

An Application for Reconsideration

- by -

Sarak Holdings Ltd. carrying on business as Premier Mountain Lodge & Suites
("Sarak")

- 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/48

DATE OF DECISION: April 30, 2015

DECISION

SUBMISSIONS

Karim Merali

on behalf of Sarak Holdings Ltd. carrying on business as
Premier Mountain Lodge & Suites

OVERVIEW

1. Sarak Holdings Ltd. carrying on business as Premier Mountain Lodge & Suites (“Sarak”) seeks reconsideration of a decision of the Tribunal, BC EST # D024/15 (the “original decision”), dated March 11, 2015.
2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on October 31, 2014.
3. The Determination was made by the Director on a complaint filed by Ailie Beaudry (“Ms. Beaudry”), who alleged Sarak had contravened the Employment Standards Act (the “*Act*”) by failing to pay all wages earned for work performed in the period September 15 – 25, 2013.
4. The Determination found Sarak had contravened provisions of the *Act* and owed Ms. Beaudry wages and interest in the amount of \$2,556.69. The Director imposed administrative penalties against Sarak in the amount of \$1,000.00.
5. An appeal was filed by Sarak alleging the Director failed to observe principles of natural justice in making the Determination.
6. The Tribunal Member making the original decision dismissed the appeal and confirmed the Determination.
7. In the original decision, the Tribunal Member found the Director had not failed to observe principles of natural justice in making the Determination. The Tribunal Member then considered whether the Director had committed an error of law, even though that ground of appeal was not raised. The Tribunal Member found no error of law was made as the result reached was one the Director was able to make based on the evidence provided during the complaint process.
8. The Tribunal Member also considered whether new evidence included with the appeal satisfied the criteria for allowing and considering additional evidence produced for the first time in an appeal, but found it did not, as the Tribunal Member found the evidence was available during the complaint investigation and could have provided to the Director.
9. The Tribunal Member dismissed the appeal.

ISSUE

10. 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

11. It is difficult to flesh out any particular argument in this application. The application is, at its core, no more than a continuing expression of disagreement with the Determination, which Sarak believes is an unfair decision. If I were to summarize the argument, it is that the Determination and the original decision are both unfair.
12. The application restates all of the arguments made in the appeal, attaching the appeal and resubmitting the additional evidence that was included with the appeal, but not accepted for the reasons stated in the original decision.

THE FACTS AND ANALYSIS

13. 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 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.*

14. 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 a 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” not be 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.

15. 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.

16. 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.
17. 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.
18. 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.
19. I am not persuaded this application warrants reconsideration.
20. As I have suggested above, this application does no more than re-assert challenges made in the appeal that were not accepted in the original decision. Its focus of this application is not the original decision but the Determination.
21. I will reiterate, briefly, the reasons provided in the original decision for denying the appeal. First, the Tribunal Member found there was no failure to observe principles of natural justice in making the Determination. Second, 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. Third, Sarak did not satisfy the criteria for the admission of additional evidence in the appeal.
22. Raising the same challenges to the Determination in an application for reconsideration that were raised and dismissed in an appeal is not an appropriate use of the reconsideration process. As indicated above, it weighs against an application for reconsideration if its objective is to have the Tribunal effectively re-examine the appeal and come to a different conclusion than was made in the original decision. That is the case here.
23. 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

24. Pursuant to section 116 of the *Act*, the original decision, BC EST # D024/15, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal