Citation: Wee Bee Hauling and Services Ltd.
2024 BCEST 119

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 -

Wee Bee Hauling and Services Ltd.

- of a Decision issued by -

The Employment Standards Tribunal

PANEL:	Robert E. Groves
SUBMISSIONS:	Susan Wilson, on behalf of Wee Bee Hauling and Services Ltd.
FILE NUMBER:	2024/131
DATE OF DECISION:	December 23, 2024

DECISION

OVERVIEW

1. Wee Bee Hauling and Services Ltd. ("**Wee Bee**"), applies for a reconsideration (the "**Application**") of a decision (the "**Appeal Decision**") of a Member (the "**Member**") of the Employment Standards Tribunal (the "**Tribunal**") dated September 16, 2024, and referenced as 2024 BCEST 87. The Application is brought pursuant to section 116 of the *Employment Standards Act* (***ESA***).

2. This matter originated when Michael Yates, an employee of Wee Bee, filed a complaint pursuant to section 74 of the *ESA* (the "**Complaint**") alleging that Wee Bee had failed to pay wages.

3. Following an investigation of the Complaint and a report (the "**Report**") issued by a delegate (the "**Investigator**") of the Director of Employment Standards (the "**Director**"), another delegate of the Director (the "**Delegate**") issued a determination (the "**Determination**") of the Complaint. In it, the Delegate determined that Wee Bee had contravened the *ESA* and, accordingly, Mr. Yates was entitled to be paid wages and interest totalling $11,575.82. The Determination also ordered Wee Bee to pay $2,000.00 in administrative penalties.

4. Wee Bee appealed the Determination pursuant to sections 112(1)(a) and (b) of the *ESA*, alleging that the Director erred in law and failed to observe the principles of natural justice.

5. After considering the submissions of Wee Bee in the appeal, the Member decided that there was no reasonable prospect the appeal would succeed. The Member dismissed the appeal pursuant to section 114(1)(f) of the *ESA*, and he ordered that the Determination be confirmed.

6. For the reasons set out below, I have decided Wee Bee has failed to establish that the Appeal Decision should be reconsidered. The Appeal Decision is confirmed.

ISSUES

7. As in any application for reconsideration under section 116 of the *ESA*, a threshold question is whether Wee Bee has raised questions of fact, law, principle, or procedure flowing from the Appeal Decision which are so important that a reconsideration is warranted.

8. Wee Bee has identified four principal issues it contends should warrant a reconsideration of the Appeal Decision. They are:

- Did the Member err in deciding the Delegate committed no error of law when she determined Mr. Yates was an employee paid hourly, and not by way of a commission?
- Did the Member err when he decided it was no failure to observe the principles of natural justice for the Delegate to decline to give effect to advice Wee Bee asserted it had received in an earlier complaint proceeding that Wee Bee believed was meant to render Wee Bee's employment contract with Mr. Yates *ESA* compliant?
- Did the Member err when he decided the Delegate's calculations for Mr. Yates' travel time, and for his regular and overtime wages, were not reviewable on appeal under the

ESA because they were adequately supported by the evidence and the Tribunal has no jurisdiction to review a delegate's findings of fact unless they raise an error of law?

- Did the Member err when he confirmed that the four administrative penalties the Delegate ordered Wee Bee to pay were lawfully imposed?

9. The Tribunal must also determine a remedy. Should the Appeal Decision be confirmed, varied, or cancelled, or should the matter be referred back to the Member or to another panel of the Tribunal?

ANALYSIS AND CONCLUSIONS

The section 116 test for reconsideration

10. As the Tribunal has stated repeatedly, the reconsideration power is discretionary, and it must be exercised with restraint.

11. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal. The Tribunal must pay heed to the section 2 purposes of the *ESA*, including the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the statute. It should also take care to ensure that its application of the reconsideration power is not utilized in a way that undermines the integrity of the appeal process mandated in section 112.

12. With these principles in mind, the Tribunal has adopted a two-stage analysis when considering applications for reconsideration (see *Director of Employment Standards (Re Milan Holdings)*, BC EST # D313/98). In the first stage, the Tribunal asks whether the matters raised in the application warrant a reconsideration of the decision at all.

13. A factor which militates against reconsideration is the desire on the part of an applicant to have the Tribunal re-weigh arguments that failed in the appeal. It is not a purpose of reconsideration that a different panel of the Tribunal is requested to provide a "second opinion" (see *Re Middleton*, BC EST # RD126/06).

14. If the applicant satisfies the requirements at the first stage, the Tribunal will move to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.

15. As I noted earlier, I have decided that the Application fails at the first stage of the inquiry. For the most part, Wee Bee merely repeats arguments that were properly rejected by the Member in the Appeal Decision. Moreover, I have concluded that the Application sets out no questions of fact, law, principle, or procedure flowing from the Appeal Decision which are so important that they warrant a reconsideration.

16. My reasons follow.

Did the Member err in deciding the Delegate committed no error of law when she determined Mr. Yates was an employee paid hourly, and not by way of a commission?

17. Wee Bee operates a trucking, excavating, and hauling company. It employed Mr. Yates as a short-haul truck driver.

18. Mr. Yates' duties included his reporting to Wee Bee's yard, completing a pre-trip inspection of the truck he would be utilizing, and then driving the vehicle to transport materials to job sites assigned by Wee Bee's dispatcher. At the end of each day Mr. Yates returned the truck to Wee Bee's yard.

19. Wee Bee paid Mr. Yates based on the hours it billed to its customers for each "assignment." In addition, it paid Mr. Yates for the thirty minutes each day it expected he would need to perform truck inspections.

20. A major element of the dispute between the parties concerned Wee Bee's assertion that Mr. Yates was paid for all the hours he worked, including for travel time to and from delivery sites, pursuant to a commission rate structure set out in the employment contract Mr. Yates willingly signed. The contract provided that Mr. Yates would be paid based on the total number of hours his truck was billed out to customers for work performed, that is, from the time the truck reached the customer's job site to the time the work for the customer ended.

21. Mr. Yates contended he should also be paid a wage rate for time worked outside of the hours billed to customers, including for travel time to and from jobs. Since he was paid a rate based on the hours billed to customers, Mr. Yates argued that he was, in substance, an employee paid by the hour, and so he should be remunerated in hourly wages for all the hours he worked, and not merely for those hours of work Wee Bee billed to its customers.

22. The Delegate determined that since there was no incentive for Mr. Yates to work faster, or to complete more jobs in a day, and because he was paid solely at fixed rates based on his truck's hours billed to customers he was, in substance, an employee paid by the hour, and not by way of a commission. That being so, the Delegate determined that Mr. Yates should be paid at his regular wage, hourly-based, for all his hours worked, including for travel time.

23. On appeal, Wee Bee argued that the law required the Delegate to give effect to the wording of Mr. Yates' employment contract, which stated quite explicitly that "[a]ll drivers are paid a commission wage based on the truck billable hours. All drivers will not be paid less than minimum wage for all hours worked." Wee Bee pointed to the fact that Mr. Yates acknowledged this payment arrangement had been explained to him, and it was the basis on which he was paid for his work while employed. For Wee Bee, it followed that the Delegate erred in law when she determined Mr. Yates' regular wage was hourly-based, and not payable as a commission.

24. The Member decided that the Delegate's analysis contained no palpable and overriding error. Instead, the Member concluded the Delegate had properly applied the legal criteria for determining contractual intention set out in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53. In that decision the Supreme Court of Canada held that while the words of a contract were important, they were no longer to be viewed as the primary source for determining the intentions of the parties.

Rather, the words of the contract should be read having regard to, and in a manner consistent with, the surrounding circumstances known to the parties at the time the contract was made.

