



Citation: Jisho Titus Kappen (Re)  
2024 BCEST 88

EMPLOYMENT STANDARDS TRIBUNAL

An application for reconsideration  
pursuant to section 116 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

- by -

Jisho Titus Kappen  
("Mr. Kappen")

- of a Decision issued by -

The Employment Standards Tribunal

PANEL: Shafik Bhalloo, K.C.  
SUBMISSIONS: Jisho Titus Kappen, on his own behalf  
FILE NUMBER: 2024/106  
DATE OF DECISION: September 18, 2024

## DECISION

### OVERVIEW

1. Pursuant to section 116 of the *Employment Standards Act (ESA)*, Jisho Titus Kappen (“Mr. Kappen”) seeks reconsideration of a decision of the Tribunal issued on July 25, 2024 (“original decision”).
2. The original decision considered an appeal of a determination issued by Shane O’Grady (“adjudicating delegate”) of the Director of Employment Standards (“Director”), on May 30, 2023 (“Determination”).

### ***Determination***

3. The Determination was made by the Director on a complaint filed by Mr. Kappen, who claimed that Douglas Linfitt (“Mr. Linfitt”) had contravened the *ESA* by failing to pay him outstanding wages.
4. A delegate of the Director (“investigating delegate”) investigated Mr. Kappen’s complaint and issued an Investigation Report (“Report”), which was provided to the parties for response on April 3, 2023. Subsequently, a second delegate, the adjudicating delegate, reviewed the information produced during the investigation, the Report, and the responses of the parties to that Report before issuing the Determination.
5. The adjudicating delegate determined that Mr. Linfitt had contravened sections 17/18, 40, 45/46 and 58 of the *ESA* in failing to pay Mr. Kappen wages, overtime wages, statutory holiday pay, and vacation pay under the *ESA*. The Director determined that Mr. Kappen was entitled to wages plus accrued interest in the total amount of \$30,180.98.
6. The Director also imposed five administrative penalties of \$500 each for the contraventions of the *ESA* against Mr. Linfitt for a total amount owing of \$32,680.98.
7. The Determination was sent by both regular mail and email to Mr. Linfitt. The statutory deadline for Mr. Linfitt to file the appeal of the Determination was 4:30 p.m. on June 23, 2023, if the Determination was served by email, and 4:30 p.m. on July 7, 2023, if the Determination was served by ordinary or registered mail.

### ***Appeal of the Determination***

8. The Tribunal received Mr. Linfitt’s Appeal Form and some documents in support of his appeal on February 14, 2024.
9. In his Appeal Form, Mr. Linfitt invoked all three grounds of appeal under section 112(1) of the *ESA*, namely: the Director erred in law, failed to observe the principles of natural justice in making the Determination, and evidence has become available that was not available at the time the Determination was being made.
10. On February 21, 2024, the Tribunal’s Registry Administrator contacted Mr. Linfitt to request additional information regarding his reasons for filing a late appeal. The Administrator also requested

that he resubmit legible copies of certain previously submitted documents that were illegible and informed him that any additional documents could be submitted via fax or email.

11. On February 23, 2024, Mr. Linfitt responded detailing his struggles with email and fax communication and asserting he had not received the Determination.
12. In a subsequent letter dated March 8, 2024, Mr. Linfitt requested an extension to file the appeal and included personal and procedural concerns referencing, among other things, an Indigenous Court, human rights violations, a fair trial, lack of privacy, previous claims he had with the Employment Standards Branch, his status as a permanently disabled old age indigenous pensioner not an employer of employees, hate crimes, senior abuse, as well as comments about Mr. Kappen.
13. In April 2024, the Director provided the Tribunal and the parties with the section 112(5) record, which included all the material that was before the Director when the Determination was made. The Tribunal invited the parties to indicate whether they believed the record was complete. Neither party challenged the completeness of the record, and the Tribunal Member was satisfied that the record is complete.
14. On May 16, 2024, the Tribunal notified the parties that a Panel had been assigned to decide Mr. Linfitt's appeal. The parties were also notified that if the Panel determined that all or part of the appeal should be dismissed, the Panel would issue a decision accordingly; however, if the appeal was not dismissed, the Tribunal would then request submissions from Mr. Kappen and the Director on the merits of the appeal.
15. On May 21, 2024, the Tribunal informed the parties that the Panel had assessed Mr. Linfitt's appeal and decided not to dismiss it under section 114 of the *ESA* and invited submissions from Mr. Kappen and the Director on the merits of the appeal.
16. On June 4, 2024, the adjudicating delegate submitted the Director's arguments on the merits of the appeal to the Tribunal, followed by Mr. Kappen's submissions on June 10, 2024, which were submitted after the deadline. Both submissions were provided to Mr. Linfitt, who was given until 4:30 p.m. on July 3, 2024, to file his final reply.
17. On July 4, 2024, the Tribunal contacted Mr. Linfitt to inquire about his final reply submission, and he informed the Tribunal that he would not be making any additional final reply submission.

### ***Original decision***

18. The Tribunal Member reviewed the submissions on the merits from both the Director and Mr. Kappen, as well as the appeal submissions from Mr. Linfitt.
19. In the original decision, under the heading "Background," the Tribunal Member summarized the nature of the case and Mr. Linfitt's appeal arguments.
20. The Tribunal Member noted that Mr. Kappen, a temporary foreign worker, alleged that he was hired by Mr. Linfitt after responding to a Facebook advertisement for a laborer position. He believed Mr. Linfitt operated a company called DEL Custom Ventures. In June 2021, Mr. Kappen began working

around Mr. Linfitt’s mobile home, receiving payments through e-transfers without tax deductions. Mr. Linfitt suggested that Mr. Kappen form a sole proprietorship, which he eventually did in February 2022. Later, in mid-June 2021, Mr. Kappen commenced renovation work on a housing complex owned by a third party, Tom Bercic (“Mr. Bercic”). Mr. Kappen claimed that Mr. Linfitt promised to pay him for this work, but when payment was not made, a dispute arose, leading to a series of text message exchanges between them from July 2021 to January 2022. Mr. Kappen then approached Mr. Bercic, who stated that he had already paid Mr. Linfitt for the renovation work. In December 2021, Mr. Kappen filed a wage complaint against Mr. Bercic, with Mr. Linfitt reportedly advising him on how to complete the complaint form.

21. Mr. Linfitt denied being Mr. Kappen’s employer, asserting that both he and Mr. Kappen were contractors working for Mr. Bercic. Despite repeated attempts by the investigating delegate to obtain relevant information from Mr. Linfitt, he failed to provide substantive responses, instead offering irrelevant comments, and expressing confusion about the process. Communications between Mr. Linfitt and the investigating delegate eventually became acrimonious, with Mr. Linfitt instructing her not to contact him further and indicating his intention to seek assistance from the Native Court Workers, which never materialized. The adjudicating delegate ultimately made the Determination based on the information available, as neither party responded to the Report.
22. On appeal, Mr. Linfitt argued that he was denied natural justice and that the adjudicating delegate erred in concluding that he was an employer. He claimed that he did not owe Mr. Kappen any monies and that his limited education and lack of access to online services were exploited by the investigating delegate. Mr. Linfitt, who is 70 years old, disabled, and living in a semi-remote area, also highlighted his experiences from the residential school system, asserting that these factors contributed to his inability to engage effectively with the investigation. He acknowledged owning a corporation called DEL Custom Ventures over 25 years ago but insisted that it had ceased operations long ago and that he no longer operated a renovation business.
23. Mr. Linfitt further contended that both he and Mr. Kappen were not paid by Mr. Bercic and that he had no documents to provide during the investigation, as the only relevant proof was that he had paid Mr. Kappen. As new evidence, Mr. Linfitt submitted records showing that he had paid Mr. Kappen a total of \$14,517.41 through bank drafts, e-transfers, and cash.
24. The Tribunal Member identified two key issues for consideration in the appeal: (i) whether the Tribunal should grant an extension of time for Mr. Linfitt to file his appeal, and (ii) whether Mr. Linfitt has established an error in the Determination, specifically regarding whether he is an employer under the *ESA*.
25. With respect to the first issue, the Tribunal Member granted Mr. Linfitt an extension of time to appeal the Determination, despite the appeal being filed after the deadline. The Tribunal Member emphasized that extensions are not granted lightly and require “compelling reasons” under the law. To assess whether an extension was justified, the Tribunal Member referred to the criteria established in *Re Niemisto* (BC EST # D099/96), which include the need for a reasonable explanation for the delay, a *bona fide* intention to appeal, and the absence of undue prejudice to the other party, among other factors.

