

An Application for Reconsideration

- by -

Richmond Certigard Auto Ltd. carrying on business as Petro-Canada
(“RCA”)

- 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.: 2010A/21

DATE OF DECISION: April 20, 2010

DECISION

SUBMISSIONS

| | |
|----------------|--|
| Peter Pang | on behalf of Richmond Certigard Auto Ltd. carrying on business as Petro-Canada |
| Kristine Booth | on behalf of the Director of Employment Standards |

OVERVIEW

1. Richmond Certigard Auto Ltd. carrying on business as Petro-Canada (“RCA”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of a decision, BC EST # D003/10, made by the Tribunal on January 5, 2010 (the “original decision”). The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on September 3, 2009. The Determination considered a complaint filed by Christopher D. Ma (“Ma”), alleging RCA had contravened requirements of the *Act* in respect of his employment by failing to pay him wages.
2. The Determination found that RCA had contravened sections 17 and 18 the *Act* and ordered the payment of regular wages, annual vacation pay and interest under section 88 of the *Act* in the amount of \$2,339.56 and imposed administrative penalties on RCA for contraventions of the *Act* in the amount of \$1000.00.
3. RCA appealed the Determination on the ground the Director erred in law and failed to observe principles of natural justice in making the decision. RCA also sought to introduce new evidence on the appeal.
4. The Tribunal Member of the original decision found none of the grounds of appeal were established, dismissed the appeal and confirmed the Determination.
5. In this application for reconsideration, RCA seeks to reopen a matter that was addressed and decided in the Determination and reviewed, and dismissed, in the original decision.

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 is whether the Tribunal should have accepted the “new” evidence provided by RCA during the appeal process and considered whether the Director erred in calculating the amount of wages owed to Ma.

ANALYSIS OF THE PRELIMINARY ISSUE

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.*

7. 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.
8. It is noted that the application here was filed outside of the time set out in the Tribunal's *Rules of Practice and Procedure* for seeking reconsideration of a decision made by the Tribunal under section 112 of the *Act* by two days. RCA says this delay was accidental. While it is a factor to be considered, the delay in this case does not weigh heavily against the application.
9. 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.

ARGUMENT

12. As indicated above, this application is based on the contention by RCA that the Director reached an incorrect factual conclusion about the amount of time Ma worked in December 2008 and that error affected the Director's calculation of the wages that were owed to Ma. In other words, RCA contends the Director made a mistake in the facts that led to an incorrect result. The same argument was made, but not accepted, in the appeal. In support of this argument in the appeal, RCA provided an unsworn statement from Matthew Ip, a former employee of RCA who worked as a mechanic under the supervision of Ma. That statement was not accepted as “new”, or additional, evidence in the original decision. The reasons for not accepting that evidence are set out in the original decision.

13. RCA does not indicate in this application how the original decision was wrong in either rejecting the challenge to the factual finding made by the Director on the December 2008 work performed by Ma or in rejecting the “new” evidence submitted in the appeal.
14. As indicated above, the focus of a reconsideration application is the original decision. As it applies to the matters raised in this application, the tribunal Member of the original decision was not persuaded the Director made any reviewable error on the matter of the work performed by Ma and the wages paid to Ma in December 2008 and exercised the Tribunal’s discretion by refusing to accept the “new” evidence presented with the appeal that sought to “clarify” the matter of the days worked.
15. In this application, as indicated above, RCA has not addressed potential errors in the original decision, but has refocused on the Determination, rearguing submissions made in the appeal, which were not accepted in the original decision, and seeking to resubmit evidence with this application that was submitted but not accepted in the appeal process.
16. It is clear the objective of RCA in this application is not to correct any demonstrated error made in the original decision, but to have this panel review the Determination, allow, and give effect to, the “new” evidence and change aspects of the original decision without showing any reason for doing so within the reconsideration principles established by the Tribunal and set out above.
17. It weighs strongly against this application that I view it as an attempt to have another panel of the Tribunal review the Determination and come to a different conclusion than the Tribunal Member in the original decision.
18. That kind of application is not an appropriate use of the power given to the Tribunal under section 116. Accordingly, RCA has not established any basis upon which I should exercise my discretion to reconsider the original decision.
19. The application is dismissed.

ORDER

20. Pursuant to section 116 of the *Act*, this application for reconsideration is dismissed.

David B. Stevenson
Member
Employment Standards Tribunal