

An Application for Reconsideration

- by -

Tomas Zavala  
("Mr. Zavala")

- 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:** Raewyn J. Brewer

**FILE No.:** 2013A/8

**DATE OF DECISION:** April 3, 2013

## DECISION

### SUBMISSIONS

Tomas Zavala

on his own behalf

### INTRODUCTION

1. This is an application made pursuant to section 116 of the *Employment Standards Act* (the “*Act*”) for reconsideration of an appeal decision by Tribunal Member Bhalloo on September 25, 2013 (BC EST # D099/12) – the “Appeal Decision”. The Appeal Decision confirmed a determination issued by a delegate of the Director of Employment Standards (the “Delegate”) on June 7, 2012, that ordered the current applicant, Tomas Zavala (Mr. Zavala), to pay his former employee, Laurence Earl Brewin (“Mr. Brewin”), the total sum of \$6,397.90 representing unpaid wages, overtime, statutory holiday and vacation pay and section 88 interest (the “Determination”). Further, and also by way of the Determination, the Delegate levied a mandatory \$1,500 monetary penalty pursuant to section 98(1) of the *Act* against Mr. Zavala for having contravened sections 17 and 18 of the *Act* and 46 of the *Employment Standards Regulation* (the “*Regulation*”). Thus, the total amount payable under the Determination was \$7,897.90.
2. Mr. Zavala’s reconsideration application rests on his assertion that he was not given a fair opportunity to present his side of the story. By way of remedy, Mr. Zavala asks that the Tribunal: (a) change or vary the decision; (b) cancel the three administrative penalties; and/ or (c) schedule a new meeting (with Mr. Brewin in attendance) to review the file.
3. Section 116 of the *Act* gives the Tribunal a *discretionary* authority to reconsider an appeal decision. In *Director of Employment Standards (Milan Holdings Inc.)*, BC EST # D313/98, the Tribunal established a two-stage process for adjudicating reconsideration applications. At the first stage, the Tribunal considers whether the application is timely, relates to a preliminary ruling, is obviously frivolous, or is simply a clear attempt to have the Tribunal revisit factual matters that have already been appropriately determined. If the application can be so characterized, the Tribunal will summarily dismiss it without further consideration of the underlying merits. On the other hand, if the application raises a serious question of fact, law or principle, or suggests that the Tribunal’s decision should be reviewed because of its fundamental importance or because of its possible implications for future cases, the Tribunal will proceed to the second stage at which point the underlying merits of the application are given full consideration.
4. At this point, I am only addressing the first stage of the *Milan Holdings* test. If I am satisfied that this application passes the first stage, the Tribunal will advise the respondents and seek their submissions regarding the issues raised by Mr. Zavala’s application. On the other hand, if this application does not pass the first stage, it will be dismissed. I am adjudicating this application based on the submissions filed by Mr. Zavala and, in addition, I have reviewed the record that was before the Tribunal when the Appeal Decision was issued.
5. In the following sections of these reasons, I briefly summarize the adjudicative history of this matter and then assess whether this application passes the first stage of the *Milan Holdings* test.

## PRIOR PROCEEDINGS

6. Mr. Zavala operates a transportation business and employed Mr. Brewin as a short haul truck driver from October 3, 2011, to November 18, 2011. Mr. Brewin resigned from his employment on November 18, 2011, and filed a complaint against Mr. Zavala on November 21, 2011, alleging that Mr. Zavala contravened the *Act* by failing to pay him regular wages, overtime, statutory holiday and annual vacation pay.
7. Over the course of the investigation Mr. Zavala was given a number of opportunities to respond to Mr. Brewin's complaint:
  - A mediation meeting scheduled for March 12, 2012, which Mr. Zavala failed to attend.
  - A Demand for Records on March 13, 2012, affording Mr. Zavala an opportunity to respond; in response Mr. Zavala sent the Delegate a set of documents he referred to as the "daily manifest" prepared by Mr. Brewin.
  - On or about March 26, 2012, Mr. Zavala spoke with a delegate at the Employment Standards Branch (the "Branch"). He submitted that he paid Mr. Brewin on commission and disputed the accuracy and amount of hours submitted by Mr. Brewin.
  - A fact-finding meeting on May 3, 2012, which Mr. Zavala notified the Delegate he could not attend on May 2, 2012.
  - Request by the Delegate on May 2, 2012, for additional submissions and documents from Mr. Zavala, which Mr. Zavala did not respond to.
8. The two key issues before the Delegate were whether Mr. Brewin was to be paid an hourly wage or a commission rate, and the total number of hours Mr. Brewin worked over the six weeks of his employment. Regarding the first issue, the Delegate determined on the balance of probabilities that Mr. Brewin was to be paid an hourly rate, not a commission as argued by Mr. Zavala. Therefore, it was necessary to calculate the hours Mr. Brewin worked. The Delegate determined that the best evidence before him regarding hours were the time sheets submitted by Mr. Brewin, so he calculated the wages, statutory and holiday pay amounts outstanding based on these time sheets. The time sheets show the work dates, start times, stop times, and the total hours worked. The Delegate did not have payroll records before him to compare the time sheets to; what he did have were the "daily manifests" submitted by Mr. Zavala. The Delegate addressed the apparent inconsistencies between the hours recorded in the manifests and the timesheets. He found that the manifests submitted by Mr. Zavala did not show the actual hours work by Mr. Zavala but rather the deliveries that he made and that the dates and times in the manifests actually supported the dates and hours stated in the time sheets.
9. Mr. Zavala appealed the Determination on the ground that new evidence had become available that was not available at the time of the investigation and asked that the Tribunal cancel the Determination. Mr. Zavala also requested a new meeting between the parties and that a new delegate be assigned to oversee the matter.
10. The crux of Mr. Zavala's appeal was that Mr. Brewin had given false or wrong information "of the conditions, payout commission rate and pay periods and other important details of his employment". To support his assertion, Mr. Zavala included a detailed explanation of his business model and how commission-based pay for truck drivers dominates his industry and reiterated Mr. Brewin was paid on commission and was therefore not entitled to overtime, statutory holiday and vacation pay. He calculated the amounts owing to Mr. Brewin as \$1,413.22. Additionally, he argued before the Tribunal that Mr. Brewin had two accidents,

which damaged his truck and a ladder being delivered by Mr. Brewin. In support he produced an invoice for repair and a picture of a ladder, both of which were available during the course of the investigation but were not submitted to the Delegate.

11. The appeal was unsuccessful. Tribunal Member Bhalloo began the appeal analysis by setting out the circumstances in which new evidence will be admitted per the framework set out in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03. Tribunal Member Bhalloo noted that to be successful in his application, the onus was on Mr. Zavala to satisfy each of the four conjunctive criteria in *Re: Merilus*. He found that Mr. Zavala failed to meet the first criterion; that is, the evidence that Mr. Zavala adduced as “new evidence” was evidence that could have been discovered and presented during the course of the investigation. While the truck repair invoice and the picture of a ladder had not been submitted during the investigation, both were available at that time.
12. Given new evidence has to meet all four parts of the *Merilus* test, this finding alone would have been sufficient to dismiss the appeal. However, Tribunal Member Bhalloo gave additional reasons to support his decision. First, the “new evidence” failed the remainder of the four-part *Merilus* test. Second, contrary to Mr. Zavala’s assertions, Mr. Zavala had been given ample opportunity to tell his “story” during the investigation and produce all documents to support his argument. Third, the Delegate had clearly considered the manifests and the remainder of Mr. Zavala’s appeal was simply a reiteration or restatement of the submissions made during the telephone conversation he had with a delegate. Tribunal Member Bhalloo noted that the Tribunal has been clear that appeals are not a forum for the unsuccessful party to have a second chance to advance arguments previously advanced during the investigation and properly rejected in the determination. Finally, he stated that allowing Mr. Zavala’s appeal or giving him the opportunity to simply reargue his case are inconsistent with the fundamental purposes of the *Act* set out in section 2(d), namely, to provide fair and efficient procedures to resolve disputes.

## THE APPLICATION FOR RECONSIDERATION

13. Pursuant to the Tribunal’s *Rules of Practice and Procedure* (September 1, 2012) (the “*Rules*”), reconsideration applications should be delivered within 30 days after the date of the Tribunal decision (Rule 25(2)). If delivered more than 30 days after the date of the Tribunal decision, the applicant must provide written reasons for the delay (Rule 25(3)). Mr. Zavala’s reason for his late application is that he was unaware of the 30-day period; in his view understandable given this is his “first time dealing with an issue like this”.
14. The substance of Mr. Zavala’s reconsideration application is a one-page letter in which he asks the Tribunal to reconsider the appeal decision, as he believes he was not given a fair opportunity to present his side of the story, including evidentiary support in the form of original daily manifests and cheque pay outs. By way of remedy, Mr. Zavala asks that the Tribunal: (a) change or vary the decision; (b) cancel the three administrative penalties; and/ or (c) schedule a new meeting (with Mr. Brewin in attendance) to review the file.
15. Attached to the covering letter are the following documents:
  - October 3 – 11, 2011, manifest titled “Right hours by Mr. Brewin, 5 hours” with a note stating “rest of daily manifest copies already on file”;
  - October 21, 2011, manifest titled “Right hours worked, 7 ¾ hours (done by Mr. Brewin)”;
  - Copy of the hand-written summary of October 2011 hours submitted by Mr. Brewin to the Delegate highlighted by Mr. Zavala in two places (October 3, 2011, and October 21, 2011) titled “Wrong to the Tribunal hours by Mr. Brewin”;

- Copy of two pages from the Reasons for Determination with the following passage highlighted: “Mr. Brewin claims that Mr. Zavala told him that he will not be paid for time spent doing vehicle inspections, time he was on stand-by, time he drove an empty truck or time” [he spent on a delivery where the cost of delivery only covered the cost of the package]; and
  - Copy of a letter dated January 8, 2013, from the Branch to Mr. Zavala outlining that if the Branch did not receive confirmation from the Tribunal by February 15, 2013, that a reconsideration application had been filed, the monies being held in trust for Mr. Brewin would be dispersed.
16. In my view, this application must be summarily dismissed. Member Bhalloo’s decision was issued on September 25, 2012, and this application was filed on February 13, 2013. There is nothing in the material before me to explain why the application was filed outside the prescribed 30-day time period, except for Mr. Zavala’s assertion that he was unaware and unfamiliar with the process. In this regard, I note that on the cover letter sent to Mr. Zavala by the Tribunal on September 25, 2012, attaching the appeal decision, there is a bolded text box that includes a phone number for the Tribunal and directs a potential applicant to the Tribunal’s website. The website clearly outlines the requirements and timing for a reconsideration application. It appears to me that it was only once Mr. Zavala was notified that the monies being held in trust for Mr. Brewin would be dispersed, did he choose to have the Tribunal reconsider the appeal.
17. That said, the application, even if it were timely, does not pass the first stage of the *Milan Holdings* test and thus I do not propose to rest my decision on timeliness.
18. As I understand Mr. Zavala’s application for reconsideration, he believes he was not given a fair opportunity to present his side of the story for the following four reasons:
- more than one delegate handled the investigation;
  - the mediation was unfair;
  - he was moving during the scheduled meeting times and therefore did not know about the meetings; and
  - he holds all the paper work that supports his case and discredits Mr. Brewin’s, samples of which he appended to the reconsideration application (as outlined above).
19. I am thoroughly satisfied based on the record before me that Mr. Zavala was given ample opportunity to present his side of the story: the mediation meeting, fact-finding meeting, demand for records, and telephone conversation with the Delegate. As noted by Tribunal Member Bhalloo, a fundamental purpose of the *Act* is to provide fair and efficient procedures to resolve disputes. It is imperative on parties to take proceedings seriously, provide their “story” and the “paper work” to support it, and to respond in a timely manner at all stages of the process, not simply when findings are made adverse to them. The exception to this is when evidence becomes available that was not available at the time the determination was being made. However, I agree with Member Bhalloo’s reasoning and analysis that the submissions and additional documentation submitted by Mr. Zavala during the appeal and reiterated before me, do not meet the test set out in *Merilus* and are simply reiterations of arguments made in the investigation and properly rejected by the Delegate.
20. Regarding Mr. Zavala’s request that the Tribunal cancel the three administrative penalties, each is imposed under section 98 of the *Act* with the amount fixed by section 29 of the *Regulation* at \$500 per contravention for a “first offender”. Given the fact of Mr. Zavala’s three contraventions, there is no jurisdiction in the

Tribunal to modify or cancel the penalties or to vary the amount imposed for each contravention (see *Eureka Security Services Ltd.*, BC EST # RD119/10).

21. In sum, Section 116 of the *Act* gives the Tribunal a *discretionary* authority to reconsider an appeal decision. Not only is this reconsideration application untimely without a reasonable explanation, but also, in my view, it does not pass the first stage of the *Milan Holdings* test, as it does not raise a *prima facie* argument that the Appeal Decision was wrongly decided. That being the case, I am exercising my discretion to refuse this application. Accordingly, there is no need to seek submissions from the respondents regarding the issues raised by this application.

### **ORDER**

22. Mr. Zavala's application under subsection 116(2) of the *Act* to cancel the Appeal Decision (BC EST # D099/12) is refused. Pursuant to subsection 116(1)(b), the Appeal Decision is confirmed.

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**Raewyn J. Brewer**  
**Member**  
**Employment Standards Tribunal**