Citation: Star Limousine Service Ltd. (Re)
2024 BCEST 105

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 -

Star Limousine Service Ltd.

("Star" or "Employer")

- of a Decision issued by -

The Employment Standards Tribunal

PANEL:	Carol L. Roberts
SUBMISSIONS:	David J. Taylor, counsel for Star Limousine Service Ltd.
FILE NUMBER:	2024/109
DATE OF DECISION:	November 5, 2024

DECISION

OVERVIEW

1. This is an application by Star Limousine Service Ltd. ("Star" or "Employer") for a reconsideration of 2024 BCEST 67 ("Original Decision"), issued by the Tribunal on July 26, 2024.

2. The Original Decision sets out the complaint history and Determination in some detail and that will not be repeated.

3. In summary, two former Star limousine drivers filed complaints with the Employment Standards Branch ("Branch") alleging that Star had contravened the *Employment Standards Act* (*ESA*) in withholding gratuities. A delegate ("Investigating delegate") of the Director of Employment Standards ("Director") investigated the complaints and on July 15, 2022, issued an Investigation Report ("Report") which identified several issues and the parties' positions on those issues. Among the issues was whether a "service fee" charged by the Employer constituted a "gratuity" as defined in the *ESA* and whether gratuities had been unlawfully withheld from the employees' wages. Also at issue was whether Star and another company, Imperial Global Chauffeur Services Inc. ("Imperial"), should be declared "associated employers" pursuant to section 95 of the *ESA*. The Investigating delegate did not make any factual findings on any of these issues. The parties were asked to provide any clarifications or further evidence they believed to be relevant by August 5, 2022.

4. Star's counsel responded to the Report, making submissions on the issues, including the application of section 95 and the definition of "gratuities."

5. On November 29, 2023, a delegate ("Adjudicating delegate") of the Director issued the Determination which found, among other things, that "service fees" charged by Star constituted a "gratuity," and that drivers who were employed by Imperial were nonetheless Star employees while driving Star vehicles and providing services to Star clientele.

6. The Employer appealed the Determination on all three statutory grounds of appeal.

7. The Tribunal Member denied the appeal.

8. The Member found that there had been no denial of natural justice. He concluded that Star had been afforded a reasonable opportunity to respond to the complainants' evidence and argument and to put forward its own position, consistent with section 77 of the *ESA* and the principles of natural justice.

9. The Member found no legal error in the Adjudicating delegate's conclusion that the service fee charged by Star to its clients was a "gratuity" as that was defined in section 1(1) of the *ESA*.

10. The Member also found that the Adjudicating delegate's determination regarding the drivers' status as Star employees was "not tainted by any palpable and overriding error." (Original Decision, paragraph 35)

11. The Member further determined that the "new evidence" submitted on appeal did not meet the Tribunal's test for new evidence and was not admissible in the appeal proceedings.

12. The Employer filed a reconsideration application on August 26, 2024, and sought an extension of time to provide the reasons and arguments for the application to September 30, 2024.

13. On August 27, 2024, the Tribunal requested that the Employer provide any additional documents in support of the application no later than September 30, 2024, after which the Tribunal would decide the Employer's request for an extension to the statutory reconsideration period.

14. On October 2, 2024, the Employer provided the Tribunal with its written submissions, contending that both the Investigating delegate and the Tribunal made "a palpable and overriding error in the findings of fact" and "breached the principles of natural justice" on both the issues of gratuity payments and the question of whether Imperial employees were also Star employees.

ISSUES

15. There are two issues on reconsideration:

1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?
2. If so, should the decision be cancelled or varied or sent back to the Member?

ANALYSIS

16. The *ESA* confers an express reconsideration power on the Tribunal. Section 116 provides in part:

> (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.
>
> …
>
> (2.1) The application may not be made more than 30 days after the date of the order or decision.

17. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *ESA* detailed in section 2 "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act."

18. In *Director of Employment Standards (Re Milan Holdings*), BCEST # D313/98, the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the Tribunal to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. The primary factor weighing in favour of reconsideration is 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. The

reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

19. The Tribunal may agree to reconsider a decision for several reasons, including:

- The member fails to comply with the principles of natural justice;
- There is some mistake in stating the facts;
- The decision is not consistent with other decisions based on similar facts;
- Some significant and serious new evidence has become available that would have led the member to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The decision contains a serious clerical error.

(*Zoltan T. Kiss,* BC EST # D122/96*)*

20. While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The reconsideration process was not meant to allow parties another opportunity to re-argue their case.

21. I find that Star has not met the threshold test.

22. At the outset, I note that counsel for the Employer appears to have misunderstood the function of the Tribunal and its relationship with the Branch, advancing many arguments that relate to the Determination (which was appealed) rather than the Original Decision (in which the Member considered the Employer's arguments in support of the appeal of the Determination).

23. For example, the Employer argues that "findings made by the Investigator and the Panel" contained errors and breached principles of natural justice. (Submissions, paragraphs 8 and 9). Counsel contends that the Tribunal "requested payroll records…" (paragraph 12). Counsel also asserted that the "Employment Standards Tribunal decision makers did not have, and more importantly did not request…" (paragraph 15).

24. The Tribunal considers appeals from Branch determinations based almost exclusively on written submissions. It does not carry out investigative functions and does not have any duty to request information from any party. The Director is responsible for reviewing and investigating complaints, and for issuing determinations (as set out in Part 10 of the *ESA*). The Director has the power, for example, to make orders for persons to produce records, including payroll records (section 84). Parties dissatisfied with determinations, which contain factual findings and conclusions about parties' compliance with the provisions of the *ESA*, may appeal those findings and conclusions on three statutory grounds of appeal (section 112(1)).

25. Star appealed the Determination made by a delegate of the Director, identifying all three statutory grounds but not expressly identifying what "new evidence" it was presenting.

26. The Tribunal has repeatedly stated that an appellant bears the burden of demonstrating an error in the determination. On appeal to the Tribunal, Star contended that the Director erred in law by assuming "that [Star] charged a 20% gratuity on its fares and then applying that false assumption to calculating monies owed to the Complainants," erred in law in determining that "the Complainants and other Imperial workers were in fact employees of Star" and erred in determining that "the Service Fee charged by Star was in fact purely a gratuity."

27. The Member noted that, although it was not clear from Star's submission, it appeared that the "new evidence" was a spreadsheet submitted on appeal. (Original Decision, paragraph 21)

28. Even if I were to read the reconsideration application submissions generously, I find that they were all arguments that were made, or ought to have been made, on appeal. As the Tribunal has repeatedly said (and acknowledged by counsel in his submissions), the reconsideration power is used to review a decision of a Tribunal Member, not to re-argue an issue already made before that Member.

29. Star contends that "the Investigator and the Member" made palpable and overriding errors in their factual findings by

> ...selectively choosing isolated, unreliable evidence on a key issue, rather than giving appropriate weight and deference to subsequent responses from authorized representatives of Star regarding gratuities.

30. Section 112 (1) of the *ESA* does not provide for an appeal of factual findings. However, questions of mixed law and fact are within the jurisdiction of the Tribunal to address as an error of law. (see *Britco Structures Ltd.* (BC EST # D260/03) applying the test in *Housen v. Nokolaisen* (2002 SCC 33))

31. The Member considered, and dismissed, Star's argument that an admission made by a Star representative by way of a June 30, 2021 email that the service fee was a gratuity should not have been given any evidentiary weight, noting that, among other things, the officer's email had been produced in the Report as a factual finding, and that Star had never challenged either the authenticity of the response or the officer's authority to respond.

32. The Member considered the definition of gratuity in section 1(1) of the *ESA* and determined that Star had not demonstrated any errors in the Determination. The Member applied the *Housen* test and found that the Director's determination that the service fee was a form of mandatory gratuity had not been tainted by a palpable and overriding error. (Original Decision at paragraph 28)

33. In the reconsideration application, Star advances the same argument made on appeal – that is, that the Investigating delegate's factual findings (and therefore, I infer, the Member's conclusions) were in error. I am not persuaded that the Employer has demonstrated that the Member made a serious mistake in applying the law or made a palpable error. In my view, the Member's conclusions were supportable on the evidence before him.

34. Star's counsel also argues, the "original Investigator and the [Member] on the Appeal both made overriding errors in fact... in failing to properly address and weigh evidence provided by Star regarding the actual legal relationship between Imperial drivers and Star" by "placing undue and inappropriate weight on the fact that there was no written "farm out agreement" between the companies."

35. Although the Member noted that the Investigating delegate did not issue a section 95 "associated employer" declaration, he considered Star's arguments regarding a such a declaration.

36. The Member considered that the question of whether an individual was an "employee" as defined in section 1(1) of the *ESA* was one of mixed law and fact, and thus the appropriate standard on appellate review was one of "palpable and overriding error" rather than "correctness" as argued by Star. (Original Decision, paragraph 31)

37. The Member then noted that, as a benefits-conferring statute, the *ESA* was to be given a broad and generous interpretation. (Original Decision, paragraph 32). The Member noted that the limousine drivers were

> ...clearly performing work normally performed by Star employees and this work was for Star's economic benefit. Star had direction and control over the drivers while they are working on its behalf.... While working on Star's behalf the drivers were operating Star's vehicles and were dispatched through Star's system. Although the two companies were separate legal entities, "the payroll and accounting for both companies were managed through Star's office" ... (Original Decision, paragraph 34)

38. I find that the Member, contrary to Star's arguments, did address the evidence regarding the relationship between Imperial drivers and Star. The Member also considered the arrangement whereby Imperial drivers would service Star's customers, noting that this arrangement was

> ...not an ordinary "contracting out" or sub-contracting of work, since the arrangement was between two firms that had a common controlling shareholder and was designed "[t]o keep Imperial drivers working" in the throes of the Covid-19 pandemic when Imperial's bookings had significantly declined...Even if Imperial was ultimately charged with the driver's wages for work performed for Star, those wages were exclusively derived from work undertaken for, and from the revenues generated by, Star. (Original Decision, paragraph 35)

39. I am not persuaded that the Member made a mistake in stating the facts, made a serious mistake in applying the law, or misunderstood a significant issue in the appeal. In other words, I find that the application has not made out a case of significant merit that warrants the exercise of the reconsideration power.

40. I further find that there is nothing in the submissions in the reconsideration application that raise 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.

41. I find that the application does not meet the test outlined in *Milan Holdings, supra*.

42. The request for reconsideration is denied.

ORDER

43. Pursuant to section 116(1)(b), I confirm the Original Decision.

/S/ Carol L. Roberts

Carol L. Roberts
Member
Employment Standards Tribunal