

An Application for Reconsideration

- by -

HAP Enterprises Ltd.
("HAP")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2016A/49

DATE OF DECISION: July 13, 2016

DECISION

SUBMISSIONS

Harry Gill

on behalf of HAP Enterprises Ltd.

OVERVIEW

1. This is an application by HAP Enterprises Ltd. (“HAP”), made pursuant to section 116 of the *Employment Standards Act* (the “*Act*”), for reconsideration of BC EST # D042/16 (the “Appeal Decision”). Having reviewed HAP’s submissions as well as the entire file that was before the Tribunal when the Appeal Decision was issued, I am of the view that this application is not meritorious and, more particularly, does not pass the first stage of the *Milan Holdings* test (see BC EST # D313/98). Accordingly, this application is summarily dismissed.

PRIOR PROCEEDINGS

2. HAP operates a trucking company and is headquartered in Delta. The complainant, Bakhtaur Singh Mokha (“Mr. Mokha”), was employed by HAP as a truck driver from mid-February to November 1, 2013, when he quit. He subsequently filed an unpaid wage complaint and this complaint was the subject of an oral complaint hearing before a delegate of the Director of Employment Standards over two days – July 2 and September 30 – in 2014. Mr. Mokha appeared on his own behalf and also brought one witness to the hearing, a former HAP employee who also had been employed as a truck driver. Harry Gill (“Mr. Gill”), who represented HAP on appeal and who also represents HAP in these proceedings, appeared as HAP’s sole witness at the complaint hearing.
3. On November 27, 2015, the delegate issued a Determination and accompanying “Reasons for the Determination” (the “delegate’s reasons”) upholding the complaint and awarding Mr. Mokha \$3,397.45 on account of unpaid wages and section 88 interest. There is nothing in the record before me to explain why there was such an extended delay between the completion of the hearing and the issuance of the Determination and the delegate’s reasons. Delay such as that involved in this case is, in my view, wholly unacceptable and not in keeping with subsection 2(d) of the *Act*. This was not a complicated case and the Determination and reasons should have been issued much sooner than was, in fact, the case.
4. Further, and also by way of the Determination, the delegate levied five separate \$500 monetary penalties against HAP (see section 98 of the *Act*), thus bringing the total amount of the Determination to \$5,897.45.
5. HAP appealed the Determination on the grounds that the delegate failed to observe the principles of natural justice in making the Determination and also on the ground that it had new and relevant evidence. By way of the Appeal Decision, each of these grounds was summarily dismissed as having no reasonable prospect of succeeding. I entirely agree, and adopt, the reasoning of the Appeal Decision with respect to the summary dismissal of the appeal.

THE APPLICATION FOR RECONSIDERATION

6. HAP has filed several separate submissions in support of its reconsideration application. In its submission appended to its Reconsideration Application Form (Form 2), HAP advanced the following arguments:

- “Section 58- annual vacation pay, does not apply to us if we are paying the trip rate according to the attachment, since it also says its [sic] inclusive in the HAP agreement (point 18) as well the BC employment standards sheet.”
 - “The HAP agreement is new evidence.”
 - “BC employment [sic] standards document is new evidence.”
7. HAP also indicated that it would be filing further evidence relating to a B.C. Provincial Court Small Claims Court action involving it and Mr. Mokha. In a brief submission filed May 20, 2016, by electronic mail, HAP filed a copy of a transcription of the Small Claims Court judge’s oral reasons in this latter case. HAP advanced the following argument flowing from this document:
- “The decision from the employment standards was awarded based on credibility of truth/trust. As per the attachment it can be seen Mr. Mokha under oath in the bc provincial court not speaking the truth and cannot be awarded credibility...Para 26. Of the court decision shows how Mr. Mokha lied about under oath, which was proven in court.” [sic]
8. HAP filed another very short submission regarding the Small Claims Court judge’s reasons, also on May 20, 2016, by electronic mail (about 15 minutes after the earlier submission):
- “From Para 13-20, it has been approved that the court has acknowledged and accepted that Mr. Mokha has done the accidents and is not eligible for the bonus.” [sic]
9. Finally, on May 30, 2016, HAP submitted a single page of a transcript that supposedly records Mr. Mokha’s testimony about a particular point given during the course of the Small Claims Court trial. HAP says:
- “I would like to add the above attachment, it is a transcript from BC small claims court that has just become available. As you see Mr. Mokha was asked a question about his pay, and he says \$14 per trip. This was said under oath in Provincial court by Mr.Mokha himself, so the decision done by employment standards is thereby incorrect.” [sic]

FINDINGS AND ANALYSIS

10. Before turning to HAP’s submissions on reconsideration, I think it important to provide some further background information relating to both the delegate’s findings and the Appeal Decision.
11. As is clear from the delegate’s reasons, Mr. Gill (for HAP) and Mr. Mokha had, in several important respects, fundamentally different views about key aspects of their employment relationship. For the most part, Mr. Mokha’s evidence was corroborated by other testimony and documents while HAP’s evidence was, to quote the delegate, “contrived” and “inconsistent”.
12. With respect to the wage rate, HAP’s position was that Mr. Mokha was paid \$12 per hour as of March 1, 2013, although drivers had previously been paid on a piecework system at \$30 per container (for a “full load”) plus a \$10 bonus per container provided the driver met certain performance benchmarks (see delegate’s reasons, page R5). The delegate ultimately accepted Mr. Mokha’s evidence that the wage agreement was based on a “piecework” payment system - \$40 per container load and \$20 for a “half trip” (that is, a trip not involving a “to and from” trip from the port to a customer or vice versa).

13. Based on Mr. Mokha's records and testimony, which the delegate found to be entirely credible, the delegate awarded Mr. Mokha overtime pay (\$1,802.90) calculated in accordance with the "short haul truck driver" provision contained in section 37.3 of the *Employment Standards Regulation*. The delegate also awarded Mr. Mokha statutory holiday pay for the four statutory holidays that fell within the 6-month wage recovery period (May 2 to November 1, 2013) in the total amount of \$655.43. The computer records generated by HAP's accountant did not show that statutory holiday pay was actually paid to Mr. Mokha.
14. Mr. Mokha's wage statements, save for his final three statements, did not record any vacation pay as having been paid, and the three statements that did indicate a figure for vacation pay did not include a correct amount (*i.e.*, 4% of wages). Nevertheless, the delegate credited HAP with having paid some vacation pay and then awarded Mr. Mokha a further \$640.53 on account of unpaid vacation pay. Mr. Mokha claimed he was not paid for the deliveries he made on his final day of work – November 1, 2013 – and the delegate accepted his position on this point and awarded him a further \$120 for wages earned on that day (3 deliveries x \$40 per load = \$120). Finally, the delegate accepted Mr. Mokha's position, relying in large part on HAP's own payroll records, that HAP unlawfully withheld wages (\$850) from him as a "chargeback" for a delivery error he apparently made and found that Mr. Mokha "is owed \$850" on this account (page R13). The delegate also awarded Mr. Mokha section 88 interest in the amount of \$178.59.
15. With respect to the latter \$850 award, although the delegate levied a \$500 monetary penalty for HAP's section 21 contravention (unlawful offloading of the employer's business costs), the delegate neglected to include the associated \$850 unpaid wage amount in Mr. Mokha's total unpaid wage award. I address this issue later on in these reasons.
16. I now turn to HAP's separate arguments advanced in support of its reconsideration application.
17. First, HAP says that section 58 (payment of vacation pay) does not apply to it because "we are paying the trip rate according to the attachment, since it also says its inclusive" [*sic*]. Aside from the fact that this argument is not one that is properly raised on a reconsideration application since it was not argued on appeal (HAP actually concedes that this argument and its supporting documentation is "new evidence"), this argument is fundamentally misconceived. Whether or not an employee is paid on a piecework basis, the employer must still pay vacation pay in accordance with section 58 of the *Act* (there is an exception for certain farm workers – see section 18 of the *Employment Standards Regulation* – but that provision has no application to the case at hand). The "attachment" – a "New Driver/Owner Operator Acknowledgement Form" states, at paragraph 18: "I understand that my pay includes 4% vacation pay & holiday pay". As the Tribunal has held in several decisions, this type of provision is not one that can lawfully excuse the employer from paying vacation pay and statutory holiday pay – in effect, it amounts to an unlawful "waiver" of statutory benefits that is proscribed by section 4 of the *Act* (see, for example, *Director of Employment Standards (VCR Print Co.)*, BC EST # RD348/01; judicial review refused: 2003 BCSC 442).
18. HAP's second argument is, essentially, an attack on the delegate's finding that Mr. Mokha's evidence was more credible than HAP's evidence. In support of this allegation, HAP relies on a decision issued by a B.C. Small Claims Court judge in an action HAP commenced against Mr. Mokha to recover approximately \$11,000 in damages (vehicle repair costs) allegedly caused by Mr. Mokha in three separate motor vehicle accidents as well as several other claims totalling approximately \$13,000. The claims for recovery of damages relating to the motor vehicle accidents were dismissed. HAP's claims to recover certain claims under the "New Driver/Owner Operator Acknowledgement Form" were also dismissed (including a claim to recover \$850 on account of the alleged delivery error – in effect, HAP was seeking to reverse the delegate's finding on this matter, an impermissible collateral attack). HAP's claim to recover a \$1,000 "advance" was dismissed but a second claim relating to a \$500 "advance" was successful. Thus, ultimately, HAP was awarded \$500 and the

court refused to make a costs order in HAP's favour. This decision was based on the evidence that was before the Small Claims Court judge and it has no impact whatsoever on the delegate's findings regarding credibility that were, in turn, based on the evidence that was before her at the complaint hearing.

19. HAP also relies on an excerpt of what is apparently a single page of the transcript of Mr. Mokha's evidence at the Small Claims Court trial to show that Mr. Mokha was not a credible witness particularly regarding his wage rate. It should be recalled that HAP's position at the complaint hearing was that Mr. Mokha was paid \$12 per hour. HAP then reversed its position at the Small Claims Court trial, arguing that the wage rate was \$30 per container delivery plus a \$10 bonus provided certain performance criteria were satisfied. In any event, the relevant quote from the transcript reads as follows: "Q: And what was your understanding? How were you – how were you receiving your wages? Were they hourly or were they by piecework? A: It was piecework. Fourteen dollar per container. Okay, the container we – we were picking up from the yard, that was for \$20."
20. I am far from satisfied that this quote is even accurate. Mr. Mokha's evidence – accepted by the delegate – was that he was to be paid \$40 for a "full trip" container load and \$20 for a "half trip" load. I think it is quite possible that Mr. Mokha actually said "Forty dollars" rather than "fourteen dollars" and there was simply a transcription error (Mr. Mokha, as stated by the Small Claims Court judge, "is not comfortable in English" and the person preparing the transcript may have simply misheard his evidence). However, whether or not that is the case, I do not find this evidence, given in a completely separate hearing, has any bearing on this reconsideration application. The delegate made certain credibility findings based on the evidence before her and I am not satisfied that she erred in any fashion with respect to her credibility findings.
21. In sum, none of the grounds advanced by HAP in support of its reconsideration application has any merit whatsoever. This application does not pass the first stage of the *Milan Holdings* test since, even on a *prima facie* basis, there is no serious question to be argued. I see no reason to notify the respondent parties in order to seek their submissions. This application must be summarily dismissed.
22. As discussed above, although the delegate determined that "Mr. Mokha is owed **\$850.00**" for business costs that were unlawfully charged to him (delegate's reasons, page R13; **boldface** in original text), she neglected to include this amount in the Determination. The Determination includes the following amounts and the delegate's reasons specifically refer to these amounts as noted in the table, below:

Claim Itemized in Determination	Delegate's Reasons
Wages (section 18): \$120	"...Mr. Mokha has not been paid for the three containers he moved on November 1, 2013 and is therefore owed wages in the amount of \$120 for this date" (page R9)
Overtime pay (section 37.3, Regulation): \$1,802.90	"...I find that HAP contravened section 37.3 of the Regulation and Mr. Mokha is owed overtime pay in the amount of \$1,802.90 " (page R10)
Statutory holiday pay (section 45): \$655.43	"...I find that HAP contravened the section 45 of the Act [<i>sic</i>], and consequently I find that Mr. Mokha is owed statutory holiday pay in the amount of \$655.43 " (page R11)

Annual vacation pay (section 58): \$640.53	“...I find that HAP contravened section 58 of the Act and Mr. Mokha is owed annual vacation pay in the amount of \$640.53. ” (page R12)
Accrued interest (section 88): \$178.59	
Section 21 unlawful wage deduction not included in Determination (\$850)	“...I find that HAP contravened section 21 of the Act and Mr. Mokha is owed \$850.00. ” (page R13)

23. It is apparent that the delegate simply neglected to include the section 21 unlawful wage deduction award of \$850 in the Determination, although her reasons unequivocally show that she made an award on this account. Accordingly, since this amounts, in effect, to a clerical error on the delegate’s part, I will issue an order effectively amending the Determination to reflect the delegate’s finding on this score.

ORDER

24. HAP’s application for reconsideration of the Appeal Decision is refused.
25. Pursuant to subsection 116(1)(b) of the *Act*, paragraph 47 of the Appeal Decision is varied as follows:
- Pursuant to section 115 of the *Act*, I order the Determination, dated November 27, 2015, to be varied to include an additional \$850.00 award in favour of Mr. Mokha (together with concomitant section 88 interest) under section 21 of the *Act*. The Determination is confirmed in all other respects. Mr. Mokha is also entitled to additional section 88 interest that has accrued as and from the date of the Determination.
26. The above variance order is suspended for a period of 30 days from the date of issuance of these reasons for decision in order to afford the Director an opportunity to confirm that there was a clerical error (by omission) in the Determination concerning the section 21 award. In the event the Director advises that there was no error in the Determination with respect to the section 21 award, I retain jurisdiction to issue an order confirming the Determination as originally issued.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal