An application for Reconsideration

- by -

LS Labour Solutions Inc.

- 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 Groves

FILE No.: 2008A/136

DATE OF DECISION: January 12, 2009

DECISION

OVERVIEW

1. This is an application brought by LS Labour Solutions Inc. (the "Employer") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") seeking reconsideration of a decision of a member of the Tribunal (the "Member") dated October 16, 2008 under #D104/08 (the "Original Decision").

2. The matter came on before the Member by way of an appeal filed by the Employer pursuant to section 112 of the *Act* in which the Employer challenged a determination of a delegate (the "Delegate") of the Director of Employment Standards (the "Director") dated March 17, 2008 (the "Determination"). In that Determination the Delegate decided that the Employer had contravened sections 6 and 40.2 of the *Employment Standards Regulation* (the "*Regulation*"), with the result that the Employer was liable to pay $10,500.00 in administrative penalties pursuant to section 29 of the *Regulation*.

3. As it appeared on its face that the Employer's appeal had been filed late, the Member had first to decide, as a preliminary matter, whether section 109(1)(b) of the *Act* should be applied, and the time for the bringing of the appeal should be extended so that it might be permitted to proceed on its merits, or whether the appeal should be dismissed pursuant to section 114(1)(b) of the *Act*.

4. The Member ordered that the Employer's application to extend the time for bringing the appeal should be denied. In the result, the appeal was dismissed. It is this decision which the Employer seeks to have reconsidered.

5. I have before me the contents of the Tribunal file relating to the Employer's original appeal, the Original Decision, and the submission of the Employer on this application for reconsideration.

6. There is no issue as to the timeliness of the application for reconsideration.

7. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 26 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. I have concluded that this application shall be decided having regard to the written materials I have received, without an oral hearing.

FACTS

8. The Employer was a farm labour contractor as defined by section 1 of the *Act*. It permitted its licence to operate in that capacity to expire early in 2008.

9. The Delegate demanded, and the Employer supplied, those employer records farm labour contractors are required to keep under section 6(5) of the *Regulation*. A review of those records and the other materials generated during the course of his investigation, including submissions from the Employer, led the Delegate to conclude that the Employer had contravened sections 6 and 40.2 of the *Regulation*, in that it had failed to maintain daily logs setting out the volume or weight of crop picked by its employees, and had neglected to pay its employees by direct deposit as required. Since the Employer had contravened section 6 on two previous occasions within the relevant timeframe, the Delegate imposed an

administrative penalty of $10,000.00 in respect of the further contravention of section 6, and a $500.00 administrative penalty for the contravention of section 40.2.

10. The Determination was issued on March 17, 2008. Section 112 of the *Act* stipulates that a person served with a determination has either 30 days or 21 days to file an appeal depending on the mode of service. In the case of service by registered mail, the time period is 30 days after the date of service. The time period is only 21 days if the determination is personally served or served by means of a transmission of the determination to the person electronically or by fax machine.

11. In this case, the Employer prepared an Appeal Form dated August 6, 2008, which was not delivered to the Tribunal until August 8, 2008. The Employer justified its filing its appeal late on the basis that it did not receive the Determination until sometime in July 2008, when it contacted the Delegate to have funds held in trust returned. The Employer asserted that the Delegate had forwarded the Determination by registered mail to the wrong farm labour contractor and that it was delivered to a person unrelated to the Employer. It further alleged that no principal of the Employer received the Determination before July. The Delegate submitted that the Determination was forwarded to the correct address, and that information from Canada Post disclosed that it had been successfully delivered on March 18, 2008.

12. The Member accepted, for the purposes of the appeal, that the Employer was not served with the Determination until July 7, 2008, at the earliest. She settled on this date because the Employer had stated in a submission that it was then that the Employer became aware the Determination had been forwarded to an incorrect address after the discussion with the Delegate about the refund. I note also that the record contains a fax transmission dated July 7, 2008 from the Employment Standards Branch to the Employer which purports to attach a copy of the Determination. In its submission on this application for reconsideration, the Employer appears to confirm that it received the Determination on that date. That being so, the Employer should have filed its appeal within 21 days thereafter. It did not.

13. In deciding that the Employer's application to extend the time to file its appeal should be denied, the Member alluded to previous Tribunal authority describing the factors to be considered when determining whether an appeal period should be extended, a non-exhaustive list of which would include:

- There is a reasonable and credible explanation for the failure to request an appeal within the statutory time limits;
- There has been a genuine and ongoing bona fide intention to appeal the determination;
- The respondent parties and the Director have been made aware of the appellant's intention to appeal the determination;
- The respondent parties will not be unduly prejudiced by the granting of the extension, and;
- There is a strong prima facie case in favour of the appellant.

14. The Member concluded that a consideration of these criteria, in the circumstances of this case, did not warrant her exercising her discretion to extend the time for appeal. More particularly, the Member decided that the Employer had provided no reasonable and credible explanation why it had failed to file its appeal within time. Nor had the Employer demonstrated a genuine and ongoing intention to appeal the

Determination. Indeed, even after it became aware of the existence of the Determination, it took few, if any, active steps to prepare an appeal until after the appeal period had expired. Finally, the Employer had presented no information establishing a strong prima facie case in favour of a successful appeal. The Employer's assertion that it had misinterpreted the requirements of the *Act* and *Regulation* could not ground an appeal on the basis that the Delegate had erred in law. There was no evidence that the Employer was unaware of the alleged contraventions the Delegate was investigating, or that it was deprived of an opportunity to make submissions in respect of them, so as to raise a plausible argument that the Delegate had failed to observe the principles of natural justice. The new evidence that the Employer sought to tender on appeal was not "new" in the sense that it was unavailable to the Employer during the proceedings before the Delegate, and at the time the Determination was being made.

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 cancelled or varied or sent 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
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> (a) reconsider any order or decision of the tribunal, and
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> (b) confirm, cancel or vary the order or decision or refer the matter back to the original panel or another panel.

17. Previous decisions of the Tribunal, taking their lead from *Milan Holdings* BC EST #D313/98, have consistently held that the reconsideration power is discretionary, and must be exercised with restraint. This attitude 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 legitimate desire to preserve the integrity of the appeal process described in section 112 of the *Act*. A losing party should not easily have available to it an avenue for avoiding the consequences of a Tribunal decision emanating from that process. Nor should it be entitled to an opportunity to re-argue a case that failed to persuade the Tribunal at first instance. In giving voice to these principles 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 original decision overturned.

18. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal asks whether the matters raised in the application warrant reconsideration at all. In order for the answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the original decision which are so important that they demand intervention. If the applicant satisfies this requirement the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the original decision. When considering the original decision at this second stage, the standard applied is one of correctness: *Zone Construction Inc.* BC EST #RD053/06.

19. In my opinion, the matters raised by the Employer on this application do not warrant reconsideration at all.

20. A principal basis on which the Employer asserts that the Original Decision should be reconsidered is that the Employment Standards Branch, and the Employer's employees, are responsible for its failure to comply with the requirements of the *Regulation*. The Employer argues that for some years it had recorded its information relating to the production of its employees having regard to the hours they had worked, rather than to the volume or weight of the crop picked, and yet no investigative team from the Branch ever advised the Employer that its record-keeping was deficient. The principal of the Employer writing the application for reconsideration therefore says that for the Branch:

> to have changed the requirements to a strict interpretation of the legislation without advising us in advance is unfair because this allowed me to continue to make the same "error" each year, without realizing that I was interpreting the regulation incorrectly.

21. Further, the Employer suggests that since its employees were being paid by the hour, it would be impractical to expect them to maintain piece-rate records for later review by the Branch.

22. Neither of these submissions supports a reconsideration. They are arguments that were made to the Member, and indeed to the Delegate, and properly rejected by both. It was not the obligation of the Branch to warn the Employer that its practices failed to comply with the *Regulation*. Nor was it the responsibility of the Employer's employees to keep the Employer's records. It was the Employer's obligation to make itself familiar with the requirements of the legislative scheme, and the type of records it was required to keep. Those requirements are unambiguous. The Employer failed to abide by them, and it alone must suffer the consequences.

23. The Employer also argues that its appeal was not, in fact, filed late, because the Determination was issued on March 17, 2008, and there is a statement at the end of it that should the Employer wish to appeal it had to do so on or before April 24, 2008. By the Employer's calculation this meant that it had 38 days to file its appeal. Since the Employer acknowledges it received the Determination on July 7, 2008, it submits that it should have had a further 38 days. In the event, it filed its appeal in 30 days. It submits, therefore, that its appeal was filed in time.

24. It is not for me to speculate why the Determination contained a statement indicating that an appeal had to be filed by April 24, 2008, but whatever the reason that statement is of little moment because the Employer did not file its appeal until a date over three months later. Nor can a statement on the Determination diminish, or augment for that matter, the time limits for an appeal that have been established in section 112(3) of the *Act*. It is those time limits to which the Employer should have paid attention.

ORDER

25. Pursuant to section 116(1)(b) of the *Act*, I order that the decision of the Tribunal dated October 16, 2008 under #D104/08 be confirmed.

Robert Groves
Member
Employment Standards Tribunal