

An Application for Reconsideration

- by -

Robert LeRuyet  
("LeRuyet")

- 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.:** 2013A/68

**DATE OF DECISION:** September 25, 2013

## DECISION

### SUBMISSIONS

Robert LeRuyet on his own behalf

### OVERVIEW

1. Robert LeRuyet (“LeRuyet”) seeks reconsideration of a decision of the Tribunal, BC EST # D065/13 (the “original decision”), dated August 8, 2013.
2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on April 16, 2013.
3. The Determination was made by the Director on a complaint filed by LeRuyet, who alleged Woonkook W. Baek and Younouk Y. Baek, carrying on business as Baek, S Taekwondo Academy (“BTA”) had contravened the *Act* by failing to pay regular wages for work performed. The Determination found Leruyet was not an employee of BTA, no wages were owing to him, the *Act* had not been contravened and no further action would be taken on his complaint.
4. An appeal was filed by LeRuyet alleging there was an error of law in the Determination and a failure by the Director to observe principles of natural justice in making the Determination. The appeal sought to have the Tribunal vary the Determination or, alternatively, to refer the matter back to the Director to be “reheard by a ‘competent’ delegate”.
5. The Tribunal Member of the original decision dismissed the appeal in BC EST # D065/13 under section 114(1)(f) of the *Act* and confirmed the Determination.
6. In the original decision, the Tribunal Member found Leruyet had not demonstrated any error of law or that the Director had failed to observe principles of natural justice in making the Determination.
7. In answering the error of law ground of appeal, the original decision contains the following summary of the principles operating in the context of the arguments made by Leruyet on this ground of appeal: first, matters the Tribunal might construe as errors of law are those identified in *Gemex Developments Corp. v. British Columbia (Accessor of Area #12-Coquitlam)*, [1998] B.C.J. No. 2275 (B.C.C.A.), which the Tribunal has accepted, adopted and consistently applied in its decisions; second, what is an error of law does not include errors of fact or errors of mixed law and fact that do not contain a discreet and extricable questions of law; third, the Tribunal has no authority to consider appeals based on challenges to findings of fact that do not amount to an error of law; fourth, an error of law, in such circumstances, requires an appellant to show the fact finder make a “palpable and over-riding error” or that the finding of fact was “clearly wrong”; fifth, the weight to be given to evidence presented during the complaint process is a matter in the discretion of the delegate of the Director charged with assessing the facts and reaching conclusions on those facts and; sixth, the Tribunal is reluctant to second guess findings of fact that are grounded in the evidence or are based on a view of the evidence provided that could reasonably have been entertained.
8. The Tribunal Member reviewed the section 112(5) “record” and found it was open to the Director to reach the conclusions made in the Determination on the evidence presented by the parties during the complaint process.

9. In responding to the natural justice ground of appeal, the Tribunal Member of the original decision was not persuaded the decision of LeRuyet's witnesses to leave the complaint hearing without testifying and LeRuyet's decision to leave the complaint hearing, abandoning his right to examine BTA's witnesses, without being told by the Director he could ask for an adjournment, denied LeRuyet the opportunity to learn BTA's case or the opportunity to be heard.

## 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 vary the original decision or refer the matter back to the Director.

## ARGUMENT

11. The first four sentences of LeRuyet's submission on the reconsideration application set the tenor of his position:

"The original reasons outlined in my appeal have not been adequately dealt with.

The decision by the Employment Standards Tribunal was so rife with mistakes and errors as to be inconsistent with any standard and level of professionalism that I am aware of.

Files were mixed up, information was simply quoted incorrectly to make the reader get the impression that the evidence had not even been examined.

People who do not exist or who are not connected with the file were quoted and a very obtuse error made when the delegate stated that a witness had made income claims that were yearly claims when in fact they were monthly claims. And this very silly mistake was given the greatest weight in the delegate's decision."

12. LeRuyet seems to perceive that the Determination and the original decision hang on the Director having accepted the evidence of Mr. Baek that the annual income from BTA's Abbotsford location has been \$6,000 to \$7,000. He continues his challenge to the Director having accepted and used that evidence in the Determination and is highly critical of the Tribunal for not reviewing and altering that factual finding in the original decision. He argues the "silly mistake" made by the Director can easily be verified by looking at the evidence or "listening to the audio transcripts of the original hearing". He asks whether there are audio transcripts and demands they "be reviewed".
13. It is appropriate to note at this point, the "audio transcripts" to which LeRuyet refers would be any such transcripts that might have been made of the complaint hearing conducted by the Director. It is unlikely there are any such transcripts. If such transcripts exist, the Director would have been required to provide them in the section 112(5) "record" and none have been provided. There is certainly no indication in any of the material or in the Determination that would suggest an audio transcript of the complaint hearing was made. There is nothing in the *Act* that would require or compel the Director to record the complaint hearing, but I am certain if a request had been made by one of the parties for an audio recording of the complaint hearing to be taken, LeRuyet would have been told and asked for his consent before the Director would have considered it. I am able to state the above with a substantial degree of certainty because the Tribunal has stated that disclosure to the parties of a request to allow proceedings to be recorded is essential to the later admissibility of a transcript or copy of that recording: see *Siegfredo B. Bervasio*, BC EST # D088/09

