

An Application for Reconsideration

- by -

Warren Dingman

- 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.:** 2010A/18

**DATE OF DECISION:** June 1, 2010

## DECISION

### SUBMISSIONS

Warren Dingman	on his own behalf
Ronald Lamperson	Counsel for Footprints Security Patrol Inc.
Terry Hughes	on behalf of the Director of Employment Standards

### OVERVIEW

1. This is an application by Warren Dingman for a reconsideration of BC EST # D002/10 (the “Original Decision”), issued by the Tribunal on January 5, 2010.
2. Mr. Dingman was employed as a security guard for Footprints Security Patrol, Inc. (“Footprints”) from April 25, 2005 until June 22, 2009. He filed a complaint alleging that Footprints had contravened the *Employment Standards Act* (the “*Act*”) in failing to pay him all wages owed. Following an oral hearing, the delegate found that Footprints had not contravened the *Act*.
3. Mr. Dingman appealed the decision on the grounds that the delegate had erred in law and failed to observe the principles of natural justice in making the Determination.
4. In his appeal submission, Mr. Dingman alleged two errors of law. The first was that the Director failed to consider the nature of the contract and that the delegate’s conclusion was unreasonable and irrational. The second error of law alleged by Mr. Dingman was that the Director failed to provide him with protection from “excessive hours of work”. He disagreed with the delegate’s conclusion that he had failed to record his own hours of work. Mr. Dingman also contended that the Director failed to observe the principles of natural justice by ignoring the issue in the complaint, which was performing work beyond the scope of his employment contract. He also alleged that the delegate was biased, failed to address a number of issues in the complaint and failed to give effect to a settlement of his complaint.
5. Mr. Dingman sought additional time in which to reply to the delegate’s submission, stating that he would be submitting a Freedom of Information request to obtain his file from the Branch. Mr. Dingman contended that the information in that file would support his reconsideration request.
6. The delegate relied on the record and the Determination. The delegate denied that there was an error of law or that she failed to observe the principles of natural justice.
7. Footprints contended that the appeal was without merit. They argued that the delegate had not made an error of law, denied there were any relevant documents and disputed Mr. Dingman’s claim that a settlement offer had even been made.
8. The Member reviewed the submissions of the parties and concluded that Mr. Dingman had not met the burden of demonstrating an error of law in the Determination. The Member found that the Director had not erred in interpreting the employment contract. He concluded that, although Mr. Dingman had contended that the interpretation was unreasonable and irrational, the Director’s conclusion was based on an analysis of

the terms of the contract and the available relevant extrinsic evidence relating to the formation and operation of the contract.

9. The Member noted that while Mr. Dingman clearly disagreed with the Director's conclusion, he had not met the burden of showing how the Director's analysis amounted to an error of law.
10. The Member also concluded that Mr. Dingman had not demonstrated that the Director erred in law by failing to provide him with protection for excessive hours. The Member concluded that this part of Mr. Dingman's appeal had no basis in fact and law because there was no evidence Mr. Dingman had ever sought the Director's protection from excessive hours of work at any time.
11. The Member found that Mr. Dingman's arguments in support of his grounds of appeal that the Director had failed to observe the principles of natural justice were simply a reiteration of his disagreement with the Director's interpretation of his employment contract. He found the argument to raise no natural justice principles and did not consider it further.
12. The Member also considered, and dismissed, Mr. Dingman's argument that the delegate was biased as Mr. Dingman provided only his personal belief rather than the "clear and cogent" evidence required to support a finding of bias.
13. The Member concluded that Mr. Dingman had failed to demonstrate that the Director had any obligation to produce particular documents, that the documents were in any way relevant to the issue in the complaint, or, as a consequence of the documents not being produced, had denied him a fair hearing.
14. The Member also decided that, in the absence of any evidence that a settlement agreement was reached, he could not conclude that the Director had failed to enforce the agreement.
15. Finally, the Member dismissed Mr. Dingman's argument that the Director's practice of not recording hearings constituted a breach of natural justice. The Member concluded that Mr. Dingman was accorded the appropriate level of procedural fairness within the complaint process that resulted in the Determination.

## **ISSUE**

16. 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**

17. Mr. Dingman seeks reconsideration of the Original Decision because he "is not being given natural justice" and because of "errors in law" in the Member's decision.
18. In support of the reconsideration application, Mr. Dingman states that although he has been constantly told that he must provide evidence in support of his appeal, he does not have the legal means or resources to compel his former employer or the Director to produce those documents.

19. Mr. Dingman alleges that “evidence and statements” provided in the hearing have been “deliberately left out” of the Determination but that he has no ability to prove that in the absence of a record. He states that even the notes taken by the delegate during the hearing have not been made available to him.
20. Mr. Dingman states that a delegate of the Director spoke with the employer’s counsel about the settlement offer and that he should have been responsible for enforcing the alleged agreement. Mr. Dingman suggests that it is the Tribunal’s responsibility to determine why the settlement was not enforced, just as it is the Director’s responsibility to investigate his complaint of excessive hours of work.
21. Mr. Dingman disputes the Member’s statement that he has been accorded an appropriate level of procedural fairness.
22. The Director states that the Branch’s policy is not to tape record complaint hearings. He states that this practice, which was upheld by the Tribunal in BC EST # D074/00, is not a breach of natural justice. He submits that all relevant evidence is contained in the Determination. Mr. Dingman disputes this, contending that the delegate omitted numerous statements he made in response to questions.
23. Furthermore, the Director says that adjudicators’ notes are not part of the s. 112 record, and that this policy is supported by section 3(1) of the *Freedom of Information and Protection of Privacy Act*. The Director further submits that this policy does not result in a denial of natural justice.
24. The Director’s delegate states that while he was not involved in the mediation process, he was told there was not a settlement of the complaint. He further states that all settlement discussions are on a “without prejudice” basis. He says that all settlement agreements are concluded when both parties have signed a written “settlement agreement” and there is no evidence of such an agreement. He states that the requirement that there be a written settlement agreement is noted in the Branch’s Fact Sheet and which is provided to the parties prior to mediation. In response, Mr. Dingman asserts that there is nothing in the *Act* requiring settlement agreements to be in writing. He further states that the delegate responsible for attempting to resolve this matter prior to the hearing advised him that Footprint’s settlement offer would not be enforceable because it was not in writing. Mr. Dingman also denies that he received any Fact Sheet prior to entering into the mediation process.
25. The Director contends that Mr. Dingman is attempting to re-argue the points he raised on appeal, all of which were addressed by the Member and seeks to have the reconsideration application dismissed.
26. Footprints submits there is no basis for the Tribunal to vary or cancel the decision and asks that the Original Decision be confirmed.
27. On March 19, 2010, Mr. Dingman sought an extension of time to file an additional reply to the reply submissions of Footprints and the Director. Mr. Dingman alleges that a settlement offer was made and accepted through the delegate, and in light of the Director’s refusal to “properly recount the events of the settlement agreement” he would be filing a Freedom of Information request for the Branch file in this matter.

## ANALYSIS

28. 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

29. 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.”
30. 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.
31. 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)
32. 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.
33. 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.

34. 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...

35. 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 favour 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.

36. I find that Mr. Dingman has not met the threshold test. As a consequence, I deny his request for an extension of time to file an additional reply.

37. Mr. Dingman’s reconsideration request appears to relate to three of Member’s conclusions:

- a. That Mr. Dingman’s allegation that the Director failed to provide him with protection from excessive hours had no basis in fact or law because there was no evidence Mr. Dingman had ever sought the Director’s protection;
- b. The delegate’s practise of not recording hearings was not a denial of natural justice; and
- c. That in the absence of any evidence of a settlement agreement, there was no basis to conclude a breach of natural justice on the basis that the delegate had failed to enforce it.

38. In my view, Mr. Dingman’s reconsideration request does not raise questions of law, fact, principle or procedure that are so significant that they ought to be reviewed. Rather, his request is an attempt to re-argue the matters addressed in the Original Decision.

39. Although Mr. Dingman contends that it is the “legal responsibility” of the Director to investigate his complaints of excessive hours of work, the Member found that Mr. Dingman raised this issue for the first time well after he was terminated from his employment and, as such, he was well beyond the statutory time period in which to make that complaint. Further, the Member found Mr. Dingman had provided no proof of such allegation. I find no basis to find any error of law in the Member’s conclusion on this issue.

40. With respect to Mr. Dingman’s allegation that the delegate breached the principles of natural justice in failing to record the proceeding, thus depriving him of proving his “claims and statements to the Director”, the Member found no basis in the evidence for the allegation:

*Finally, Dingman says the Director’s practice of not recording complaint hearings is, in his view, denying due process and natural justice. Whether his opinion is correct is not the issue. The issue is whether the failure of the Director to record the complaint hearing in this case has resulted in a denial of natural justice. As has been noted in several areas of this appeal and in the opening comments to this analysis, the burden of showing a failure by the Director to observe principles of natural justice in making the Determination is on Dingman. The natural justice obligations on the Director that typically operate in the context of the complaint process,*

*including the complaint process hearing, are to ensure that parties have an opportunity to know the case against them, the right to present their evidence and the right to be heard by an independent decision maker...*

*There is no evidence that Dingman was denied any of these rights. The facts show he was accorded the appropriate level of procedural fairness within the complaint process that resulted in the Determination.*

41. Mr. Dingman continues to assert that “due process” cannot be claimed “when the Director of Employment Standards does not properly record or compel the delegate’s to record hearings”. As the Member noted, the Director is under no duty to record proceedings and its decision not to do so does not constitute a breach of natural justice. I also note that under the *Administrative Tribunals Act*, (SBC 2004, c. 45) tribunals in British Columbia are not required to transcribe or tape their proceedings. Mr. Dingman’s reconsideration request has failed to disclose a significant question of law, fact, principle or procedure in this respect.
42. Although Mr. Dingman alleges that the Member failed to “investigate why the settlement wasn’t enforced”, the Member found no evidence that a settlement had been reached. Mr. Dingman continues to assert that a settlement had been reached, and on this basis seeks an adjournment of the proceedings until his Freedom of Information request is completed. He suggests that the contents of his file will provide evidence in support of this assertion.
43. I appreciate Mr. Dingman believes that there was a settlement of his claim and that he is frustrated in his attempt to prove that in the face of the Director’s denial that any settlement agreement existed. However, without a written agreement, such agreement cannot be enforced. Had there been a settlement agreement, there would have been no need for a hearing on the merits of Mr. Dingman’s complaint. Given that Mr. Dingman participated in the hearing without raising the existence of a settlement agreement at any time during that hearing, I infer that he did not believe that a settlement agreement existed. I note that Mr. Dingman only raised the existence of a settlement agreement after the Director had dismissed his complaint. For this reason, I find no basis to conclude that the Member’s decision on this point warrants reconsideration and deny Mr. Dingman’s application for an extension of time to file a further reply.
44. I am not persuaded that Mr. Dingman has made out an arguable case of sufficient merit to warrant the exercise of the reconsideration power.

## **ORDER**

45. The request for reconsideration is denied.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**