26. A central aspect of the decision was the Tribunal Member's finding that Mr. Linfitt had a valid reason for missing the deadline due to his difficulties with internet connectivity and email communication. The Tribunal Member stated:

I find there is a reasonable and credible explanation for the Appellant's failure to file the appeal within the prescribed time limit. The record, as well as correspondence with the Tribunal, makes it clear that the Appellant has some difficulty with internet connectivity and receiving documents by email, as he repeatedly asked the Investigating delegate to provide information in hard copy, by regular mail. As is evidenced by some of the correspondence between them, he also had difficulty submitting evidence, specifically text messages, and asked the Investigating delegate for assistance in providing them to her.

27. The Tribunal Member recognized that although granting the extension might cause some prejudice to Mr. Kappen, it would not be excessive. Given Mr. Linfitt's intent to appeal, as indicated in his June 2, 2023, email to the Employment Standards Branch challenging the Determination, along with the strength of his case and the application of the *Niemisto* criteria, the Tribunal Member granted Mr. Linfitt an extension to file his appeal.

28. With respect to the merits of the appeal, the Tribunal Member first addressed the natural justice ground. Specifically, the Tribunal Member considered Mr. Linfitt's argument that the Director failed to uphold the principles of natural justice by not providing him with a fair opportunity to respond.

29. The Tribunal Member acknowledged that natural justice is a fundamental procedural right, encompassing the right to know the case being made, the right to respond, and the right to be heard by an unbiased decision maker. The Tribunal Member noted that Mr. Linfitt claimed that the delegates "took advantage" of his lack of education, age, and limited computer skills, which hampered his ability to engage fully with the investigation process.

30. The Tribunal Member also noted that the record revealed that, while Mr. Linfitt occasionally responded to emails, he struggled with understanding email correspondence and requested hard copies of documents. He also had difficulty forwarding text communications to the investigating delegate and sought assistance, to which the delegate's response was to suggest googling how to screenshot on his phone. The Tribunal Member noted that, although the investigating delegate informed Mr. Linfitt that Mr. Bercic denied hiring Mr. Kappen and promised to forward related email correspondence to the investigating delegate, Mr. Bercic never provided those emails.

31. The Tribunal Member further observed that Mr. Linfitt consistently disputed Mr. Bercic's assertions and expressed frustration that the investigating delegate did not verify Mr. Bercic's claims with "City Hall." Despite being given opportunities to respond to the Report, Mr. Linfitt felt uncertain about what specifically required his response and indicated that he would have preferred an in-person discussion at a local Branch office.

32. Although the Tribunal Member found that Mr. Linfitt had opportunities to respond and did so, the Tribunal Member acknowledged that more support could have been provided, particularly when Mr. Linfitt sought help in submitting potentially critical text message evidence. The Tribunal Member suggested that, given Mr. Linfitt's familiarity with the Branch office in Prince George, the investigating delegate might have directed him there for assistance, rather than leaving him to search for online solutions.

33. Moreover, the Tribunal Member emphasized that the principles of the Truth and Reconciliation Commission’s Calls to Action, specifically Recommendation #57, which calls for skills-based training in intercultural competency, conflict resolution, and human rights for public servants, were not reflected in this investigation. The Province of British Columbia’s commitment to these principles, including a distinctions-based approach to acknowledging the unique rights and circumstances of Indigenous peoples, was not evident in the handling of Mr. Linfitt's case. The Tribunal Member concluded that, considering Mr. Linfitt's background and circumstances, much more should have been done to assist him in responding to the complaint, highlighting a failure to uphold both natural justice and the Calls to Action in this instance.
34. With respect to the error of law ground of appeal, the Tribunal Member relied on the definition of “error of law” established in *Gemex Developments Corp. v. British Columbia (Assessor of Area #12 – Coquitlam)*, which includes misinterpretation or misapplication of the law, acting without evidence, and making factual findings that cannot be reasonably supported.
35. The Tribunal Member determined that the adjudicating delegate acted on a view of the facts that “could not reasonably be entertained.” Specifically, the Tribunal Member found that the conclusions drawn by the investigating delegate lacked a proper evidentiary foundation and that the investigation itself was inadequate. The Tribunal Member noted that the adjudicating delegate's findings, particularly regarding the existence of an employer-employee relationship between Mr. Linfitt and Mr. Kappen, were not supported by the evidence. The Tribunal Member highlighted inconsistencies in the text messages and invoices, which undermined the conclusion that Mr. Linfitt directed and controlled Mr. Kappen’s work. Furthermore, the Tribunal Member found that the investigation appeared to pre-judge the outcome against Mr. Linfitt, as the investigating delegate “pre-judged the outcome of the complaint against the Appellant” without adequately assessing the credibility of other key parties, such as Mr. Bercic.
36. In the result, the Tribunal Member concluded that the adjudicating delegate's decision constituted an error of law, and as a result, allowed the appeal, cancelled the Determination, and referred the complaint back to the Director for a new investigation.

