

An application for Reconsideration

- by -

Jack's Towing Ltd.
("Jack's Towing")

- 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.: 2005A/209

DATE OF DECISION: March 8, 2006

DECISION

SUBMISSIONS

Cheryl Lambert on behalf of Jack's Towing Ltd.
Mary Walsh on behalf of the Director

OVERVIEW

1. Jack's Towing Ltd. ("Jack's Towing") seeks reconsideration under Section 116 of the *Employment Standards Act* (the "Act") of a decision, BC EST #D181/05, made by the Tribunal on November 22, 2005 (the "original decision"). The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards on August 19, 2005. The Determination had found Jack's Towing had contravened Sections 18, 40 and 63 of the *Act* in respect of the employment of Timothy Vieira ("Vieira") and ordered Jack's Towing to pay wages to Vieira in the amount of \$14,637.19 and imposed an administrative penalties of \$1500.00. The original decision confirmed the Determination.
2. This application was filed with the Tribunal by Jack's Towing on December 13, 2005. There is no issue concerning the timeliness of the application.
3. The application asks the Tribunal to reconsider the original decision because there has been a denial of natural justice through the process, including, but not necessarily limited to:
 - (i) the refusal by the delegate of the Director conducting the complaint hearing to grant an adjournment requested by a representative of Jack's Towing;
 - (ii) by making the determination without providing fair and efficient procedures for resolving the dispute; and
 - (iii) the failure of the Tribunal to conduct an oral hearing on the appeal;
4. Jack's Towing also says the decision that Vieira was an employee under the *Act* was pre-determined by the delegate and was based only on the submissions made by him.
5. The application asks that Jack's Towing be given an oral hearing and an opportunity to present its case, and respond to Vieira's claims, at that hearing. Although not specifically requested, it would logically follow that this Panel is being asked to set aside the original decision and the Determination.

ISSUE

6. 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 issue raised in this application, as it was in the appeal, is whether the Director failed to comply with principles of natural justice in making the Determination and whether the Tribunal erred by not granting Jack's Towing an oral hearing on their appeal.

ANALYSIS OF THE PRELIMINARY ISSUE

7. The legislature has conferred an express reconsideration power on the Tribunal in Section 116 which provides:
- 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.*
8. 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.
9. 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.
10. 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.
11. 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.

12. After review of the original decision, the submissions of the parties and the material on file, I have decided this application does not warrant reconsideration. This application does no more than re-visit the decision of the delegate to deny a request by Jack's Towing for adjournment of the complaint hearing. That matter was raised four-square in the appeal and was properly, and in my view correctly, dealt with in the original decision.
13. In the circumstances of this case, it is absurd to suggest Jack's Towing was denied a fair hearing. The representative for Jack's Towing, Mr. Slusar, was given ample opportunity to respond to Vieira's claims, but made a conscious decision to avoid participating in the complaint process, including the mediation session and the complaint hearing. It is exactly that type of conduct at which the principle in *Tri West Tractor Ltd.*, BC EST #D268/96, is directed. The panel in the original decision correctly found that principle applied to the circumstances of this case. Additionally, the suggestion that Jack's Towing should be able to submit evidence that was available during the complaint process but was not provided to the delegate at the time the Determination was being made flies in the face of the limited grounds of appeal in subsection 112(1) of the *Act*, which speaks, in paragraph (c), of evidence that was "not available" at the time the Determination was being made.
14. The Tribunal is not required to hold an oral hearing in any appeal. The applicant has not shown how the decision to decide the appeal based on written submissions alone was an error by the panel deciding the original decision. The argument for an oral hearing wrongly presupposes there is merit in the natural justice and "new evidence" arguments.
15. The application is denied.

ORDER

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

David B. Stevenson
Member
Employment Standards Tribunal