

An Application for Reconsideration

- by -

Sundeeep Singh Kajla carrying on business as Colebrook Farms  
("Colebrook")

- 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/163

**DATE OF DECISION:** December 15, 2016

## DECISION

### SUBMISSIONS

Sundeep Singh Kajla on his own behalf carrying on business as Colebrook Farms

### OVERVIEW

1. Sundeep Singh Kajla carrying on business as Colebrook Farms (“Colebrook”) seeks reconsideration of a decision of the Tribunal, BC EST # D146/16 (the “original decision”) dated November 2, 2016.
2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 23, 2016.
3. The Determination was made by the Director following a site inspection of Colebrook by the Agricultural Compliance Team on June 28, 2016.
4. In the Determination, the Director found Colebrook had contravened sections 9, 18 and 28 of the *Act* arising from the employment of a child under the age of 12 years (“the child”) without obtaining the Director’s permission. Colebrook was ordered to pay the child wages in the amount of \$15.73, an amount which included interest under section 88 of the *Act*, and administrative penalties in the amount of \$3,500.00. A substantial portion of the administrative penalties amount flowed from a second violation of section 28 of the *Act* within three years of a previous contravention of that section: see section 29(1) (b) of the *Employment Standards Regulation* (the “*Regulation*”).
5. An appeal of the Determination was filed by Colebrook alleging the Director failed to observe principles of natural justice in making the Determination. Colebrook argued it was not aware the child was working, that he had been sent away when the fact of his working was brought to light, that the child had been paid for the little work he had performed and, in respect of the failure to include the child in Colebrook’s payroll records, that Mr. Kajla, the sole proprietor of Colebrook, said he was confused because he did not consider the child to have been an employee.
6. In the appeal, Colebrook sought to have the Determination cancelled.
7. The Tribunal Member making the original decision found Colebrook had not shown there was any failure by the Director to observe principles of natural justice. The material before the Tribunal Member showed Colebrook had been accorded the procedural rights to which a party participating in the complaint process was entitled: Colebrook was advised of the case being made and had been given full opportunity to respond before the Determination was made.
8. The Tribunal Member also addressed a matter of additional information that was provided with the appeal in the context of the ground of appeal set out in section 112(1) (c), commonly referred to as the “new evidence” ground of appeal, and the test applied by the Tribunal when considering new or additional material submitted with an appeal: see *Re Merilius Technologies*, BC EST # D171/03. The Tribunal Member applied the test and decided this information should not be accepted and considered in the appeal, stating, in part:

Not only is the “new evidence” different from the information initially provided during the investigation process, the information was clearly available at the time the delegate was investigating the contravention.

Furthermore, I am not persuaded that the evidence could have led the delegate to a different conclusion on the material issue.

9. The Tribunal Member concluded Colebrook had not met the burden of establishing any of the statutory grounds of appeal and dismissed the appeal under section 114 of the *Act*.
10. In this application, Colebrook seeks to have the Determination varied to cancel the wage amount found owing to the child and to remove the administrative penalties related to the finding that Colebrook had contravened sections 18 and 28 of the *Act*.

## ISSUE

11. 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

12. While not stating it directly, the essence of the argument made by Colebrook in this application is that the Director erred in finding the child was an employee, was required to be included in the payroll records and was entitled to wages and that Colebrook was required to pay those wages in compliance with section 18 of the *Act*.
13. Colebrook submits the child “absolutely did not pick berries to the benefit of Colebrook Farms and he was compensated appropriately.” Notwithstanding the seeming inconsistency in that statement, I take it to mean that because the child placed the berries he had picked into his father’s picking bucket, he was paid, albeit indirectly, for his work. This argument was made in the appeal; it relies on information that was included with the appeal as new evidence, but as indicated above was not accepted or considered by the Tribunal Member making the original decision.
14. Colebrook also asserts the administrative penalties for contravening sections 18 and 28 would “imply that I did not pay [the child] and did not have a record of it. This is false.” This assertion also relies on information that was not accepted in the appeal. In the original decision, the Tribunal Member stated that if such information existed at the time of the investigation, it should have been provided to the Director. It was not, and I reiterate what the Tribunal Member stated in the original decision about this information: that it was different from what was provided by Colebrook to the Director during the investigation, which was that Colebrook did not keep records for the child. The following is found in the Determination:

Mr. Kajla admitted to not paying [the child] for the work performed on June 28, 2016. [The child] put the blueberries picked by him into the picking bucket of his father and, therefore, Mr. Kajla had no records of the amount of blueberries picked by [the child].

## ANALYSIS

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

16. Section 116 of the *Act* reads:

- 116** (1) *On an 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.*

17. 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 able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

18. 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.

19. 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 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.
20. 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.
21. 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.
22. I find this application does not warrant reconsideration.
23. While this application does not directly challenge the conclusion in the original decision on the assertion of additional facts made in and additional material filed with the appeal, it seeks to undermine that conclusion by grounding its arguments on a reassertion of those facts and reference to material that was not accepted in the appeal under the “new evidence” test.
24. This application does not indicate, within the considerations applied by the Tribunal when deciding on whether to accept “new evidence” with an appeal – and which were referred to in the original decision – why this panel should interfere with the conclusion in the original decision on the “new evidence” Colebrook sought to include with the appeal.
25. Rather, this application seeks to avoid the requirements to both clearly identify in some tangible way an error in the original decision and to demonstrate such error warrants reconsideration by simply, and inappropriately, ignoring the original decision on that point.
26. On analysis, I find the reasons given in the original decision for not accepting the “new evidence” show no error. They are reasonable and, in my view, correct.
27. The Tribunal Member applied the test adopted and consistently applied by panels of the Tribunal when considering requests for including “new evidence” with an appeal.
28. There is nothing new in this application; it recycles submissions that were made, unsuccessfully, in the appeal; it seeks to rely on facts that were not allowed to be added to the record or included with the appeal. It weighs heavily against this application that it seeks to have this panel re-visit arguments made in the appeal and not accepted in the original decision.
29. In sum, there is nothing in this application to demonstrate there is any error in the original decision or any reason that would justify the Tribunal exercising its discretion to order a reconsideration of that decision.
30. The application is denied.

**ORDER**

31. Pursuant to section 116 of the *Act*, the original decision, BC EST # D146/16, is confirmed.

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