

An Application for Reconsideration

- by -

JBS Auto Sales and Service Ltd.
("JBS")

- 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.: 2015A/156

DATE OF DECISION: January 20, 2016

DECISION

SUBMISSIONS

Sukhdev Singh Jhand

on behalf of JBS Auto Sales and Service Ltd.

OVERVIEW

1. This is an application for reconsideration brought by JBS Auto Sales & Service Ltd. (“JBS”) pursuant to section 116 of the *Employment Standards Act* (the “*Act*”).
2. JBS challenges a decision of the Tribunal dated October 27, 2015, under BC EST # D109/15 (the “Original Decision”).
3. The Original Decision followed an appeal by JBS of a determination (the “Determination”) issued by a delegate (the “Delegate”) of the Director of Employment Standards on August 11, 2015.
4. The Determination resolved a complaint filed by one Jack Denbow (the “Complainant”) pursuant to section 74 of the *Act*. The Complainant alleged that JBS had failed to pay him all the wages to which he was entitled as an employee of JBS. Following a hearing of the complaint, the Delegate decided that JBS must pay \$2,563.24 in wages and interest to the Complainant, and an administrative penalty of \$500.00. The total found owing, therefore, was \$3,063.24.
5. The Original Decision confirmed the Determination.
6. I have before me the JBS application for reconsideration and supporting documents, the Original Decision, the JBS Appeal Form and submissions on the appeal, including the Determination and the Delegate’s Reasons for the Determination, as well as the record produced by the Director pursuant to section 112(5) of the *Act*.
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. I adopt the facts set out concisely in paragraphs 8 – 18 of the Original Decision.
9. Briefly put, JBS operates an auto sales and service business. It employed the Complainant as a body man.
10. The parties agreed that the Complainant’s last day of work was March 11, 2015. The parties disagreed about the date the Complainant commenced to work for JBS. The Complainant said he started work in November 2014. JBS contended that the date was January 7, 2015, and the Delegate agreed.
11. JBS paid the Complainant in cash for his work. The Delegate accepted its evidence regarding the wages it did pay to the Complainant while he was employed. However, the Delegate concluded that the parties’ evidence

relating to the Complainant's hours of work was insufficient to provide compelling support to the positions of either of them on that issue.

12. That said, the Complainant testified, and JBS did not contest, that he worked a five-day week, and five hours each work day. In addition, the parties agreed that the Complainant was to be paid \$20.00 per hour for his work. That evidence, taken with the findings made by the Delegate concerning the dates on which the Complainant started, and ended, his employment, and the evidence accepted by the Delegate as to the amounts JBS paid the Complainant in cash, led the Delegate to a simple arithmetical calculation of the amount of wages still owed to the Complainant. The Delegate did this by subtracting the amounts paid from the total wages owed calculated at \$20.00 per hour for a five-day week at five hours per day for the period January 7, 2015, to March 11, 2015. The Tribunal Member deciding the Original Decision concluded that it was open to the Delegate to resolve the dispute over unpaid wages in this manner.
13. The JBS appeal stated that the Delegate had failed to observe the principles of natural justice. In support, JBS alleged that the Delegate required two of its witnesses at the hearing to wait outside the hearing room, and would not hear their evidence when JBS asked that he do so. In the Original Decision the Tribunal Member noted that the Delegate was entitled to manage the hearing, and to decline to hear evidence that was deemed irrelevant. The mere fact, then, that the Delegate might have declined to hear the evidence of the JBS witnesses was not conclusive of a finding that he had failed to observe the principles of natural justice. The Tribunal Member also observed that there was nothing in the submissions of JBS on appeal that set out the substance of the evidence the witnesses might have given, and how it might have been relevant to the issues confronting the Delegate at the hearing. Accordingly, the Tribunal Member decided that JBS had not established a failure to observe the principles of natural justice.

ISSUE

14. 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

15. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116 of the *Act*, 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, cancel or vary the order or decision or refer the matter back to the original panel or another panel.
16. 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.
17. 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*.

18. 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.
19. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. At 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.
20. 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). Moreover, and *a fortiori*, the Tribunal will decline to reconsider when evidence that was available to a losing party, but was not presented to a delegate, or to the Tribunal on appeal, is advanced for the first time in support of an application under section 116 (see *Re Steelhead Business Products*, BC EST # D237/97, and *Re Faqiri*, BC EST # RD180/05).
21. 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.
22. In my view, JBS has failed to elicit grounds which would warrant my reconsidering the Original Decision.
23. The JBS application submits, in part, that the Complainant was not an employee, but an independent contractor. I infer from this submission that JBS wishes me to decide that the *Act* is inapplicable in this instance, as it only provides protections to individuals who are found to be employees.
24. The difficulty with this submission is that I see nowhere in the record of the proceedings before the Delegate, or the Tribunal on appeal, any reference to the issue of the Complainant's employment status, or evidence even remotely relating to it. That being so, and given that the JBS submission includes no substantive, new evidentiary support for its assertion that the Complainant was a contractor apart from bare assertions that he contractually agreed to that characterization of his status, I see no basis, on this ground, for disturbing the result set out in the Original Decision. If JBS wished to contest the Complainant's status as an employee, it needed to do so at first instance, before the Delegate, and not for the first time in an application for reconsideration.
25. JBS further alleges that the Complainant misrepresented his abilities and experience when hired. It also says that the Complainant's work was poor. These were matters that were raised before the Tribunal on appeal. The Original Decision concluded that they were irrelevant, because they were not probative of the issue that confronted the Delegate – whether the Complainant had been paid all the wages owed to him for the work he had performed prior to his terminating his employment in March 2015.
26. I agree with the conclusion stated in the Original Decision on this point. The complaint dealt with the question whether the Complainant was owed wages for work performed while he was employed. It did not

involve a claim for compensation for length of service. Therefore, the issue whether the Complainant gave cause for JBS to terminate his employment, either because he misrepresented his qualifications, or because he was less than competent in his work, was entirely unrelated to the issue that was the subject of the Determination. Since these matters were irrelevant on appeal, they are equally irrelevant on this application for reconsideration.

27. JBS also criticizes the Delegate and the Tribunal for what it perceives to be their disregard of the facts of the case, and their failure to acknowledge its concern regarding the alleged treatment of its witnesses at the hearing. JBS states, therefore, that they cannot be viewed to be impartial adjudicators.
28. I reject this submission. There is no evidence of bias or a lack of impartiality in any of the proceedings before the Delegate or the Tribunal Member responsible for the Original Decision. The Delegate conducted a hearing at which JBS was present. Apart from the issue of the witnesses, with which I have dealt, there is nothing which indicates that JBS was deprived of an opportunity to know the case against it, or an opportunity to lead evidence in response.
29. The Delegate made findings of fact, as he was duty bound to do. The Tribunal is rarely inclined to consider submissions challenging a delegate's findings of fact. For the Tribunal to be permitted to do that, it must be shown that the delegate's findings were irrational, perverse, or inexplicable. This is so because the appellate jurisdiction of the Tribunal under section 112 of the *Act* does not permit it to correct errors of fact. Instead, the Tribunal may only correct errors of law. An error of fact does not amount to an error of law unless the Tribunal concludes that no reasonable person, acting judicially and properly instructed as to the relevant law, could have made the impugned finding of fact (see *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, [1998] BCJ. No. 2275 (BCCA.); *Delsom Estates Ltd. v. British Columbia (Assessor of Area 11 – Richmond/Delta)* [2000] BCJ No.331). This is an extremely high standard for an appellant to meet. Mere disagreement with the facts as found, without more, is insufficient.
30. In my view, the JBS submission does not meet the required standard because it fails to show how the Delegate's findings of fact are irrational, perverse, or inexplicable. Instead, it limits its challenge to an assertion that they are incorrect.
31. The Tribunal Member examined the grounds of appeal offered by JBS on appeal, and addressed them in the Original Decision. Apart from saying that the Tribunal got it wrong, and therefore must be found to lack impartiality, JBS offers nothing that might persuade me the Original Decision reveals an error.
32. Like an appeal, reconsideration is an error-correction process. It is not a hearing *de novo*. In proceedings engaging section 116 of the *Act*, the applicant has the burden of demonstrating that a reviewable error has occurred when the Tribunal issues a decision in an appeal. In my view, JBS has failed to establish that the Original Decision contains any such error.

ORDER

33. Pursuant to section 116 of the *Act*, I order that the Original Decision BC EST # D109/15 be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal