

An Application for Reconsideration

- by -

Darya Construction Inc.
("Darya")

- 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.: 2013A/13

DATE OF DECISION: March 21, 2013

DECISION

SUBMISSIONS

Majid Mojahed

on behalf of Darya Construction Inc.

OVERVIEW

1. Darya Construction Inc. (“Darya”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of a decision, BC EST # D014/13, made by the Tribunal on February 5, 2013 (the “original decision”).
2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 2, 2012.
3. The Determination was made by the Director on complaints filed by Sam Mousavi (“Mr. Mousavi”) and Parvaneh Azizi (“Ms. Azizi”), who alleged Darya had contravened the *Act* by failing to pay regular wages, annual vacation pay and statutory holiday pay. The Determination found that Darya had contravened Part 3, sections 17 and 18 and Part 5, section 45 of the *Act* and section 46 of the *Employment Standards Regulation* (the “*Regulation*”) and ordered Darya to pay the complainants \$17,434.45, an amount which included both wages and interest.
4. The Director also imposed administrative penalties on Darya under Section 29(1) of the *Regulation* in the amount of \$2,000.00.
5. The appeal filed by Darya sought to have the Determination referred back to the Director.
6. The Tribunal Member of the original decision dismissed the appeal under section 114(1) (f) of the *Act* and confirmed the Determination.
7. In this application, Darya requests the Tribunal to do what the Tribunal Member of the original decision would not do, which is to refer the matter back to the Director.

ISSUE

8. In any application for reconsideration there is a threshold, or preliminary, issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case warrants reconsideration, the issue raised in this application is whether the Tribunal should grant the request to reconsider the original decision and refer the matter back to the Director.

ARGUMENT

9. The reasons provided by Darya to support this application for reconsideration echo, with some minor differences in form but not substance, the reasons for the appeal. In brief, Darya says there is evidence available that was not available when the Determination was being made. The evidence described comprises the testimony of two witnesses – there was only one referred to in the appeal submission – and expert evidence that his computer was tampered with and documents removed, which the submission suggests ought to provide an acceptable reason for failing to provide documents demanded by the Director during the

investigation of the complaints. The application also attaches the submission filed with the appeal and adds those submissions to this application.

ANALYSIS

10. Section 116 of the *Act* states:

- 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.*

11. As the Tribunal has stated in numerous reconsideration decisions, the authority of the Tribunal under section 116 is discretionary. A principled approach to the exercise of this discretion has been developed. The rationale for this 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 approach is fully described 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 *The Director of Employment Standards (Re Giovanni (John) and Carmen Valoroso)*, BC EST # RD046/01, the Tribunal explained the reasons for restraint:

. . . the Act creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute . . .

There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the “winner” is not deprived of the benefit of an adjudicator’s decision without good reason. A third is to avoid the spectre of a tribunal process skewed in favor of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

12. 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, generally, the correctness of the original decision.

13. 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.
14. 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.
15. 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.
16. Having reviewed the original decision, the material in the appeal file and the submissions of Darya on the reconsideration request, I am not persuaded this matter warrants reconsideration.
17. As noted above, the focus of a reconsideration request is the correctness of the original decision.
18. Darya has, however, in this application requested, once more, that the Tribunal revisit the Determination in the context of alleged “new evidence” – a request that was examined and denied in the original decision. There is no reference at all in the application to there being any error in the original decision, and I can find none. The application simply expresses a disagreement with the conclusion of the Tribunal Member in the original decision about the merits of the appeal and its prospects for its success. In short, this application seeks to have another panel of the Tribunal examine the merits of the appeal and reach a different conclusion than did the Tribunal Member in the original decision. This is an inappropriate use of the reconsideration power in the *Act*.
19. Based on the material in the file and the recitation of the facts in the original decision, I agree completely with the findings made on the appeal and with the disposition of the appeal. Faced with an appeal having no reasonable prospect of succeeding, it was entirely correct and appropriate for the Tribunal Member in the original decision to take an approach that, in result, accepted it is neither fair nor efficient to put parties through the delay and expense of an appeal process in such circumstances: *Gerald Knodel a Director of 0772646 B.C. Ltd. carrying on business as Home Delivery*, BC EST # D083/11.
20. The fact that Darya now alleges one additional witness is available to testify and that he can provide evidence that his computer was tampered with adds nothing to this application. The facts set out in the original decision and the comments at paras. 24-26 would apply equally to two witnesses as to one.
21. The assertion relating to the company’s computers being tampered with and information being lost was made to the Director during the investigation, but no effort was ever made at that time to establish the validity of that assertion and it was never raised as a basis for appealing the decision of the Director to impose an administrative penalty under section 46 of the *Regulation*. Nor was there any attempt made to have the information allegedly lost, which purportedly had been contained in an e-mail provided by Darya’s accountant, to have that information re-sent by the accountant. The assertions made lack an element of credibility. As well as concerns about whether such evidence could be accepted as credible and probative, it is well past the time for making such an assertion and is, in any event, unsupported by anything but a bald statement made in the reconsideration submission. I cannot imagine that the Tribunal Member of the original decision would have been convinced there was merit to the appeal based on this “new evidence”.
22. In sum, Darya has not shown the original decision was wrong in any respect. The Tribunal will not revisit the arguments made by Darya in its appeal. The application for reconsideration is denied.

ORDER

23. Pursuant to section 116 of the *Act*, the original decision is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal