

An Application for Reconsideration

- by -

Brad's Trucking Ltd.  
("Brad's")

- 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.:** 2014A/71

**DATE OF DECISION:** July 2, 2014

## DECISION

### SUBMISSIONS

Maryon Gallant

on behalf of Brad's Trucking Ltd.

### OVERVIEW

1. Brad's Trucking Ltd. ("Brad's") seeks reconsideration of a decision of the Tribunal, BC EST # D038/14 (the "original decision"), dated May 13, 2014.
2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on February 13, 2014.
3. The Determination was made by the Director on a complaint filed by Colin Hall ("Hall"), who alleged Brad's had contravened the *Act* by failing to pay all wages earned for work performed by him.
4. The Determination found Brad's owed Hall wages and interest in the amount of \$2,001.89 and imposed administrative penalties against Brad's in the amount of \$1,000.00.
5. An appeal was filed by Brad's alleging the Director failed to observe principles of natural justice in making the Determination. The appeal sought to have the Tribunal cancel the Determination and refer the matter back to the Director.
6. The Tribunal Member of the original decision dismissed the appeal under section 114(1)(f) of the *Act* and confirmed the Determination.
7. In the original decision, the Tribunal Member found Brad's had not shown there was a failure to observe principles of natural justice in making the Determination. The original decision notes Brad's knew the details of Hall's claim, was provided with a hearing, by teleconference, and, at that hearing, was given the opportunity to present evidence and argument and to ask questions of Hall. At the hearing, evidence for Brad's was given by Maryon Gallant ("Mr. Gallant").
8. In the appeal, Brad's argued the form of hearing – teleconference – presented difficulty for Mr. Gallant as he is "extremely hard of hearing" and "probably" did not understand "the depth of the questions". This argument was dismissed in the original decision based primarily on a finding that the notice of hearing indicated the hearing would be conducted by teleconference and Mr. Gallant had not objected at any time up to the completion of the hearing to that form of hearing. The original decision also makes the observation that the Determination gives no indication Mr. Gallant had indicated or demonstrated any difficulty in understanding questions during the teleconference hearing.
9. The Tribunal Member making the original decision also rejected the argument that a witness for Hall was available but not called, finding there was no evidence the failure of the Director to hear this evidence was a denial of natural justice.
10. Finally, the Tribunal Member denied an attempt by Brad's to introduce a new ground for challenging the Determination and provide evidence and argument in respect of that new ground.

11. The appeal also challenged specific findings of fact made in the Determination, but these challenges were not addressed in the original decision as the only ground of appeal raised and argued was breach of natural justice.

## ISSUE

12. 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

13. Brad's seeks reconsideration on the basis the original decision "could be partially wrong due to interpretation of the facts, and to some degree the natural course of justice".
14. Brad's concedes Hall is owed some money, but disputes both the hours claimed (and accepted by the Director) and the wage rate at which those hours were claimed.
15. In respect of the hours claimed, Brad's submits Hall worked no hours in October 2013, but is credited in the Determination with having worked one day. Brad's also submits the hours of work are not adjusted for lunch breaks taken by Hall.
16. In respect of the wage rate, Brad's submits it never agreed to pay a rate of \$33.00 an hour. Brad's says that rate is not an industry standard and submits he should either be paid the amount he was earning as a journeyman welder for 1½ years at his previous employment or the industry standard, both of which are approximately \$6.00 an hour less than the hourly rate found by the Director.

## ANALYSIS

17. 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 of the *Act* 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.*

18. 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 *Director of Employment Standards (Re Milan Holdings Inc.)*, 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 the 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 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.

19. 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.
20. 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.
21. 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.
22. 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.
23. I am not persuaded this application warrants reconsideration.
24. The application does nothing more than re-assert challenges made in the appeal that were not accepted in the original decision. Its focus is not the original decision but findings of fact made in the Determination. While not accepting the challenges re-asserted in this application, the original decision did not specifically address those matters. Nor did it need to for three reasons: first, the Tribunal has no authority on an appeal to consider challenges to findings of fact made by the Director in a Determination unless the Director’s findings are shown to raise an error of law: see *Britco Structures Ltd.*, BC EST # D260/03; second, the appeal was not grounded in error of law; and third, Brad’s did not assert or present any evidence that the challenged findings raised an error of law. On my view and assessment of the Determination, no error of law existed on the challenged findings of fact. They were simply findings of fact and thus not reviewable under section 112 of the *Act*.
25. Raising the challenged facts again in an application for reconsideration does not alter the Tribunal’s authority to consider them. This application re-argues challenges to facts found in the Determination without

demonstrating a reviewable error and, in the absence of such an error, are matters over which the Tribunal has no authority.

26. Brad's also re-asserts "natural justice", without showing any natural justice issue exists or, if it does, how the Tribunal Member of the original decision erred on that issue.
27. There is no basis to allow reconsideration of the original decision and accordingly the application is denied.

**ORDER**

28. Pursuant to section 116 of the *Act*, the original decision, BC EST # D038/14, is confirmed.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**