25. Applying this legal formula, the Member affirmed the analysis of the Delegate regarding the intentions of the parties. In the circumstances, it could not be said that the use of the word "commission" in the employment contract should be read as an agreement to pay Mr. Yates an incentive-based regular wage. The Member also said this, at paragraph 55 of the Appeal Decision:

> I agree completely with the deciding Delegate; there is nothing in the circumstances that suggests Wee Bee intended the rate of pay for Mr. Yates, and other drivers, to be a commission. If that was their intention, they were, as the deciding Delegate noted, required to maintain a record of total hours worked in each pay period, determine the wage rate for each pay period, provide the information required by section 27 of the *ESA* to their employees on each wage statement, and maintain the records required by section 28 of the *ESA*. Wee Bee did not do any of that. The failure of Wee Bee to meet its statutory obligations lends credence to the assertion that the purported "commission" structure is nothing more than a way to avoid paying its employees the agreed upon hourly wage for all time worked and for overtime.

26. Wee Bee repeats that the *ESA* does not define how a commission is earned or when it becomes payable, and that an employee's entitlement to a commission depends on the terms of the employment contract in question. It argues that a commission may incorporate an hourly rate, as such a rate is necessary to ensure that minimum wages are always paid.

27. Wee Bee's posture in the Application offers the same argument on this point that it presented, and the Member rejected, in the Appeal Decision. Wee Bee has provided no analysis explaining why the Member's conclusion regarding this issue is flawed in law, and my reading of the Appeal Decision fails to persuade me that the Member made any such error. In essence, Wee Bee's submission amounts to nothing more than a request for a "second opinion" that utilizes the same arguments in the Application that were unsuccessful in the appeal proceeding, but which leads to a different result. For this reason, Wee Bee's submission on this issue raises no pertinent question warranting a reconsideration of the Appeal Decision.

Did the Member err when he decided it was no failure to observe the principles of natural justice for the Delegate to decline to give effect to advice Wee Bee asserted it had received in an earlier complaint proceeding that Wee Bee believed was meant to render the Wee Bee's employment contract with Mr. Yates' ESA compliant?

28. In its appeal, Wee Bee asserted it was a failure of natural justice for the Delegate to decline to consider evidence Wee Bee tendered regarding a previous *ESA* complaint made by another employee in 2016. In that complaint the employee also challenged the validity of Wee Bee's practice of calculating wages for drivers based solely on truck billable hours. Wee Bee's position regarding this previous complaint was that it had been resolved in its favour during a mediation proceeding. In addition, Wee Bee stated a delegate of the Director informed Wee Bee at the time that its relevant pay practice did not contravene the *ESA*, but that Wee Bee should amend its employment contracts to state that commission was to be paid on truck billable hours and that drivers would not be paid

less than minimum wages for all hours worked. Wee Bee then incorporated this wording into its employment contracts applicable to its drivers, including the contract signed by Mr. Yates

29. The Member rejected this submission. At paragraph 73 of the Appeal Decision, the Member said this:

> The argument relating to the 2016 complaint presumes this matter is relevant to the complaint.... It is not; the mediation process under the *ESA* is intended to be relatively informal and non-precedential. The results of mediation in one case do not direct the result in any other case. Additionally, the Branch's file did not include any material relating to the mediation and it would be manifestly unfair to reach any conclusion on incomplete information and on the recollections of a person already predisposed to a particular result.

30. As it did in its appeal, Wee Bee attacks what it states was the failure of the Director's delegates determining the Complaint to consider what transpired in the 2016 complaint. It refers, again, to the advice Wee Bee says it received at the time concerning the language it might utilize in its employment contracts to ensure compliance with the ESA moving forward. Wee Bee submits that the provisions of the *ESA* have not changed since 2016 and so the principles affirmed in the 2016 complaint, and those to be applied to Mr. Yates' Complaint, should be the same.

