

BC EST #D190/00
Reconsideration of BC EST #D543/99

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

G. & R. Singh & Sons Trucking Ltd.
(the “ Appellant ”)

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE No.: 2000/76

DATE OF DECISION: May 8, 2000

DECISION

APPEARANCES/SUBMISSIONS:

William R. Hibbard	for G. & R. Singh & Sons Trucking Ltd.
Jeff Black	for himself
Judy McKay	for the Director of Employment Standards

OVERVIEW

This is an application by G. & R. Singh & Sons Trucking Ltd. under Section 116(2) of the *Employment Standards Act* (the “*Act*”) for a reconsideration of BC EST Decision # D543/99 dated December 21, 1999. The reconsideration is being dealt with through written submissions.

ISSUE(S) TO BE DECIDED

Did the original panel of the Employment Standards Tribunal (“original panel”) err in its finding that Gus Holdings Ltd. (“Gus Holdings”) and 478450 B.C. Ltd. operating as A.B.K. Enterprises (“A.B.K.”) and G. & R. Singh & Sons Trucking Ltd. (“G. & R. Singh”) were “associated corporations” in accordance with section 95 of the *Act*.

FACTS

On August 7, 1998 the complainant, Jeff Black, who was employed as a truck driver by Gus Holdings filed an unpaid wage complaint against that employer. The complaint resulted in the issuance of a Determination dated April 29, 1999 in the amount of \$4,778.63 against Gus Holdings. That Determination was not appealed. Subsequently Gus Holdings ceased doing business as an operating entity. On July 5, 1999 the Director of Employment Standards issued a second determination for the same amount plus some additional accrued interest against Ranjeet Singh who was a director and officer of Gus Holdings. Likewise this Determination was not appealed. No monies were paid under either the April 29, 1999 nor July 5, 1999 Determinations.

Subsequently the Director’s Delegate advised the parties, in writing, of an intention to treat Gus Holdings Ltd., 478450 B.C. Ltd. operating as A.B.K. Enterprises and G. & R. Singh & Sons Trucking Ltd. as a single entity pursuant to Section 95 of the *Act*. A Determination to that effect was issued on September 29, 1999. On October 25, 1999 the Acting Chair of the Employment Standards Tribunal wrote to the parties requesting full and complete submissions with supporting documents to be filed by no later than November 15, 1999. It must be noted that there was a one page letter under the name of Bhajneek K. Singh dated October 22, 1999 filed in the matter. The letter asserted that Bhajneek K. Singh was appealing on behalf of the three corporations named in the aforementioned determination. No further submissions were received.

The original panel considered the one page submission and the other material on file. The original panel concluded that the three appellants were separate companies. The original panel went on to state at page 4:

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“Indeed, the point of section 95 is to address the very situation raised by the facts in this case – i.e., a single business enterprise operated through a number of separate corporate entities. By way of a section 95 declaration, employees of any one constituent corporation may be considered, for purposes of the *Act*, to be employed by the entire business enterprise.”

The original panel then went on to conclude that the section 95 declaration which covered all three appellants was entirely proper given the uncontradicted evidence before the delegate that the three appellant corporations were involved in the trucking industry; that the same individual was responsible for managing the day to day affairs of all three appellant corporations; that assets such as trucks were transferred from one company to the other; that the directors/officers of all three companies are members of a single family who all share a common mailing address; and, lastly, that the family farm was the location where all the appellant’s vehicles were stored and from which they were dispatched.

The original panel then confirmed the Determination dated September 29, 1999 in the amount of \$4,883.76 together with such further interest that may have accrued pursuant to section 88 of the *Act* since the date of issuance. The original panel’s decision was dated December 21, 1999.

ANALYSIS

Section 116 of the *Act* reads:

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) cancel or vary the order or decision or refer the matter back to the original panel.

(1) The director or a person named in a decision or order of the tribunal may make an application under this section.

(2) An application may be made only once with respect to the same order or decision.

The power to reconsider orders and decisions under Section 116 is a discretionary power that is exercised with caution. The Tribunal has accepted certain limited grounds for reconsideration of decisions. Those grounds include a failure by an adjudicator to comply with principles of natural justice; where a mistake of fact has been made; where a decision is inconsistent with other decisions not distinguishable on the facts; where significant and serious new evidence has become available that had such evidence been presented to the adjudicator it would have lead the adjudicator to a different conclusion; serious mistake in applying the law; misunderstandings or failure to deal with a significant issue; and a clerical error in the decision.

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The discretionary power to reconsider is exercised with caution. One reason for exercising such caution is that the purpose of the *Act* is to resolve disputes fairly and efficiently (see section (2)(d)). Allowing more than one hearing in a matter turns the appeal hearing of a determination into a type of discovery to set the basis for a reconsideration application. Furthermore, the Tribunal's authority is limited to confirming, varying or canceling a determination, or referring a matter back to the Director of Employment Standards under Section 115. The above reasons imply that a degree of finality is desirable. (See Re: Kiss BC EST # D122/96; Re: Pacific Ice Company BC EST # D241/96; Re: Restaurontics Services Ltd. BC EST # D274/96; and Re: Khalsa Diwon Society BC EST # D199/96).

The purpose of the policy is to facilitate the quick, efficient and inexpensive adjudication of complaints in cases. It has been stated that the reconsideration power should be used sparingly and only in exceptional cases. (See World Project Management Inc. BC EST # D134/97; Re: Allard BC EST # D265/97).

In the instant reconsideration application counsel for the appellant argues that there has been a demonstrable breach of the rules of natural justice. Firstly, counsel argues that one of the principals of the appellant G. & R. Singh, a Mr. Gurdarshen Singh, was not questioned at any point in the investigation regarding any details surrounding the complainant's termination including the investigation of the initial complaint and the "associated companies" investigation.

Secondly, counsel argues that another principal of an associated company, Ranjeet Singh, was not in Canada during the investigation or at the times that the determinations dated April 29, 1999 and July 5, 1999 were issued. Counsel argues that since she was not able to participate in the investigative process she was denied a fair hearing.

Counsel takes exception to the findings of fact made in the first Determination dated April 29, 1999 and argues that different findings would have been made had the aforementioned individuals been interviewed.

Thirdly, counsel argues that 478450 B.C. Ltd. operating as A.B.K. Enterprises and G. & R. Singh & Sons Trucking Ltd. were not given the opportunity to explain why they should not be associated under section 95 of the *Act* with Gus Holdings Ltd. Counsel argues that because a separate complaint against A.B.K. had been resolved neither that company nor G. & R. Singh believed that they needed to explain their position. Counsel argues that Ranjeet Singh, a principal of Gus Holdings, had failed to advise her husband, Gurdarshen Singh, a principal of G. & R. Singh, that she was concealing information relating to the operation of her company, Gus Holdings Ltd. G. & R. Singh argues that it was never provided with an opportunity to make submissions on its own behalf with respect to the section 95 Determination dated September 29, 1999.

Fourthly, counsel advances an argument that the adjudicator relied on irrelevant evidence and hearsay statements in arriving at the conclusions of fact in the appeal decision dated December 21, 1999. Counsel argues that Gurdarshen Singh and Anupe Singh, (of Gus Holdings Ltd.), were never contacted or spoken to during the investigation of the September 29, 1999 Determination.

Fifthly, counsel argues that the only submission that was received by the Employment Standards Tribunal and which was accepted as the appeal of the September 29, 1999 Determination was

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made by one Bhajneek Singh who did not have the authority to represent A.B.K. and G. & R. Singh in the matter. In effect counsel argues that because Ranjeet Singh at the material times was absent from Canada no other person had the authority to deal with the appeal on behalf of Gus Holdings than Ranjeet Singh. Counsel argues that the September 29, 1999 Determination is not capable of support because of the failure to contact Ranjeet Singh during the investigation process. Counsel further argues a statement made during the investigation leading up to the first determination by the complainant that he accepted that Gus Holdings and A.B.K. Enterprises were not associated companies was not given sufficient weight. These arguments also go to the overarching contention by counsel that mistakes of fact were made in the April 29, 1999 and the September 29, 1999 Determination.

Counsel argues that the failure of the investigating delegate to interview Mr. Gurdarshen Singh or Ranjeet Singh compromised the investigation. As a result the audi alterem partem rule which provides a basic procedural protection to persons before administrative tribunals was breached. The appellant argues that it was not provided adequate opportunity to be heard because it had no knowledge of the proceedings.

Finally, counsel argues that due to the breach of natural justice the adjudicator has committed a jurisdictional error. Counsel argues that there has been an error in the exercise of the adjudicator's functions which are judicial in nature as the decision affects the rights of Gurdarshen Singh and his company. The effect of the adjudicator's presumption becomes a disregard of relevant considerations and, as such, is a jurisdictional error addressable through Section 116 of the *Act*.

Counsel argues that the adjudicator based his judgment upon the faulty investigation reports provided to the Branch and the incorrect factual findings in the Determination dated September 29, 1999. Counsel argues that as a result of considering these incorrect conclusions the adjudicator was not able to properly exercise his judgment. Counsel argues that reasonable attempts to obtain relevant and important information were not properly pursued and the effect was to taint the entire proceedings. Counsel argues that since the adjudicator did not observe the principles of natural justice the adjudicator's ability to consider the relevant circumstances of the case was poisoned to such an extent that the order should be cancelled or, alternatively, referred back so a proper determination can be reached.

I am not able to agree with counsel. I have reached this conclusion for the following reasons. I turn firstly to the appellant's quarrel with the findings of fact in the April 29, 1999 and the September 29, 1999 Determinations. The April 29, 1999 Determination was the initial finding that the complainant, Jeff Black, was entitled to \$4,883.76 in unpaid wages (including over-time pay and compensation for length of service) plus interest. That Determination was not appealed. The Director's Delegate indicates that she dealt with Anupe Singh as the representative of both Gus Holdings Ltd. and 478450 B.C. Ltd. operating as A.B.K. Enterprises in those matters.

The appellant, G. & R. Singh argues that it was denied a fair hearing because it was not interviewed during the initial investigation. There is a sound reason why that didn't occur. The Director's Delegate was dealing with complaints against Gus Holdings and A.B.K. There was no indication that the complainant was or had been an employee of G. & R. Singh at the time the complaints arose and were being investigated. Therefore, there was no need to interview a representative from G. & R. Singh. Furthermore, the investigation was made and the

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Determination rendered in good faith. There was nothing to indicate to the Director's Delegate at the time that Gus Holdings would cease operations or that it would fail to pay the Determination. It is the failure to pay the monies ordered under the Determination that caused the Director's Delegate to widen the scope of her investigation to include G. & R. Singh under section 95.

It must also be recognized that Gus Holdings Ltd. and 478450 B.C. Ltd. operating as A.B.K. Enterprises did not appeal the April 29, 1999 Determination. Gus Holdings took the position that it had ceased operations and was not liable to pay the monies. The other company, A.B.K. took the position that a complaint that had been made against it had been settled and therefore it was not liable for the monies under the Determination. It is true that a complaint against 478450 B.C. Ltd. operating as A.B.K. Enterprises had been settled. However, the basis for that settlement was the fact that there was a personal debt owing from the complainant to the principal of A.B.K. Enterprises. The parties were able to settle that matter between themselves and therefore there was no basis for the Director's Delegate to issue a determination on that matter.

However, the fact that there was a settlement of a personal debt does not relieve A.B.K. from the scope of the Section 95 or "associated employers" inquiry. The reconsideration section of the *Act* does not provide an avenue to resurrect or re-argue findings of fact made in an initial determination. The April 29, 1999 Determination was not appealed. The appellant G. & R. Singh cannot through Section 116 of the *Act* and the reconsideration process now re-open the findings of fact made in the initial investigation. There is no breach of natural justice and no error of law or fact made by refusing to allow the appellant to re-open findings of fact made in the April 29, 1999 Determination or the September 29, 1999 Determination.

The appellant also argues that the Director's Delegate did not allow Ranjeet Singh, the principal of Gus Holdings, full opportunity to participate in the initial investigation. However, the file material indicates that the Director's Delegate had several conversations with Anupe Singh, who is Ranjeet Singh's daughter, and who purported to be speaking for Gus Holdings and A.B.K. Enterprises. Furthermore the file material indicates that the Director's Delegate after being informed that Ranjeet Singh would return to Canada on or about March 22, 1999 withheld making the determination pending her return. The file material indicates that the Director's Delegate had several conversations with Anupe Singh between the end of March and the issuance of the April 29, 1999 Determination. I am not prepared to accept an argument that Ranjeet Singh was not aware of or was not given an opportunity to participate in the investigative process. I further note that the Determination against Gus Holdings, after being issued on April 29, 1999, was sent by registered mail to the registered operating and records office of the company. The Determination was also sent via regular mail to the director/officers of the company. As stated previously that Determination was not appealed.

The file material also indicated that after the expiry of the appeal period for the April 29, 1999 Determination the Director's Delegate again contacted Anupe Singh regarding payment. The Delegate was informed that Ranjeet Singh had again left Canada. Anupe Singh indicated that her mother would be returning at the end of June and that the Director's Delegate would be contacted at that time. That contact did not occur and the Director's Delegate subsequently issued the July 5, 1999 Determination against Ranjeet Singh as a director and officer of Gus Holdings Ltd. That

Determination was sent by certified mail. The records indicate that Ranjeet Singh signed the acknowledgement of delivery. Likewise the July 5, 1999 Determination was not appealed.

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The Director's Delegate contacted Anupe Singh after the appeal period had expired for the July 5, 1999 Determination. Collection action was not taken on either of the previous two Determinations because Anupe Singh had indicated that her mother was again absent from Canada and that she (Anupe) was busy with exams. Subsequently there was an effort to settle the differences but that effort proved fruitless. The Determinations remained unpaid.

The Director's Delegate indicates that during the July 1999 period in her discussions with Anupe Singh she informed Anupe Singh that she believed that Gus Holdings Ltd., 478450 B.C. Ltd. operating as A.B.K. Enterprises and G. & R. Singh & Sons Trucking Ltd. were associated companies. Anupe Singh denied that they were. On September 3, 1999 the Director's Delegate faxed to the three companies a copy of the complainant's last offer to settle, along with a letter stating that she was considering associating the companies. She also enclosed a copy of section 95 of the *Act* and the information on associated companies taken from the Interpretation Guidelines Manual. This information was also sent by regular mail. The record indicates that there was no response. The record further indicates that on September 16, 1999 the Director's Delegate left a message for Anupe Singh. That message went unanswered.

On September 29, 1999 the Director's Delegate issued the Determination associating the three companies. That Determination was sent by registered mail to the three companies' operating addresses as well as the registered and records office. A copy of the Determination was sent by regular mail to all directors and officers of the companies. The only correspondence that was returned was that correspondence sent to the records office of Gus Holdings Ltd. It was returned and marked "unclaimed".

The record does indicate that the Director's Delegate did not speak with Gurdarshen Singh during her investigation. The record also indicates that Gurdarshen Singh made no attempt to contact the officer. I will deal with whether this constitutes a basis for appeal later in this award.

As stated previously the Director's Delegate sent a letter dated September 3, 1999 to the three companies. The second paragraph of that letter clearly stated that if the complaint was not resolved by September 14, 1999 the Delegate would issue a determination under section 95 of the *Employment Standards Act* associating G. & R. Singh & Sons Trucking Ltd., 478450 B.C. Ltd. operating as A.B.K. Enterprises and Gus Holdings Ltd. In its final paragraph the letter asked each of the three to contact the Director's Delegate by September 14, 1999. The letter then stated that if the Director's Delegate did not hear from the parties by September 14, 1999 she would issue a Determination associating the companies which could be appealed to the Employment Standards Tribunal. The appellant in this case did not respond to this letter. The determination was issued on September 29, 1999.

On October 22, 1999 the Employment Standards Tribunal received on its standard form an Appeal of a Determination Issued by the Director of Employment Standards. The form letter was signed by Bhajneek K. Singh. I am satisfied that Bhajneek K. Singh filed the appeal on behalf of the three companies including G. & R. Singh the instant appellant. Bhajneek K. Singh's letter opens with the statement that:

"On behalf of Ranjeet Singh previous, president of Gus Holdings, I Bhajneek Singh Director of A.B.K. Enterprises (478450 B.C. Ltd.), am responding to the Determination issued to her September 29, 1999 – ER No. 92-676"

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The letter goes on to state at the second paragraph:

“On behalf of G. & R. Singh & Sons Trucking Ltd., Jeff Black has no right making a complaint against the President Gurdarshen Singh in pursuit of payment.”

The fourth paragraph of the letter states:

“Concerning the issue of whether or not G. & R. Singh and Sons Trucking, 478450 B.C. and a company no longer existing – GUS Holdings Ltd. are associated companies under Section 95 of the *Act* and jointly responsible for wages owing to Jeff Black, I Bhajneek Singh on behalf of the mentioned parties argue that this is not the case.”

I do not accept that the appellant G. & R. Singh was denied a fair hearing in this matter. The file clearly discloses that G. & R. Singh received the September 3, 1999 letter from the Director’s Delegate. That letter set out clearly that the Director’s Delegate was contemplating a declaration under Section 95 of the *Act* and invited the recipients of the letter to respond. Mr. Gurdarshen Singh did not respond despite the fact that the letter stated that a section 95 declaration would be made and that such a declaration could be appealed to the Employment Standards Tribunal. When the determination was made a letter dated October 22, 1999 was received by the

Employment Standards Tribunal along with the standard appeal form. The letter clearly states that Bhajneek K. Singh is representing the three companies and deals with the section 95 issue as well as taking issue with the finding of fact in the April 29, 1999 Determination.

I am not prepared to accept the argument that G. & R. Singh was denied a fair hearing because it did not participate in the initial investigation or have input into the April 29, 1999 Determination. I do not accept that argument for the reasons stated earlier, that is, that the initial investigation was conducted in good faith and involved complaints against Gus Holdings Ltd. and 478450 B.C. Ltd. operating as A.B.K. Enterprises. That matter was not appealed. Nor was the July 5, 1999 Determination against Ranjeet Singh as a director/officer of Gus Holding appealed. I am convinced that the appellant G. & R. Singh was made aware on September 3, 1999 of the delegate’s investigation under section 95 and the possible consequences of that investigation. G. & R. Singh did not respond to her invitation to discuss the matter. The September 29, 1999 Determination associating the companies under section 95 was appealed. If there was any defect prior to the issuance of the September 29, 1999 Determination, and I do not accept that there was, the appellant had the opportunity to cure the defect on appeal. I accept that the appellant G. & R. Singh was satisfied to deal with the matter in the submission dated October 22, 1999 by Bhajneek K. Singh.

I reiterate that Section 116 is not an opportunity to rehash evidence or re-examine arguments made to a delegate prior to a determination or to the panel that hears the appeal of that determination. The reconsideration provisions of the *Act* provide a limited opportunity for review based on the narrow grounds identified earlier in this award.

I do not accept that a breach of natural justice has occurred because the appellant was lulled into a false sense of security in its belief that the complaint against A.B.K. Enterprises had been settled. There is a distinction to be drawn between the initial complaints which were dealt with

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in the April 29, 1999 Determination and the “associated companies” determination of September 29, 1999. The April 29, 1999 Determination dealt with the complaint of unpaid wages and compensation for length of service. When that Determination remained unsatisfied and the reason given was that Gus Holdings had ceased operation the delegate rightfully considered other avenues for satisfying the Determination. One of those avenues was an investigation into whether the three companies would be caught by the “associated companies” provision found in Section 95 of the *Act*. The Delegate through her investigation and upon putting the three companies on notice determined that there was indeed a basis for making a finding that the companies were associated. That conclusion is separate and distinct from the findings in the April 29, 1999 Determination and the settlement that was reached between the complainant and A.B.K. Enterprises. An appellant cannot use a section 116 reconsideration application of a section 95 determination to reopen the merits of the underlying complaint absent fraud or discovery of serious new evidence. The principle of issue estoppel applies. (See Sawers BC EST # D174/97 and Re: Sea Corp Properties Inc. BC EST # D440/97 for a discussion of res judicata under s. 96 of the *Act*.)

The appellant also argues that the original panel erred at law in its consideration of evidence that was irrelevant. In particular the appellant argues that the original panel considered hearsay evidence given by a union business agent. I have read the Determination dated December 21, 1999 and cannot agree with the appellant on this point. Such a consideration is not evident on the face of the award. There was sufficient evidence for the original panel to draw its conclusion without reliance on the hearsay evidence. I am satisfied the original panel applied the four fold test in arriving at its conclusion that the “associated companies” finding should be upheld. (See Invicta Security Systems Corp. BC EST # D249/96)

For the above reasons the appeal is dismissed.

ORDER

The Determination dated December 21, 1999 is confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal