An application for Reconsideration

- by -

Super Sandhu Ent. Ltd.
("SSEL")

- 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: Shafik Bhalloo

FILE No.: 2007A/136

DATE OF DECISION: December 19, 2007

DECISION

OVERVIEW

1. This is an application by Super Sandhu Ent. Ltd. ("SSEL") under Section 116 of the *Employment Standards Act* (the "*Act*") for Reconsideration of a Decision (BC EST #D199/07) (the "Original Decision") issued by the Employment Standards Tribunal (the "Tribunal") on October 18, 2007. The Original Decision confirmed the determination issued by a delegate of the Director (the "Delegate") on July 18, 2007 (the "Determination"). The Determination found that the employer, SSEL, had contravened section 6 of the *Employment Standards Regulation* (the "*Regulation*"), by failing to make a daily log available for inspection. As a result, the Delegate ordered SSEL to cease contravening section 6 of the *Regulation* and to comply with all the requirements of the *Act* and *Regulation* and, furthermore, imposed an administrative penalty on SSEL in the amount of $10,000 pursuant to section 29 of the *Regulation* as this was SSEL's third contravention of section 6 of the *Regulation* within three years.

2. SSEL based its appeal of the Determination on the grounds that the Director erred in law in making the Determination and evidence has become available that was not available at the time the Determination was made. In support of the said grounds of appeal, SSEL, through it counsel, presented written submissions arguing that at the time of the worksite visit by the Employment Standards Officer (the "Officer"), the owner of SSEL was not present but had provided the daily log to one of the two employees of SSEL on site, namely, Mr. Dhaliwal. SSEL further contended that the Officer did not ask the two employees for the daily log or if he did then the request was not understood by the employees as the employees in question were recent immigrants from India and their spoken Punjabi is different than the spoken Punjabi in Canada. According to SSEL, while the Officer may have thought that he was "speaking Punjabi effectively" to these employees, the latter did not understand him; notwithstanding they answered the Officer's other questions effectively. In support of its position, SSEL also adduced into evidence almost similarly worded statutory declarations of the two employees stating that the Officer was speaking Punjabi as it is spoken in Canada and not in India and they had difficulty with understanding him, although they both seem to have understood and responded to the Officer's questions regarding their employer, rate of pay, and the frequency and manner of payment. SSEL also adduced a document purporting it to be a copy of the daily log for the date of the Officer's worksite visit. In the circumstances, SSEL argued "the worksite inspection was not properly and adequately carried out due to the parties involved; therefore it is unfair and unreasonable to determine that regulation 6(4) has been contravened".

3. The Tribunal, in confirming the Determination in the Original Decision, rejected the error of law ground of appeal of SSEL stating that the latter's appeal does not identify an error of law and is simply based on the argument that the Delegate failed to conduct a proper investigation and arrived at an "unfair and unreasonable" conclusion. The Tribunal also rejected as new evidence the statutory declarations of the two employees adduced by SSEL and as well as the document purported to be SSEL's daily log. According to the Tribunal, the statutory declarations and the purported daily log contained information available during the Delegate's investigation (in advance of the Determination) and reference was made to some of the information contained in these documents in SSEL's July 3, 2007 written response to the Delegate's enquiry (which was made subsequent to the Officer's worksite visit and before the Determination).

4. In its Reconsideration application, SSEL, through its counsel, essentially reiterates the argument that SSEL advanced in its appeal of the Determination. SSEL states that the reviewable error of law in the

Determination and the Original Decision is that the Delegate "misapplied a section of the Act". Apparently, SSEL is referring to section 6 of the *Regulation*, which provides:

> (4) A farm labour contractor must keep at the work site and make available for inspection by the director a daily log that includes
>
> (a) the name of each worker,
>
> (b) the name of the employer and work site location to which workers are supplied and the names of the workers who work on that work site on that day,
>
> (c) the dates worked by each worker,
>
> (d) the fruit, vegetable, berry or flower crop picked in each day by each worker, and
>
> (e) the volume or weight picked in each day by each worker.

5. According to SSEL, if a request is made for the daily log by the Officer, it should have been "effectively communicated to and understood by the person to whom the communication is made". In the case at hand, according to SSEL, the daily log was kept on site and the Officer failed to "effectively communicate" the request for the daily log to the employees otherwise it would have been produced to him. SSEL states that it was the "ineffectiveness of the communication and language limitations/difficulties of both the delegate and the farm employees (that) lead to an unfair and unreasonable conclusion".

6. With respect to the "new evidence" ground of appeal in the Reconsideration application, SSEL states that the statutory declarations of the two employees "were not available or in existence" at the time of the Delegate's investigation as they did not exist and while the daily log existed, the Delegate did not request for it after the worksite visit.

7. SSEL in concluding its Reconsideration submissions states " (t)aking into consideration the relevant facts of this case, it would be a serious mistake in applying the law strictly to these set of events".

ISSUES

8. In an application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the Act to reconsider the original decision. If the Tribunal is satisfied the case is appropriate for reconsideration, then the Tribunal proceeds to the second stage that involves consideration of the substantive issues in the reconsideration application. In this case, the substantive issue is whether the Director erred in law in making the Determination- that is, in finding SSEL to have breached section 6 of the Regulation. A related issue is whether there is new evidence that has become available that was not available at the time of the Determination- that is, whether the statutory declarations of the two employees and the purported daily log should be accepted as new evidence.

ANALYSIS OF THE PRELIMINARY ISSUE

9. Section 116 of the Act confers the Tribunal with the authority to reconsider and confirm, cancel or vary its own orders or decisions:

> ***Reconsideration of orders and decisions***

> ***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.*

10. The Tribunal's authority under Section 116 of the Act is discretionary in nature as the Tribunal "may" reconsider its own orders or decisions. Furthermore, the Tribunal's discretion in this regard is to be exercised with caution. As indicated by the Tribunal in *Re Eckman Land Surveying Ltd.* BC EST #D413/02:

> Reconsideration is not a right to which a party is automatically entitled, rather it is undertaken at the discretion of the Tribunal. The Tribunal uses its discretion with caution in order to ensure: finality of its decisions; efficiency and fairness of the appeal system and fair treatment of employers and employees.

11. In *Re British Columbia (Director of Employment Standards) (sub nom. Milan Holdings Ltd.)*, BC EST #D313/98, the Tribunal delineated a two-stage process that it employs in determining whether or not to exercise its reconsideration power. First, the Tribunal must decide whether the matters raised in the application warrant reconsideration. In determining this question, the Tribunal will consider a non-exhaustive list of factors that include such factors as: (i) whether the reconsideration application was filed in a timely fashion; (ii) whether the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already provided to the adjudicator; (iii) whether the application arises out of a preliminary ruling made in the course of an appeal; (iv) whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases; (v) whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

12. If the Tribunal, after weighing the factors in the first stage, concludes that the application is not appropriate for reconsideration then the the Tribunal will reject the application and provide its reason for not reconsidering. However, if the Tribunal finds that one or more issues in the application is appropriate for reconsideration, the Tribunal will proceed to the second stage in the analysis. The second stage in the analysis involves a reconsideration of the merits of the application.

13. In this case, the submissions filed on behalf of SSEL unequivocally establish that SSEL's primary focus is to have the reconsideration effectively reweigh the evidence already tendered before the adjudicator in the appeal of the Determination with a view to obtaining a favourable decision this time. The Tribunal has indicated time and again that reconsideration is not an opportunity to rehear the evidence and re-determine the matter afresh. In the circumstances, SSEL's application fails.

14. At this stage, while I am not required to proceed to the second stage and review SSEL's application on the merits, I have reviewed SSEL's reasons for asking Reconsideration and find them without any merit. In the reverse order of the written submissions of SSEL, on the issue of the admissibility of the statutory declarations of the two employees and the purported daily log, the Tribunal in the Original Decision correctly rejected the said documents and information, as they did not amount to "new evidence" pursuant

to first of the four-part test for admitting new evidence on appeals delineated in *Re Merillus Technologies Inc.*, BC EST#D171/03. More specifically, under the first part of the Merilus test, the onus is on the party adducing the "new evidence" to show that the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the determination being made. In this case, while the statutory declarations did not exist at the time of the investigation, all of the information contained in the declarations existed and some of it was already referenced in SSEL's letter of July 3, 2007 in response to the Delegate's enquiry during the latter's investigation before the Determination. Further, with respect to any evidence in the statutory declarations that was not referenced in the July 3 letter of SSEL to the Delegate, in my view simply inserting that information in a statutory declaration form after the Determination does not make it new evidence when it existed during the investigation stage and could have been produced with the exercise of due diligence on the part of SSEL. With respect to the purported daily log of SSEL, this document, according to SSEL was in existence on the date of the worksite visit by the Officer. SSEL's contention that the Delegate did not request the daily log after the worksite visit and before the Determination does not transform the purported daily log into new evidence. The onus is on SSEL to present the daily log to the Delegate during the investigation.

15. With respect to SSEL's contention that the Director erred in law in making the Determination, I concur with the conclusion of the Tribunal in the Original Decision that SSEL has not identified an error of law. However, in the Reconsideration application, SSEL appears to couch its argument in the language describing a reviewable error of law. In particular, SSEL states that the Delegate "misapplied a section of the Act" (referring to Section 6(4) of the *Regulation*). However, in the balance of SSEL's submission, SSEL largely reiterates in similar terms its previous argument before the adjudicator in the Original Decision that the Officer, during the worksite visit, did not communicate effectively with the two employees of SSEL when making a request for the daily log under section 6 of the Regulation. More specifically, SSEL states that the Officer did not speak to the employees, who were immigrants from India, in Punjabi as spoken in India but instead spoke to them in Punjabi as spoken in Canada which the employees did not understand well (notwithstanding that the employees appear to have understood other requests or questions of the Officer). I find that the Director did not misapply section 6 of the Regulation and further add that there is no basis for SSEL to import into section 6 of the Regulation a requirement that the Director or the Delegate is obliged to communicate to a farm labour contractor or the latter's workers in any language other than in the official languages of Canada let alone Punjabi as spoken in India. In this case, the Director went beyond its obligation under section 6 of the *Regulation* by sending to the worksite a Punjabi speaking officer (although the officer may only have spoken to the employees in Punjabi as spoken in Canada and not in India).

ORDER

16. Pursuant to Section 116 of the *Act*, I order the original decision, BC EST #D099/07 be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal