

An application for Reconsideration

- by -

LS Labour Solutions Inc.  
(the “Employer”)

- 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:** Kenneth Wm. Thornicroft

**FILE No.:** 2005A/219

**DATE OF DECISION:** February 21, 2006

## DECISION

### SUBMISSIONS

Ronnie Gill

for LS Labour Solutions Inc.

### INTRODUCTION

1. This is an application filed by LS Labour Solutions Inc. (the “Employer”) pursuant to section 116 of the *Employment Standards Act* (the “Act”) for reconsideration of an adjudicator’s decision issued on December 8th, 2005 (B.C.E.S.T. Decision No. D190/05).
2. This application is being adjudicated based solely the parties’ written submissions. In that latter regard, I have a completed reconsideration application form from the Employer and no other submissions. Neither the delegate nor the respondent employee filed any submission and the Employer’s material is deficient. In adjudicating this application I have also considered the previous decisions issued in this matter (by both the Tribunal and the Employment Standards Branch) and the section 112(5) “record”.

### PREVIOUS PROCEEDINGS

#### *The Determination*

3. On January 6th, 2005 a delegate of the Director of Employment Standards, after having conducted an investigation, issued a Determination and accompanying “Reasons for the Determination” ordering the Employer to pay its former employee, Mandeep Bahniwal (“Bahniwal”), the sum of \$1,912.40 on account of unpaid wages and section 88 interest. Further, the delegate levied an additional \$500 administrative penalty (see section 98) for having contravened section 18 of the *Act*. Thus, the total amount payable under the Determination was \$2,412.40.
4. Ms. Bahniwal alleged that she worked from March 23rd to May 7th, 2004 as a farm labourer (the Employer is a licensed farm labour contractor) at a wage rate of \$8 per hour, however, was only paid \$332.80; she claimed payment for 224 “unpaid” hours. The Employer did not dispute Ms. Bahniwal’s hours of work but alleged that she had been paid in full—the balance of her pay having been paid in cash. The Employer did not have proper records to corroborate the alleged cash payments such as an accounts ledger or receipts (the Employer did provide some written records of questionable provenance). The delegate observed, quite correctly, that the Employer had the burden of proving that all wages had been paid and concluded that the Employer had not discharged its burden.

#### *The Appeal Proceedings*

5. The Employer appealed the Determination (although not within the statutory appeal period) on the grounds that the delegate failed to observe the principles of natural justice in making the Determination [section 112(1)(b)] and that it had new and material evidence [section 112(1)(c)]. The Employer also requested that the appeal be adjudicated by way of an oral hearing.

6. By way of Reasons for Decision issued July 27th, 2005, a Tribunal Member extended the appeal period pursuant to section 109(1)(b) of the *Act* (see B.C.E.S.T. Decision No. D113/05).
7. On October 3rd, 2005 the Tribunal Member issued a second set of Reasons for Decision (B.C.E.S.T. Decision No. D115/05) dismissing the Employer's appeal insofar as it concerned "natural justice". With respect to the "new evidence" ground, the Tribunal Member held that an oral hearing should be convened, however, the Tribunal Member also delineated what particular evidence would be admissible at the oral hearing [since some of the Employer's proposed "new evidence" was not admissible under section 112(1)(c)].
8. The oral appeal hearing was held on November 21st, 2005; Ms. Ronnie Gill testified for the Employer and Ms. Bahniwal testified on her own behalf. In Reasons for Decision issued on December 8th, 2005, the Tribunal Member varied the Determination to reflect an additional payment (over and above the \$332.80 previously determined, by the delegate, to have been paid) by the Employer to Ms. Bahniwal of \$608 on account of unpaid wages. In all other respects, the Determination was confirmed. The Tribunal Member concluded, based in part on the expert evidence of a former R.C.M.P. forensic document examiner, that Ms. Bahniwal had been paid—and acknowledged (in writing) having received—a further \$608, in cash, on April 27th, 2004.

### **THE REQUEST FOR RECONSIDERATION**

9. The Employer's request for reconsideration is dated December 29th, and was filed December 30th, 2005. The request is contained on a printed Tribunal Form and is not supported by any other documentation or further submissions. Neither Ms. Bahniwal nor the delegate—despite being invited to do so—filed any submissions in response to the Employer's reconsideration request.
10. In its application, the Employer specifically challenged the Tribunal Member's comments contained in paragraphs 33 and 34 of her December 8th, 2005 Reasons for Decision. In essence, the Employer asserts that the Tribunal Member erred in making certain factual findings.

### **FINDINGS AND ANALYSIS**

11. Applications for reconsideration do not proceed as a matter of statutory right; rather, the Tribunal has a statutory discretionary authority to reconsider a previously issued decision. In accordance with established jurisprudence, the Tribunal will only exercise its discretionary reconsideration power if two criteria are satisfied. First, the issue(s) raised in the reconsideration request must be sufficiently significant to warrant further inquiry and, second, assuming the first threshold has been satisfied, the Tribunal will then examine the merits of the application and decide if the adjudicator's decision ought to be overturned (*e.g.*, where the adjudicator has made a significant error in interpreting the *Act* or where there has been a failure to comply with the principles of natural justice) or referred back to the original adjudicator.
12. The Tribunal has consistently held that applications for reconsideration should succeed only when there has been a demonstrable breach of the rules of natural justice, or where there is compelling new evidence that was not available at the time of the appeal hearing, or where the adjudicator has made a fundamental error of law. The reconsideration provision of the *Act* is not to be used as a second opportunity to

challenge findings of fact made by the adjudicator, unless such findings can be characterized as lacking any evidentiary foundation whatsoever.

13. In this case, the disputed findings of fact relate to another employee by the name of Manjinder Dhaliwal—this person’s name appears in the Employer’s records but both the Employer’s representative and Ms. Bahniwal “denied that they knew a person named Manjinder Dhaliwal” (Tribunal Member’s Reasons for Decision at para. 33). However, “Ms. Gill stated that...Manjinder Dhaliwal may have worked for them, but there was no Social Insurance Number on file for Manjinder Dhaliwal, and they had no way to contact this person” (para. 33). The Tribunal Member concluded that it was likely that Manjinder Dhaliwal was a former employee and that cash wages were paid to her either directly or given to Ms. Bahniwal who, in turn, forwarded the money to Manjinder Dhaliwal (para. 42).
14. The Tribunal Member concluded, at para. 43:

The [Employer has] failed to meet the onus of proving that Ms. Bahniwal received and retained the amounts indicated in [the Employer’s documents] which were noted in connection with the name Manjinder Dhaliwal. There was no proof that Ms. Bahniwal was paid the sum of \$300.00 on May 15, 2004, as alleged. Besides the sum of \$332.80, which Mandeep Bahniwal acknowledged having received, it was not established that [the Employer] paid a cash payment of more than \$608.00 to Ms. Bahniwal for her labour. I have determined that the sum of \$608.00 was paid by [the Employer] in cash to Ms. Bahniwal on April 27, 2005.
15. In its application for reconsideration, the Employer asserts that it “never paid nor asked Mandeep Bahniwal to pay Manjinder Dhaliwal” and that as far as the Employer is concerned Manjinder Dhaliwal “is still owed funds”.
16. In essence, the Employer now asks (and without any further corroborating evidence) the Tribunal to set aside findings of fact made by the Tribunal Member even though the Tribunal Member’s findings of fact were based on a consideration of the conflicting *viva voce* evidence before her and were, for the most part, based on the Employer’s own records.
17. In my view, the Employer has manifestly failed to raise a sufficiently important issue to warrant further inquiry. The Employer’s application amounts to nothing more than a simple assertion that it disagrees with certain findings made by the Tribunal Member. A simple assertion of disagreement about findings of fact, without more, cannot constitute a proper foundation for a successful section 116 application.
18. The Tribunal Member made certain findings of fact; the Employer disagrees with the Tribunal Member’s findings. However, as noted above, the Tribunal Member had conflicting evidence before her and made her findings based on the relative credibility of the parties and the available corroborating documentary evidence. I am in no position to second-guess the Tribunal Member’s disputed findings of fact.

**ORDER**

19. The application to vary the decision of the Tribunal Member in this matter is **refused**. Pursuant to section 116(1)(b) of the *Act*, the Tribunal Member's decision (B.C.E.S.T. Decision No. D190/05) is **confirmed**.

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**Kenneth Wm. Thornicroft**  
**Member**  
**Employment Standards Tribunal**