



An Application for Reconsideration

- by -

Angels There For You Home and Health Care Services Inc.  
(“ATFY”)

- 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:** Robert E. Groves

**FILE No.:** 2016A/98

**DATE OF DECISION:** October 12, 2016

## DECISION

### SUBMISSIONS

Patricia Cruz on behalf of Angels There For You Home and Health Care Services Inc.

### OVERVIEW

1. This is an application for reconsideration brought by Angels There For You Home and Health Care Services Inc. (“ATFY”) pursuant to section 116 of the *Employment Standards Act* (the “*Act*”). It asks that the decision of the Tribunal, BC EST # D088/16 (the “Appeal Decision”) issued on June 24, 2016, be referred back.
2. The Appeal Decision was the result of an appeal brought by ATFY challenging a determination (the “Determination”) of a delegate of the Director of Employment Standards (the “Delegate”) dated March 9, 2016.
3. In the Determination, the Delegate ordered ATFY to pay \$47,868.77 for overtime, statutory holiday pay, vacation pay and interest in respect of claims brought by two former employees of the company, Merlita Badua and Aurora Puno (the “Complainants”). The Delegate also ordered ATFY to pay \$2,500.00 in administrative penalties. The total found to be payable was, therefore, \$50,368.77.
4. Relying on its jurisdiction under subsection 114(1)(f) of the *Act*, the Tribunal dismissed ATFY’s appeal on the basis that there was no reasonable prospect it would succeed.
5. I have before me the Determination, the Delegate’s Reasons for it, the ATFY Appeal Form and submissions supporting it, the record delivered to the Tribunal pursuant to subsection 112(5) of the *Act*, the Appeal Decision, and the application for reconsideration.
6. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings on applications for reconsideration. Having reviewed the materials before me, I find I can decide this application based on the written materials filed, without an oral or electronic hearing.

### THE FACTS

7. ATFY operates a business that provides in-home care services for clients on a “fee for service” basis. None of its services are funded by government agencies.
8. The Complainants were employed as overnight caregivers by ATFY. They alleged that ATFY failed to pay them for all the regular hours they worked, for their overtime hours, and for hours that attracted an obligation to pay statutory holiday pay.
9. ATFY defended the complaints on several grounds, summarized as follows:
  - While the Complainants were required to be present at clients’ homes for scheduled shifts, they should only be paid for the hours they actually worked. Often, while the Complainants were

present for overnight shifts, they were able to sleep, undisturbed, as the clients were also at rest, and required no specific services to be performed.

- Hours that the Complainants worked after midnight during a shift should be counted on the following day, and so they should not engage the overtime provisions in the *Act*.
- The Complainants were either “live-in home support workers”, “residential care workers”, “sitters”, or “night attendants”, and therefore should be excluded from the application of the hours of work and overtime provisions of the *Act*.

10. In addition, ATFY offered a number of policy reasons in support of its position that the Complainants’ claims should be rejected. It submitted, inter alia, that:

- Paying caregivers the flat rate the Complainants had received was standard practice within the industry, and was a cost-effective way to permit seniors to maintain their dignity, to stay at home longer, and to reduce the burden on the public health care system.
- Governments were encouraging an “aging in place” philosophy for seniors. The clients of ATFY would not pay the sums necessary to compensate the Complainants if their claims were allowed, and there was no economic justification for paying caregivers for hours when they were on-call in clients’ homes, but not actually providing caregiving services.
- If the Complainants were successful it would have the effect of penalizing seniors who wished to pay for their own care rather than rely on government assistance, it would embarrass the relevant government agencies, aggravate a health care system already in crisis and, ultimately, cause chaos in the home care services industry.

11. For reasons which are ably set out in the Determination, and which I do not feel the need to repeat here, the Delegate declined to accept the submissions of ATFY.

12. In its appeal submission to the Tribunal, ATFY alleged that the Delegate failed to observe the principles of natural justice. It asserted that the Delegate considered erroneous documents from the Complainants that were not disclosed, and so ATFY was precluded from providing a substantive response. The relevant issue addressed in the documents was the hours worked by the Complainants. ATFY argued that the failure resulted in the Delegate’s miscalculating the wages owed to the Complainants.

13. The difficulty with the ATFY submission was that it provided no specific information, or documentation in support, which would have clarified where the Delegate had erred in the calculations he had made.

14. The Tribunal observed that the Delegate had provided detailed schedules to the Determination setting out the basis for his calculations. The Tribunal also made note of the Delegate’s comment in his Reasons for the Determination that “[t]here was substantially no dispute about the hours of work as evidenced by the Employer’s records and the Complainant’s [sic] records.”

15. The Tribunal declined to find that there was a substantive failure to disclose, given that the nature of the Complainants’ wage claims had been discussed by the Delegate with a principal of ATFY, had been summarized in a preliminary way in a letter to ATFY from the Delegate dated July 30, 2015, and had been alluded to in the complaints submitted by the Complainants.

16. A second issue for the Tribunal related to the contents of the appeal submission delivered by ATFY. The Tribunal was of the view that ATFY had submitted documents which were inadmissible, for two reasons.

First, the documents were irrelevant, having regard to the issues on appeal. Second, they had not been presented to the Delegate for his consideration prior to the issuance of the Determination, and so they should not be relied upon in the appeal proceedings, given the strict interpretation the Tribunal has developed regarding the receipt of “new evidence” pursuant to subsection 112(1(c) of the *Act*.

17. A third matter considered by the Tribunal was the submission of ATFY that the adjudication of the appeal be postponed, as the company had been advised that new legislation affecting its industry was pending. The Tribunal rejected this submission. The Tribunal observed that apart from its uncorroborated statement, ATFY had provided no evidence that legislative changes were in the offing, and even if they were, it was unlikely that the changes would have retrospective effect.
18. The Tribunal also referred to subsection 2(d) of the *Act* which states that it is the purpose of the legislation to provide fair and efficient procedures for resolving disputes over its application and interpretation. The Tribunal was of the view that it would be neither fair nor efficient if it were to place the appeal in abeyance based on speculation that the legislative scheme might be amended in a way that would have the effect of abrogating the Delegate’s Determination that the Complainants were entitled to wages.
19. As for the ATFY policy arguments, the Tribunal stated that it had no jurisdiction to waive or otherwise amend the *Act* or the provisions of the *Regulation* in support of the company’s business model. The Tribunal also affirmed that until the province decided to change the legislative regime, all parties subject to its prescriptions, including ATFY, must adhere to them.

## ISSUES

20. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:
  1. Does the request meet the threshold established by the Tribunal for reconsidering a decision?
  2. If so, should the decision be confirmed, cancelled, varied or referred back to the original panel, or another panel of the Tribunal?

## DISCUSSION

2. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116, the relevant portion of which reads as follows:
  - 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.
3. The reconsideration power is discretionary, and must be exercised with restraint. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal.
4. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *Act*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers and, as I have already noted, the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is also derived from a desire to preserve the integrity of the appeal process mandated in section 112 of the *Act*.

5. With these principles in mind, the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party seeking to have an appeal decision of the Tribunal overturned.
6. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal considers the applicant's submissions, the record that was before the Tribunal in the appeal proceedings, and the decision the applicant seeks to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. In order for the answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the appeal decision which are so important that the Tribunal is persuaded to reconsider.
7. In general, the Tribunal will be disinclined to reconsider if the primary focus of the application is to have the reconsideration panel re-weigh arguments that failed in the appeal. It has been said that reconsideration is not an opportunity to get a "second opinion" when a party simply does not agree with an original decision (see *Re Middleton*, BC EST # RD126/06).
8. If the applicant satisfies the requirements of the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering the appeal decision at this second stage, the standard applied is one of correctness.
9. A preliminary issue I must consider here is whether ATFY filed its application for reconsideration in a timely way. The Tribunal's *Rules of Practice and Procedure* (the "Rules") required that ATFY file its application within thirty days after the date of the Appeal Decision. The final day for the application was July 25, 2016. ATFY did file a Reconsideration Application Form on that day. However, it did not file written material explaining why its application should be allowed, along with any supporting documents, as it should also have done pursuant to the Tribunal's *Rules*. Instead, it provided a memorandum requesting an extension, to August 26, 2016, to file its supporting material, so that it could "engage the services of legal counsel" for the case.
10. ATFY subsequently filed a lengthy submission in support of its application, on August 26, 2016.
11. In my view, ATFY's request for an extension should be granted. It did file its Reconsideration Application Form within time, thereby establishing a bona fide intention to request a reconsideration. The reason given for the request for an extension to file its supporting material is plausible, and the time requested – thirty days – is not inordinate.
12. Having said that, I am of the view that ATFY has failed to establish that the Appeal Decision should be reconsidered.
13. The ATFY application raises several concerns.
14. First, it alleges that the Delegate miscalculated the hours spent at work by the Complainant Badua for one specific client. ATFY says that Badua only worked 20 hours in a day for this client, and not the 24 hours for which the Delegate gave her credit.
15. In support of its assertion, ATFY has delivered a statement from the client setting out the hours worked for him in a day by Badua, and stating that she had a "break...from five to four hours a day."
16. I have several difficulties with the ATFY submission on this point.

17. It does not appear from the record that this issue relating to this client and the Complainant Badua was ever specifically addressed with the Delegate. This is so despite the fact that the Delegate and the principal of ATFY communicated with each other extensively concerning the nature of the Complainants' work and whether there were any exemptions within the legislative scheme which might operate in favour of ATFY. In particular, the Delegate delivered a Demand for Employer Records requiring ATFY to produce, inter alia, a daily record of hours the Complainants worked with each of their clients.
18. The Delegate also wrote to ATFY on July 30, 2015, outlining his preliminary findings, including an estimate of the amounts of unpaid wages he believed might be owed to the Complainants. The Delegate invited ATFY to supply further submissions and evidence, should it wish. It appears that there was significant communication between the Delegate and ATFY over a period of months thereafter, in which the Delegate provided further clarification as to his interpretation of the relevant provisions of the *Act* and *Employment Standards Regulation* (the "*Regulation*"), in specific response to the several queries posed by ATFY.
19. According to the record I have before me, at no time prior to the issuance of the Determination did ATFY raise the issue regarding the Complainant Badua and the client, to which it now refers on this application for reconsideration.
20. The statement from the client enclosed with the ATFY application appears to have been generated after the date of the Determination. ATFY has, however, provided no explanation why the evidence of the client was not canvassed with him earlier, and presented to the Delegate during the course of the investigation.
21. ATFY did include the client's statement with its other material delivered in support of its appeal. There, however, ATFY's challenge relating to the Complainants' hours of work was not based on an assertion that they had enjoyed breaks while attending at clients' residences, but rather that they had submitted erroneous documents to the Delegate that were not shared with ATFY. As I have noted already, the Tribunal rejected this allegation because the record showed that the basis for the Delegate's calculations of the amounts owed had been shared and discussed with ATFY, the Delegate had found that there was no substantial dispute in the evidence submitted from the parties concerning the number of hours the Complainants spent performing "work" as defined in the *Act*, and ATFY had not provided compelling evidence that the Delegate's calculations based on the "work" performed, as defined, were incorrect.
22. On this application for reconsideration, ATFY has elected to submit, again, the statement from the client implying that the Delegate's calculation of the Complainant Badua's hours of work was incorrect. I do not believe it should be permitted to do so. If I were to rely on the client's statement it would, I believe, have the effect of giving affirmation to ATFY's treating the Delegate's investigation as a species of discovery proceeding employed for the purpose of determining the components of a case most likely to succeed on an appeal, and later, on an application for reconsideration.
23. I agree with the opinion expressed in the Appeal Decision. My relying on a client statement created after the Determination was issued would be inconsistent with the principles of fairness and efficiency to which I have referred, and also the desirability of finality. Put simply, a party must marshal all the available evidence in support of its case for presentation at first instance. In this case, that means ATFY should have sought the evidence out during the investigation, and presented it to the Delegate prior to the issuance of the Determination.
24. I am also of the view that the statement from the client is of limited, if any, probative value in determining the merits of Complainant Badua's complaint. The statement alleges that Badua had a break comprising several hours each day, and that she was able to sleep undisturbed during the night. It states that Badua only

provided actual services for less than eight hours each day. However, the statement does not assert that Badua was absent from the client's residence at any time during the full twenty-four hours on the scheduled workday. That being so, the Delegate's conclusion that both Complainants provided "work" as defined in the *Act* while present at clients' residences, but during times when they were not actually providing services to the clients, is entirely accurate. The reason is that the definition of "work" in the *Act* includes time when an employee is "on call at a location designated by the employer unless the designated location is the employee's residence."

25. ATFY also offers evidence of a letter from WorkSafeBC to the Complainant Badua dated October 22, 2015. Badua, it appears, had claimed compensation under the Workers Compensation Act in respect of her work for ATFY. The issue addressed in the letter was whether Badua was entitled to the benefits claimed. The letter does, however, make reference to information provided by Badua asserting that she should have been paid for twelve hours worked in a day, and not merely the eight hours for which she alleged ATFY was prepared to provide credit.
26. ATFY submits this correspondence demonstrates that the Complainant Badua was only seeking remuneration for twelve hours of work, and not the twenty-four hours of work the Delegate found she had performed, and for which the *Act* entitled her to make a claim.
27. In my view, whether the Complainant Badua was aware she was entitled to remuneration for twenty-four hours of work is of no moment. Subsection 76(2) of the *Act* provides that the Delegate was entitled to investigate the circumstances of the Complainants' employment with ATFY to ensure compliance with the legislation, whether a complaint relating to the failure to pay wages for the full twenty-four hour period had been received or not. Such a power reposed with the Delegate is entirely consistent with a purpose of the statute that employees receive the minimum benefits it provides.
28. ATFY also argues that the Determination, and the Appeal Decision confirming it, are flawed because they fail to account for the fact employers in British Columbia are permitted to develop, and to implement, policies and practices that provide better standards than those mandated by the law. I infer from the ATFY submission that the "better standards" to which it refers means the business model of care to which it adhered prior to these proceedings. ATFY submits that its model of care provides "better standards" because it offers personal care at a price that many seniors can afford, and affirms what ATFY describes as the "Home is Best" solution for care adopted by the industry and supported by many government health authorities. By reason of these "exceptional circumstances", ATFY contends that its in-home caregivers should be exempted from the protection of the *Act*. It also warns that if the Determination is confirmed it may result in its ceasing to do business, as it will be unable to pay its in-home caregivers the wages the Determination has decided they must receive for their work.
29. I cannot accede to these submissions. It is undeniable that employers may implement standards that are better than the minimum standards mandated by the *Act*. However, the standards addressed in the *Act* do not relate to the value of the services provided by employers like ATFY. Rather, they focus on the quality of the employment benefits provided by employers to employees who perform work. What ATFY suggests is that the requirements of the *Act*, which provide minimum employment benefits to its employees, should be weakened because the important services it provides to its clients may be compromised if they are enforced.
30. It is not for the Tribunal to give effect to policy arguments such as those offered by ATFY where, as here, the Tribunal's deciding to do so would result in serious contraventions of the statutory scheme, and prejudice to the lawful claims of the Complainants. The Appeal Decision identified no legal errors in the

Determination, and ATFY has presented no persuasive arguments suggesting that the Tribunal's assessment of its policy arguments was wrong.

31. Finally, ATFY has requested a postponement of my decision. I infer from its comments on this point in its submission that it anticipates "new rules" to be promulgated which may change the legislation affecting its operations.
32. I decline to place this matter in abeyance. Like the Tribunal responsible for the Appeal Decision, I am not disposed to await the possibility that legislative proposals of which I am unaware may ultimately result in pertinent changes to the statutory scheme. Moreover, a postponement would deprive the Complainants of benefits that have already vested under the *Act* as it is currently written, and to which they are therefore entitled.

### **ORDER**

33. Pursuant to section 116 of the *Act*, I order that the Appeal Decision of the Tribunal, BC EST # D088/16, be confirmed.

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**Robert E. Groves**  
**Member**  
**Employment Standards Tribunal**