(Reconsideration denied in BC EST # RD049/10). Accordingly, it is unnecessary to address submissions based on the possible existence of an “audio transcript”.

## ANALYSIS

14. 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.*

15. 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 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 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 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.

16. 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.

17. 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.
18. 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.
19. 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.
20. The principal difficulty with this application, from the perspective of what the Tribunal will accept for reconsideration, is that its focus is squarely on the Determination. The substantive elements of this application continue LeRuyet's challenge to particular findings of fact made in the Determination. That much is apparent from the opening sentence of his reconsideration submission: "my appeal has not been adequately dealt with".
21. He asserts the original decision is "rife with mistakes and errors" without identifying a single alleged "mistake or error" in the original decision that stands independently of the errors he contends were made by the Director in the Determination.
22. LeRuyet argues the perceived mistakes and errors, only one of which is ever specifically identified, "could be easily verified by looking at the evidence or listening to the audio transcripts of the original hearing". This kind of argument reflects a misunderstanding of the appeal and reconsideration provisions in the *Act*. Proceedings under sections 112 and 116 are error correction processes. As expressed in the original decision, at para 37, the burden in the appeal was on LeRuyet to persuade the Tribunal the Determination was wrong and the Tribunal should have intervened to correct that error. The burden on LeRuyet in this application is to show there was an error in the original decision that warrants further consideration.
23. It is not the function of the Tribunal, either on appeal or reconsideration, to conduct a global review of the entire file that was before the Director, looking for possible errors or re-weighing all of the evidence, based simply on an assertion that the process was "rife with mistakes and errors".
24. In respect of the matter of the annual income evidence and findings, which has been specifically referred to as a "very silly mistake" by the Director, perpetuated in the original decision, I agree entirely with the analysis of that matter in the original decision.
25. Simply put, there was a finding of fact made by the Director on the evidence presented, and accepted, during the complaint process. While LeRuyet strongly disagrees with that finding (and the handling of it in the original decision), there is nothing in the material on file, in the appeal or in any other document provided, or referred to, by LeRuyet that would show that finding was so patently wrong as to amount to an error of law. LeRuyet either has failed to appreciate or has ignored the comments in the original decision, which as a matter of law are sound and correct, that the Tribunal has no authority under the appeal provisions found in the *Act* to entertain an appeal challenging findings or conclusions of fact that do not amount to an error of law.

26. No matter how strongly he disagrees with it, LeRuyet has never shown that finding to be an error of law and, as a result, has never provided the Tribunal with a legal basis for setting it aside.
27. The above comments also apply to other findings and conclusions of fact with which LeRuyet has expressed a general disagreement. To a degree, I am reiterating what was stated in the original decision, but that may be necessary in this case. It is clear from an examination of the Determination and the material in the file that there was evidence from both parties going to the issues in dispute between them. The Director acknowledged the evidence of both parties and explained the reasons for accepting the position chosen. The Tribunal Member of the original decision found the choice made was one which could reasonably be made on the evidence. It is apparent the Director considered all of the evidence that LeRuyet says should have been reviewed in the original decision and which he contends should be reviewed again in this application. There is an analysis of the evidence in the Determination and, as much as LeRuyet disagrees with the result, whether some other conclusion was available is irrelevant. In order for the Tribunal Member of the original decision to have been able to set aside the findings and conclusions of fact made in the Determination, LeRuyet was required to establish the challenged findings flowed from an error of law within the definition adopted by the Tribunal, which is set out in the original decision. LeRuyet was unable to show the Director made any error of law in the findings made and his appeal was correctly and justifiably dismissed in the original decision.
28. When the basis for the appeal and the appeal provisions and principles of the *Act* are considered, I find no error in any aspect of the original decision on the merits of the appeal. The Tribunal will not revisit LeRuyet's disagreement with the Determination in this application.
29. In sum, LeRuyet has not made out a case that would justify or warrant exercising my discretion to entertain this application.
30. The application for reconsideration is denied.

## **ORDER**

31. Pursuant to section 116 of the *Act*, the original decision is confirmed.

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