### ***Reconsideration Application***

37. On July 25, 2024, the Tribunal sent the original decision to Mr. Linfitt and the Director by mail and email, and to Mr. Kappen via email. The accompanying correspondence stated that any application for reconsideration must be received by the Tribunal by 4:30 p.m. on August 26, 2024.
38. On July 26, 2024, the Tribunal received two emails from Mr. Kappen: the first containing his arguments against the appeal decision and the second with an embedded image.
39. On the same day, the Tribunal emailed Mr. Kappen to notify him that the appeal file was closed and that no further action would be taken regarding the received emails. The Tribunal provided instructions on filing an application for reconsideration and asked Mr. Kappen to indicate whether his July 26, 2024, emails should be considered in support of his reconsideration application.
40. On August 20, 2024, Mr. Kappen submitted two attachments to the Tribunal: his Reconsideration Application Form and Applicant Contact Information Form.

41. On August 21, 2024, the Tribunal emailed Mr. Kappen to inform him that his Reconsideration Application Form was missing his written reasons, arguments, and supporting documents, despite his claim of including them. The Tribunal requested that he provide these materials by 4:30 p.m. on August 26, 2024, and to indicate whether the two emails he sent on July 26, 2024, should be considered in support of his reconsideration application.
42. On the same date, Mr. Kappen emailed the Tribunal, indicating that his previous email with attachments should be considered as his additional details. He also mentioned that he had submitted all required documents earlier.
43. On September 5, 2024, the Tribunal notified the parties that Mr. Kappen had filed an application for reconsideration of the original decision, that a panel had been assigned to review the application, and if it is not dismissed, the Tribunal will solicit submissions from Mr. Linfitt and the Director regarding the merits of the application.

## ISSUE

44. 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 *ESA* to reconsider the original decision. If satisfied the case warrants reconsideration, the issue raised in this application is whether this panel of the Tribunal should vary or cancel the original decision.

## SUBMISSIONS of MR. KAPPEN

45. Having reviewed Mr. Kappen's emails of July 26 and August 20, 2024, and his Reconsideration Application Form, he contends:
- He has submitted all the documents in support of his position (presumably referring to those documents he adduced during the investigation of the Complaint).
  - He applied for a job with Mr. Linfitt on Facebook.
  - Mr. Linfitt threatened to call the police on him.
  - He is not the only "victim" of Mr. Linfitt's "scam"; there are others who were working for him. He had many employees.
  - Contrary to Mr. Linfitt's evidence, he does, and did previously, have a van. Mr. Linfitt also purchased a van a month before he (Mr. Kappen) quit working for Mr. Linfitt.
  - He rarely talked to Mr. Bercic, but when he did, Mr. Bercic mentioned that he had paid Mr. Linfitt "more and he is not happy with his work." When Mr. Kappen informed Mr. Linfitt of this, Mr. Linfitt became very angry.
  - Contrary to Mr. Linfitt's evidence that he does not have a company, Mr. Linfitt told him that he had more than one company, and Mr. Kappen saw him purchasing appliances and materials in his company's name. Mr. Kappen requests verification of Mr. Linfitt's tax filings to determine whether Mr. Linfitt "claims everything in his company['s] name or not."

- Mr. Linfitt asked Mr. Kappen “to do all invoices” because he wanted “proof” and to be able to “claim for it,” and Mr. Kappen “sent him pictures ... in text messages.”
- Mr. Linfitt made him, and others, work at Mr. Bercic’s house as well as “many other locations,” including his “trailer house,” installing “new kitchen cabinets, cleaning up his surroundings, drywall work, painting,” and more.
- This was his first job as a construction worker, and he did as he was instructed by Mr. Linfitt.
- He is not the only person Mr. Linfitt “scammed.”

46. Regarding the embedded images submitted by Mr. Kappen with his emails on July 26 and August 21, 2024, they are provided without any accompanying explanation and do not appear to contribute substantively to the written submissions. The images include names of parties in chat or people he was texting, and another shows a text group created by Mr. Kappen. These images do not provide meaningful context or clarity and do not enhance the overall understanding of the submissions.

## ANALYSIS

47. Section 116 of the *ESA* delineates the Tribunal’s statutory authority to reconsider any order or decision of the Tribunal:

### 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 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.

48. A review of the decisions of the Tribunal reveals certain broad principles applicable to reconsideration applications have consistently been applied. The following principles bear on the analysis and result of this reconsideration application.

49. Reconsideration is not an automatic right of any party who is dissatisfied with an order or a decision of the Tribunal. That said, reconsideration is within the sole discretion of the Tribunal, and the Tribunal must be very cautious and mindful of the objects of the *ESA* in exercising its discretion (see *Re Ekman Land Surveying Ltd.*, BC EST # RD413/02).



50. In *Director of Employment Standards (Re Giovanni (John) and Carmen Valoroso)*, BC EST # RD046/01, the Tribunal explained the reasons why it should exercise reconsideration power with 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.

51. In *Re: British Columbia (Director of Employment Standards) (sub nom) Milan Holdings Ltd.*, BC EST # D313/98, the Tribunal delineated a two-stage approach for the exercise of its reconsideration power under section 116. In the first stage, 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:

- (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. If the applicant satisfies the requirements in the first stage, then the Tribunal will proceed to the second stage of the inquiry, which focuses on the merits of the original decision.

52. Section 116(2.1) provides that an application for reconsideration must be made within 30 days of the order or decision. The original decision was issued on July 25, 2024, and the deadline for Mr. Kappen to file his reconsideration application was 4:30 p.m. on August 26, 2024. Mr. Kappen submitted his Reconsideration Application Form on August 20, 2024. Although he indicated on the form that his application was complete and stated that he had attached his reasons and arguments, the Tribunal discovered that these were missing. Upon inquiry, Mr. Kappen later confirmed that his two emails from July 26, 2024, serve as his written submissions in support of the reconsideration application. I find that Mr. Kappen’s application for reconsideration was filed within the required timeframe.

53. After reviewing the merits of Mr. Kappen’s reconsideration application, I find that it fails to meet the first stage of the analysis set out in *Milan Holdings Ltd.*, supra. The application does not present an arguable case of sufficient merit to warrant reconsideration, nor does it raise any important questions of law, fact, principle, or procedure that would be significant for the parties or have

implications for future cases. It also does not identify any errors in the original decision or present other circumstances that would justify this panel's intervention.

54. Additionally, Mr. Kappen's submissions seem to represent an effort to have this panel reweigh evidence already assessed by the Director, and potentially to augment or reassert the same evidence in support of his position.
55. I find the Tribunal Member's reasoning in the original decision to cancel the Determination and refer the matter back to the Director for a new investigation to be both compelling and persuasive.
56. In the result, Mr. Kappen's reconsideration application is denied.
57. I would also like to express my support for the Tribunal Member's reasoning in this matter, particularly the reference to the Truth and Reconciliation Commission's (TRC) Call to Action #57. This call emphasizes the need for education and training among public servants on the unique history, rights, and circumstances of Indigenous peoples. Given Mr. Linfitt's background, he should have been provided with a level of assistance that reflects these principles. The investigating delegate's suggestion that Mr. Linfitt "google" how to submit evidence via screenshots, without offering further guidance or support, appears insufficient, especially when there were alternatives, such as utilizing a local Branch office, that could have been explored.
58. The Province of British Columbia has indeed committed to incorporating the TRC's Calls to Action into its practices, including ensuring that public servants are trained in intercultural competency and conflict resolution. Mr. Linfitt's case illustrates the importance of applying these principles in practice, ensuring that Indigenous individuals are not disadvantaged by systemic processes that fail to accommodate their unique needs and circumstances. By recognizing the shortcomings in this case, the Tribunal Member rightfully highlights the need for a more inclusive and supportive approach, consistent with the Province's commitments under the TRC's framework.

## **ORDER**

59. Pursuant to section 116(1)(b) of the *ESA*, the original decision, 2024 BCEST 66, is confirmed.

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**Shafik Bhalloo, K.C.**  
**Member**  
**Employment Standards Tribunal**