

An Application for Reconsideration

- by -

Daniel Alberto De Buen
("De Buen")

- 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:** Carol L. Roberts**FILE No.:** 2012A/35**DATE OF DECISION:** June 5, 2012

DECISION

SUBMISSIONS

Daniel Alberto De Buen	on his own behalf
Gordon World	on behalf of Ecodrive Technology Group Inc.
Sukh Kaila	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an application by Daniel Alberto De Buen for a reconsideration of Decision #D025/12 (the “Original Decision”), issued by the Tribunal on March 8, 2012.
2. On July 6, 2010, Mr. De Buen filed a complaint of unpaid wages and compensation for length of service against Ecodrive Technology Group Inc. (“Ecodrive”). On December 14, 2011, the Director of Employment Standards issued a decision dismissing Mr. De Buen’s complaint.
3. Mr. De Buen appealed the Determination citing all of the statutory grounds of appeal (that the Director erred in law and failed to comply with the principles of natural justice and that new evidence had become available that was not available at the time the Determination was made). Mr. De Buen’s submissions were, in essence, that the Director’s delegate was biased against him, made perverse findings of fact and failed to consider relevant evidence. Mr. De Buen also submitted new evidence on appeal consisting of documents obtained from Vancouver City Hall pursuant to a Freedom of Information (FOI) request.
4. After reviewing the parties’ submissions and the record, the Member concluded that the Director had breached the principles of natural justice in failing to consider an email regarding Mr. De Buen’s presence at Ecodrive between October 31, 2009, and November 9, 2009. The Member referred the matter back to the Director to consider the question of whether or not Mr. De Buen was employed and entitled to any wages during that period. The Member determined that, notwithstanding the delegate’s failure to consider the email, that evidence did not support Mr. De Buen’s argument that he was entitled to additional wages. The Member upheld all other aspects of the Determination, concluding that Mr. De Buen had not demonstrated the Director was biased or had made a palpable or overriding error in the interpretation or application of the *Act*. The Member concluded that the “new evidence” was not relevant to the material issue on appeal relating to his claim for outstanding wages and would not qualify as new evidence.

ISSUES

5. There are two issues on reconsideration:
 1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?
 2. If so, should the decision be cancelled or varied or sent back to the Member?

ARGUMENT

6. Mr. De Buen seeks to have “key points” of the Original Decision “reviewed for reconsideration”. He submits that an email and other material obtained as a result of the FOI request are critical to determining the validity of Ecodrive’s assertion that no deferred wage agreement existed between the parties.
7. Mr. De Buen submits that this information is highly relevant to his claim for wages and seeks to have the information “admitted” and considered in making a final decision.
8. The Director submits that Mr. De Buen’s application has failed to demonstrate the existence of a deferred wage agreement and asks the Tribunal to deny the application for reconsideration.
9. Ecodrive also contends that the FOI data has no relevance to Mr. De Buen’s claim that there was an agreement between the parties to pay Mr. De Buen in excess of \$1,500 per month and seeks to have the application for reconsideration dismissed.

ANALYSIS

10. The *Employment Standards Act*, R.S.B.C. 1996 c. 113 (the “*Act*”) confers an express reconsideration power on the Tribunal. Section 116 provides
 - (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.

1. The Threshold Test

11. The Tribunal reconsiders a Decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *Act* detailed in Section 2 “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act.”
12. In *Milan Holdings* (BC EST # D313/98) the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the Tribunal to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.
13. The Tribunal may agree to reconsider a Decision for a number of reasons, including:
 - The Member fails to comply with the principles of natural justice;
 - There is some mistake in stating the facts;
 - The Decision is not consistent with other Decisions based on similar facts;

- Some significant and serious new evidence has become available that would have led the Member to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The Decision contains a serious clerical error.

(*Zoltan Kiss*, BC EST # D122/96)

14. While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.
15. After weighing these and other factors, the Tribunal may determine that the application is not appropriate for reconsideration. Should the Tribunal determine that one or more of the issues raised in the application is appropriate for reconsideration, the Tribunal will then review the matter and make a decision. The focus of the reconsideration Member will in general be with the correctness of the decision being reconsidered.
16. In *Voloroso* (BC EST # RD046/01), the Tribunal emphasized that restraint is necessary in the exercise of the reconsideration power:

.. the Act creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute...
17. 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.
18. I find that Mr. De Buen has not met the threshold test for exercising the reconsideration power.
19. Mr. De Buen made extensive submissions before the Member regarding the relevancy of both the email and the documents obtained under the FOI request. In my view, his submissions were fairly considered and addressed by the Member. I agree with the Member’s conclusion that there was nothing in the documents relevant to Mr. De Buen’s assertions about his wages.
20. In my view, Mr. De Buen has failed to demonstrate that this is an appropriate case for the exercise of the Tribunal’s reconsideration power. I am not persuaded, in reviewing the Determination, the arguments made on appeal, the Original Decision and the submissions on the application for reconsideration, that Mr. De Buen has raised significant questions of law that should be reviewed because of their importance to the parties and/or their implications for future cases. The issues relate solely to Mr. De Buen’s own claim and relate to a dispute about factual matters. Those facts have been fully and appropriately decided upon by the Director and a Member.
21. Furthermore, Mr. De Buen has not raised an issue of sufficient merit to warrant exercising the reconsideration power. In essence, Mr. De Buen disagrees with the Member’s decision. That, in and of itself,

is not a basis for reconsideration. There is nothing in Mr. De Buen's application, for example, that suggests the decision is not consistent with other decisions based on similar facts, or that the Member failed to comply with the principles of natural justice.

ORDER

22. Pursuant to section 116 of the *Act*, the application for reconsideration is denied.

Carol L. Roberts
Member
Employment Standards Tribunal