

An Application for Reconsideration

- by -

Sate Express Foods Inc.
("Sate")

- 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: David B. Stevenson

FILE No.: 2007A/5

DATE OF DECISION: March 27, 2007

DECISION

SUBMISSIONS

Derrick Ghieuw	on behalf of Sate Express Foods Inc.
Brian Oentoro	on his own behalf
Erwin Schultz	on behalf of the Director

OVERVIEW

1. Sate Express Foods Inc. (“Sate”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “Act”) of a decision, BC EST #D007/07, made by the Tribunal on January 15, 2007 (the “original decision”). The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards on September 18, 2006. The Determination considered a complaint filed by Brian Oentoro (“Oentoro”) alleging Sate had contravened the *Act* by failing to pay wages in respect of his employment.
2. The Director found that Sate had contravened Section 18 of the *Act* by failing to pay Oentoro wages for 31.5 hours of work. The Director ordered Sate to pay Oentoro an amount of \$270.40, an amount which included annual vacation pay and interest, and imposed an administrative penalty under Section 29 of the *Employment Standards Regulation* in the amount of \$500.00.
3. The appeal raised the issues of whether there was a failure to observe principles of natural justice in making the Determination and whether the director erred in deciding Oentoro was an employee under the *Act*.
4. The Tribunal Member making the original decision provided a comprehensive analysis of those two issues in the appeal and confirmed the Determination.
5. The reconsideration application is brief. The reasons for requesting reconsideration are given as follows:

We feel we were not properly given a fair due process and clarification understanding of this matter at the first stage of our Hearing. It is quite obvious that a personal favour has gone sour to another, that a premeditated personal grudge was used to an advantage to conspire a loop-hole within our Employment Standards System.

- As an employer for nearly 17 years, we have absolutely NO records whatsoever
- The costly legal counsel was not an option for small business operations
- If we had been clearly advised of this black & white written rule, we would not have this option to proceed any further and would justifiably settled the amount
- The decision to proceed was due to uncertainty of the information provided and discussed during the Hearing Procedure
- Claim amount: upon further review, we had advised the Hearing the hours computed was 22 hours, and we have no idea to why 30 hours was accepted

- Why was it not taken into account that the complainant lied under Oaths [sic]

6. This reconsideration request raises matters that were not raised in the appeal.

ISSUE

7. In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case is appropriate for reconsideration, the substantive issues raised in this application relate to questions of fair hearing and the amounts found owing to Oentoro.

ANALYSIS OF THE PRELIMINARY ISSUE

8. The legislature has conferred an express reconsideration power on the Tribunal in Section 116 of the *Act* 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.*
- (2) The director or a person named in a decision or order of the tribunal may make an application under this section*
- (3) An application may be made only once with respect to the same order or decision.*

9. Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is "to provide fair and efficient procedures for resolving disputes over the interpretation and application" of its provisions. Another stated purpose, found in subsection 2(b), is to "promote the fair treatment of employees and employers". The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. An assessment is also made of the merits of the original decision. The focus of a reconsideration application is the original decision.

10. Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the tribunal as including:

- failure to comply with the principles of natural justice;
- mistake of law or fact;
- significant new evidence that was not reasonably available to the original panel;
- inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

11. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively re-visit the original decision and come to a different conclusion.
12. If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration.
13. After review of the original decision and the submissions of the parties on this application, I have decided this application does not warrant reconsideration.
14. The original decision considered the central issue that is re-visited in this reconsideration request: the alleged failure by the Director to observe principles of natural justice, described in this application as “fair due process and clarification understanding”. The original decision specifically considered whether there was any indication of unfairness in the process and found there was not. The focus of reconsideration is the original decision. There is nothing in this application that indicates how the original decision was wrong on that issue – as distinct from it being a decision on that issue with which Sate disagrees.
15. The point of the assertion that Sate was not given a proper “clarification understanding” of the matter at the “first stage” of the hearing is unclear. If it is meant to convey the sense that Sate was not given a fair hearing, that matter was addressed in the original hearing and, in respect of this application, immediately above. If it is meant to convey the suggestion that the delegate conducting the complaint hearing should have advised Sate to put forward their evidence and argument about the hours which Oentoro claimed he worked or that he should have advised Sate to settle, there is no obligation on the delegate conducting the complaint hearing to do either of those things. There are, in fact, sound reasons, which relate to the risk that a delegate might compromise his or her impartiality by directing a party on how to conduct their case during a complaint hearing, for not providing such advice.
16. If that assertion is meant to convey something other than what I have surmised from the context in which it is found, it is not apparent from the application and, ultimately, Sate must bear the failure to clearly communicate the basis for and the substance of the assertion.
17. In any event and even if this assertion merited some consideration, it does not appear to have been raised in the appeal and it would inappropriate to raise it for the first time in this application.
18. Sate’s dispute with the claim amount is also raised for the first time in this application. It was not a contentious issue in the Determination. The Determination specifically notes that Sate did not dispute Oentoro’s evidence as to the hours he attended the worksite. Nor was the finding in the Determination on the hours worked raised in the appeal. Had it been raised in the appeal, it is improbable that it would have been considered, as the conclusion by the delegate on the hours worked by Oentoro was purely factual. The Record does not remotely suggest any question of law was involved. Alleged errors in findings of fact are not included in the grounds of appeal set out in Section 112 of the *Act*.
19. In any event, as with the previous matter, it would be inappropriate to allow it to be raised in this application.
20. Even if the matters which were not raised in the appeal are properly before me, there is nothing in the material that would compel me to conclude either is meritorious.
21. In sum, the reconsideration request does not identify or address any alleged errors in the original decision. It re-visits the appeal and raises matters that were not raised in the appeal. Reconsideration is not warranted and the application is dismissed.

ORDER

22. Pursuant to Section 116 of the *Act*, I order the original decision be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal