not of significant probative value for the purposes of resolving the issue of the Complainant's status vis-a-vis Zip Cartage. It also contradicted a specific finding of fact made by the Delegate, after an oral hearing at which Zip Cartage had ample opportunity to lead all the evidence it thought useful to prove its case, that it was Zip Cartage that arranged and controlled the hauling services performed by the Complainant.

## ORDER

40. Pursuant to section 116 of the *Act*, I order that the Original Decision BC EST # D109/14 be confirmed.

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**Robert E. Groves**  
**Member**  
**Employment Standards Tribunal**