

An Application for Reconsideration

- by -

Global Agriculture Trans-Loading Inc.
("Global")

- 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.: 2015A/36

DATE OF DECISION: April 8, 2015

DECISION

SUBMISSIONS

Deepak Gautam

counsel for Global Agriculture Trans-Loading Inc.

OVERVIEW

1. Global Agriculture Trans-Loading Inc. (“Global”) seeks reconsideration of a decision of the Tribunal, BC EST # D013/15 (the “original decision”), dated January 27, 2015.
2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 28, 2014.
3. The Determination was made by the Director on a complaint filed by Emmanuel Lobo (“Mr. Lobo”), who alleged Global had contravened the *Act* by failing to pay all regular and overtime wages earned, annual vacation and statutory holiday pay and by requiring him to repay wages.
4. The Determination found Global had contravened several provisions of the *Act* and owed Mr. Lobo wages and interest in the amount of \$37,204.45. The Director imposed administrative penalties against Global in the amount of \$2,500.00.
5. An appeal was filed by Global alleging the Director erred in law and failed to observe principles of natural justice in making the Determination. Global also sought to introduce new evidence in the appeal. The appeal sought to have the Tribunal cancel the Determination and refer the matter back to the Director.
6. The Tribunal Member making the original decision dismissed the appeal under section 114(1)(f) of the *Act* and confirmed the Determination.
7. In the original decision, the Tribunal Member found the Director had not erred in law and that Global had not shown there was a failure to observe principles of natural justice in making the Determination. The Tribunal Member making the original decision refused to consider the “new evidence” Global sought to have included in the appeal finding it did not meet the criteria the Tribunal has adopted for allowing new or additional evidence in an appeal.
8. In the appeal, Global argued the Director had erred in law by acting without evidence in finding Mr. Lobo worked for Global until October 3, 2013. The Tribunal Member making the original decision reviewed the evidence that was presented to and considered by the Director during the complaint process and found there was evidence presented on that issue which was sufficient to allow the Director to make the finding being challenged. The Tribunal Member making the original decision found Global was doing no more than challenging the weight attached by the Director to the evidence provided by the respective parties, stating, correctly in my view, that the weight to be given to evidence is a question of fact which, in the circumstances, was not open to appeal by Global.
9. The Tribunal Member making the original decision found the conclusion reached by the Director was one that could reasonably be made on the available evidence and Global had not met the burden of showing an error of law in that conclusion.

10. Global argued the Director failed to observe principles of natural justice in making the Determination by not ordering Mr. Lobo to produce “original or certified copies of bank statements, Visa statements, debit card statements, phone bills, driving abstract from ICBC, copy of work permit under his new employer and name and contact information of current employer to verify start date” and by not adjourning the complaint hearing until Mr. Lobo provided these items. The Tribunal Member making the original decision found the Director had not failed to observe principles of natural justice by not ordering Mr. Lobo to produce the requested documentation or by refusing to grant a further, and indefinite, adjournment of the complaint hearing.
11. The Tribunal Member making the original decision also refused to accept the “new evidence” presented by Global with the appeal, finding the information contained in the evidence Global sought to add was not credible and, in any event, was evidence which, with some diligence, could have been provided to the Director during the complaint process.
12. Finally, the Tribunal Member making the original decision rejected other arguments made by Global in the appeal, finding them to be challenging findings of fact and a submission on a point made in the complaint hearing and rejected in the Determination. None of these additional arguments were shown by Global to be an error on the part of the Director.

ISSUE

13. 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 and cancel the original decision and refer the matter back to the Director.

ARGUMENT

14. In the application for reconsideration, Global re-visits the grounds on which the appeal was based, re-arguing the Director failed to observe principles of natural justice by not granting an adjournment to Global while Mr. Lobo produced documents. The thrust of the arguments made in this application is that the Director failed to properly balance the interests of efficiency and fairness, ignored valuable and relevant evidence explaining the failure by Global to produce the hand written time sheets and failed to explain to Global’s representative the importance of having witnesses present at the complaint hearing to present *viva voce* evidence.
15. The application for reconsideration includes further attempts to introduce additional evidence, some in the form of documents, some in the form of unsubstantiated assertions.
16. Global submits the Tribunal Member making the original decision also missed the same crucial evidence ignored by the Director. Global submits the Tribunal Member making the original decision erred in accepting the time sheets provided by Mr. Lobo to those prepared by Global. I will note here that that decision on hours worked by Mr. Lobo was made by the Director in the Determination, not by the Tribunal Member. The Tribunal Member did nothing more in respect of that decision than to point out those were findings of fact and that Global had not established those findings could be challenged.

ANALYSIS

17. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally. 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.

18. 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 application and interpretation” 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.

19. 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. Undue delay in filing for reconsideration will mitigate against the application. 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.
20. 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.
21. It will weigh against the 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.
22. 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.
23. I am not persuaded this application warrants reconsideration.
24. This application does nothing more than re-assert challenges made in the appeal that were not accepted in the original decision. Its focus is not the original decision but the exercise of discretion by the Director in directing the complaint process and findings of fact made in the Determination.
25. I will reiterate, briefly, the reasons provided in the original decision for denying the appeal. First, the Tribunal Member found there was no error of law made by the Director as there was, contrary to the argument made on appeal, evidence on which the Director could reasonably have come to the decision made. There was no error of law shown and, absent such an error, an appeal may not challenge findings of fact. Second, there was no failure to observe principles of natural justice in making the Determination. Third, Global did not satisfy the criteria for the admission of additional evidence in the appeal.
26. Raising again challenges to findings of facts made in the Determination in an application for reconsideration does not alter the Tribunal's authority to consider them. This application re-argues challenges to facts found in the Determination without demonstrating a reviewable error and, in the absence of such an error, confirming the correctness of the Tribunal Member making the original decision, are matters over which the Tribunal has no authority.
27. Adding more detail to support arguments that were not accepted by the Director and, in any event, were not made in the appeal, and providing new factual assertions to support other arguments, particularly when these arguments speak against the Determination, not the original decision, are not appropriate in the reconsideration process.
28. Overall, there is nothing in this application that would justify the Tribunal using its authority to allow reconsideration of the original decision and accordingly the application is denied.

ORDER

29. Pursuant to section 116 of the *Act*, the original decision, BC EST # D013/15, is confirmed

David B. Stevenson
Member
Employment Standards Tribunal