

An Application for Reconsideration

- by -

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

- of Decisions 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:** Rajiv K. Gandhi

**FILE Nos.:** 2017A/136 and 2017A/137

**DATE OF DECISION:** December 8, 2017

## DECISION

### SUBMISSIONS

Patricia Cruz and Cary Ulmer

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

### OVERVIEW

1. Angels There For You Home and Health Care Services Inc. (“ATFY”) applies under section 116 of the *Employment Standards Act* (the “*ESA*”) for reconsideration of a determination of the Director of Employment Standards (the “Director”) dated March 9, 2016 (the “Determination”), a decision of the Employment Standards Tribunal (the “Appeal Decision”, reported at BC EST # D088/16) and the Tribunal’s reconsideration of the Appeal Decision (the “Reconsideration Decision”, reported at BC EST # RD122/16), on the basis that the Tribunal has erred in law and breached certain principles of natural justice.
2. It is necessary to summarize, briefly, the history of proceedings:
  - (a) Complaints from two ATFY employees were filed with the Director on October 27, 2014, April 1, 2015, and February 15, 2016, asserting a failure on the part of ATFY to pay wages, when due.
  - (b) The Determination was issued on March 9, 2016. ATFY was ordered to pay \$47,868.77 on account of unpaid overtime, statutory holiday pay, statutory holiday premium pay, vacation pay, and interest, according to sections 36, 40, 45, 46, 58, and 88 of the *ESA*. ATFY was also required to pay five separate administrative penalties, each in the amount of \$500.
  - (c) ATFY appealed the Determination on April 19, 2016, alleging both an error of law and a failure on the part of the Director to observe the principles of natural justice. That appeal was dismissed on June 24, 2016, with the issuance of the Appeal Decision.
  - (d) On July 26, 2016, ATFY applied for reconsideration of the Appeal Decision. That application was denied on October 12, 2016, with the issuance of the Reconsideration Decision.
  - (e) On December 8, 2016, ATFY filed a petition for judicial review of the Tribunal’s decisions (the “Petition”). According to ATFY, the court is not able to hear the Petition until at least March 2018.
3. In this application, filed on November 22, 2017, ATFY asks the Tribunal to review the Determination, the Appeal Decision, and the Reconsideration Decision, and to address what the former says are fundamental errors in both Tribunal decisions, suggesting that this would be faster, and cheaper, than forcing it to continue with the Petition.
4. Because this request was filed more than seventeen months after the Appeal Decision, and more than one year after the Reconsideration Decision, ATFY also seeks an extension of time. ATFY says that an extension (under section 109 of the *ESA*) is appropriate because any delay resulted from uncertainty in the process and

it has been diligent in pursuing its various appeals of the Determination, which include the original appeal, the first application for reconsideration, and the Petition.

5. To succeed on an application for more time ATFY must, among other things, satisfy this Tribunal that it has a strong *prima facie* case (see *Niemisto*, BC EST # D099/96).
6. ATFY argues that, at both the appeal and reconsideration stages of these proceedings, the Tribunal erred in law and breached the principles of natural justice. Had the Tribunal "...been attuned to, and made appropriate consideration of [ATFY's] position at the time of the appeal and reconsideration stages", it says, "the outcome would have been substantially different".
7. ATFY says that the Director's delegate, the Tribunal, or both misapplied the law, improperly relied on the complainants' *viva voce* evidence, and failed to consider both the employment agreement signed by the complainants and other, relevant, extrinsic evidence. ATFY claims that the Director's delegate demonstrated bias by "improperly advocating for the complainants". Finally, ATFY says that the length of time taken to issue the Determination "prevented ATFY from mitigating their circumstances".

## ANALYSIS

8. I have reviewed the following:
  - (a) the Determination;
  - (b) ATFY's appeal of the Determination, dated April 18, 2016;
  - (c) submissions from the Director's delegate, received April 26, 2016;
  - (d) the Director's record, submitted to the Tribunal on May 5, 2016;
  - (e) submissions from ATFY received May 20, 2016;
  - (f) the Appeal Decision;
  - (g) ATFY's application for reconsideration of the Appeal Decision, received July 25, 2016;
  - (h) submissions from ATFY, received August 26, 2016;
  - (i) the Reconsideration Decision; and
  - (j) ATFY's present application, received November 22, 2017.
9. The Tribunal's authority under section 116 of the *ESA* is discretionary, and limited:
  - 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 served with an order or a decision of the tribunal may make an application under this section.*

- (2.1) *The application may not be made more than 30 days after the date of the order or decision.*
- (2.2) *The tribunal may not reconsider an order or decision on the tribunal's own motion more than 30 days after the date of the decision or order.*
- (3) *An application may be made only once with respect to the same order or decision.*
- (4) *The director and a person served with an order or a decision of the tribunal are parties to a reconsideration of the order or decision.*

- <sup>10.</sup> According to section 116(3) of the *ESA*, an application for reconsideration may be made only once with respect to the same order or decision.
- <sup>11.</sup> Conceivably, the Tribunal could reconsider the Reconsideration Decision by application or on its own motion, but the circumstances in which the Tribunal will exercise that discretion are exceedingly rare. Reconsiderations in the first instance must be exercised with restraint, and then only in a manner that is fair to the affected parties and consistent with the purpose of the statute (see *Milan Holdings Inc.*, BC EST # D313/98, at page 6, and *The Director of Employment Standards (Re Giovanni (John) and Carmen Valoroso)*, BC EST # RD046/01, at page 4).
- <sup>12.</sup> In *Dusty Investments Inc. d.b.a. Honda North*, BC EST # D043/99, the Tribunal on its own motion decided to reconvene reconsideration proceedings because the reconsideration panel rendered a decision before giving a party to those proceedings the opportunity to respond to submissions from another party. This was a clear breach of procedural fairness. In doing so, the Tribunal declared that it had the general authority, like other administrative tribunals, to correct errors rendering a decision a nullity (see *Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster*, 1983 CanLII 411 (BCSC)).
- <sup>13.</sup> However, the sort of circumstances described in *Dusty Investments* and *Trizec Equities* do not exist here. Although ATFY alleges legal errors and procedural unfairness, these arguments are not new. The Tribunal has previously considered and addressed the same issues in both the Appeal Decision and the Reconsideration Decision. ATFY seeks to reargue its position, hoping for a different result.
- <sup>14.</sup> Considering section 116(3) of the *ESA*, I decline to revisit either the Appeal Decision or the Determination. With respect to the Reconsideration Decision, I am also of the opinion that ATFY has failed to show rare or exceptional circumstances justifying yet another reconsideration.

## ORDER

- <sup>15.</sup> Both of ATFY's applications are dismissed.

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**Rajiv K. Gandhi**  
**Member**  
**Employment Standards Tribunal**