

An Application for Reconsideration

- by -

0896022 B.C. Ltd. carrying on business as Fuji Japan  
("Fuji Japan")

- 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.:** 2016A/144

**DATE OF DECISION:** November 9, 2016

## DECISION

### SUBMISSIONS

Yi Li on behalf of 0896022 B.C. Ltd. carrying on business as Fuji Japan

### OVERVIEW

1. 08960022 B.C. Ltd. carrying on business as Fuji Japan (“Fuji Japan”) seeks reconsideration of a decision of the Tribunal, BC EST # D116/16 (the “original decision”) dated September 14, 2016.
2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 7, 2016.
3. The Determination was made by the Director on a complaint filed by Holland Gauthier (“Mr. Gauthier”) who had alleged Fuji Japan had contravened the *Employment Standards Act* (the “*Act*”) by failing to pay him regular and overtime wages and annual vacation pay.
4. In the Determination, the Director found Fuji Japan had contravened sections 18, 40 and 58 of the *Act* and was ordered to pay Mr. Gauthier wages in the amount of \$1,642.98, an amount which included interest under section 88 of the *Act*, and administrative penalties in the amount of \$1,000.00.
5. An appeal of the Determination was filed by Fuji Japan alleging the Director failed to observe principles of natural justice in making the Determination. Fuji Japan argued it was not advised the Director was going to make the Determination and understood the Director was attempting to reach a “fair resolution” of Mr. Gauthier’s complaint with the parties when it was issued.
6. The Tribunal Member making the original decision found Fuji Japan had not shown there was any failure by the Director to observe principles of natural justice. The material before the Tribunal Member showed Fuji Japan had been accorded the procedural rights to which a party participating in the complaint process was entitled: Fuji Japan was advised of the case being made by Mr. Gauthier and had been given full opportunity to be heard before the Determination was made.
7. The Tribunal Member noted the appeal was comprised almost entirely of a re-argument of the case it presented to the Director, which was that Mr. Gauthier’s record of hours worked was inaccurate and he was actually owed much less than he claimed.
8. The Tribunal Member dismissed the appeal under section 114 of the *Act*.

### ISSUE

9. 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 cancel the original decision and refer the matter back to the original panel or, if more appropriate, to the Director.

## ARGUMENT

10. Fuji Japan makes essentially the same arguments it made in the appeal; submitting it was never given proper notice from the Director that the “settlement process became the decision process”. In this application, Fuji Japan adds it would like the matter to be remitted back to the Director where it is prepared to settle the complaint at the amount the Director found was owed to Mr. Gauthier as wages.
11. Nothing in the arguments addresses the correctness of the original decision or the basis upon which the original decision was made. This application does no more than seek the same result – a return to the Director to continue the “settlement process” – that it was unable to achieve in the appeal.

## ANALYSIS

12. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally.

13. Section 116 of the *Act* reads:

- 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.

14. The authority of the Tribunal under section 116 is discretionary. A principled approach to this discretion has been developed and applied. The rationale for this approach is grounded in the language and purposes of the *Act*. One of the purposes of the *Act*, found in section 2(d), is “to provide fair and efficient procedures for resolving disputes over the application and interpretation” of its provisions. Another stated purpose, found in section 2(b) is to “promote the fair treatment of employees and employers”. The approach is fully described in *Milan Holdings Inc.*, 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.

15. In deciding whether to reconsider, the Tribunal considers timeliness and such factors as the nature of the issue and its importance both to the parties and the system generally. Delay in filing for reconsideration will likely lead to a denial of an 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.
16. The Tribunal has accepted an approach to applications for reconsideration that resolves itself 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.
17. It will weigh against an 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.
18. 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 in the reconsideration.
19. I find this application does not warrant reconsideration.
20. There is nothing new in this application; it recycles the same submissions as were made, unsuccessfully, in the appeal. It weighs against this application that it seeks to have this panel re-visit the arguments made in the appeal and not accepted in the original decision.
21. There is absolutely nothing in this application to demonstrate there is an error in the original decision that would justify the Tribunal exercising its discretion to order a reconsideration of that decision.
22. The application is denied.

**ORDER**

23. Pursuant to section 116 of the *Act*, the original decision, BC EST # D116/16, is confirmed.

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