31. It is apparent on this point, too, that Wee Bee's submissions merely repeat the arguments presented in the appeal.

32. In my view, the Member was right to reject Wee Bee's argument on this point, and I affirm the Member's comments regarding the precedential value of undocumented comments made by another delegate at an earlier time during a mediation of a different complaint involving a different employee.

33. As the Member's comments affirm, Wee Bee misconceives the legal importance of the observations a delegate may decide to offer during a mediation proceeding under the *ESA*. It is trite to say that statements made by the participants in a mediation are privileged. A reason for this is that the statements are normally made to further the prospects of a settlement, and not to adjudicate a dispute. Absent cogent proof of a tarnishing element—fraud being an example—what is communicated at, or for, the purposes of a mediation of a complaint cannot, therefore, be utilized for any purpose in any future proceeding, particularly as the communications in question in this case occurred years earlier, they involved other parties, and the record of the discussion is incomplete.

34. A related submission, presented in the appeal of the Determination, was that the Delegate's Reasons for the Determination are flawed on natural justice grounds because they do not refer to the advice regarding its wage regime Wee Bee says it received in 2016.

35. The Member declined to accept this submission too, on the basis, once more, that the 2016 proceedings could not be utilized by Wee Bee to influence the resolution of the Complaint.

36. The Application refers to this allegation again, but in more forceful terms. Wee Bee asserts that the Investigator elected to "bury" the information Wee Bee had provided regarding the 2016 complaint. It submits, too, that the Delegate was not apprised of Wee Bee's position regarding the importance

of the advice it received in 2016 or, alternatively, she ignored it, and so it cannot be said that she rendered "an unbiased decision."

37. I am not persuaded the Member's disposition of this aspect of Wee Bee's appeal is in error. As was the case in its appeal, Wee Bee asserts a failure on the part of the Director's delegates, but it offers no compelling evidence in support of its allegations. I note, too, that the Delegate's Reasons, at R3, state explicitly that she considered not only the evidence the parties provided during the investigation, but also the Investigator's Report and the submissions the parties delivered in response to it.

38. A submission in response to the Report delivered by Wee Bee contained a discussion of the 2016 complaint proceeding and the inferences Wee Bee believed should be drawn from it. Given these facts, it would be unreasonable for me to decide that the Delegate was either unaware of Wee Bee's submission, or worse, ignored it. It is much more probable that the Delegate considered the submission, but she declined to engage with it in her Reasons because she concluded, correctly in my view, that the substance of what Wee Bee believed it had learned from the 2016 mediation proceeding was irrelevant to the adjudication of the Complaint.

39. It follows that I have concluded Wee Bee's allegations regarding the impartiality of the Director's delegates in this matter are unwarranted.

Did the Member err when he decided the Delegate's calculations for travel time, and for regular and overtime wages, were not reviewable on appeal under the ESA because they were adequately supported by the evidence and the Tribunal has no jurisdiction to review a delegate's findings of fact unless they raise an error of law?

40. Since Wee Bee relied on its interpretation of Mr. Yates' employment contract that all wages owed to Mr. Yates, apart from payment for pre-trip inspections, would be based on truck billable hours for customers, Wee Bee did not keep records of the time Mr. Yates expended travelling to and from work sites during the recovery period. The Delegate therefore relied on the oral evidence of Mr. Yates to determine the extra hours of work for which he should have been paid.

41. During the investigation of the Complaint, Wee Bee submitted that Mr. Yates had been paid in duplicate for the same hours worked by him, on occasion, and that he had, at other times, received payment when he was not working at all. On this point, the Delegate determined that there was insufficient evidence to support these claims.

42. Wee Bee challenged these findings in its appeal.

43. The Member decided that the Delegate's findings of fact regarding the wages payable to Mr. Yates should not be disturbed. The Member stated, correctly, that the Tribunal has no jurisdiction to challenge a delegate's findings of fact unless the findings reveal an error of law.

44. The test for determining that such an error of law has occurred is strict. It has often been said, and the statement is applicable in this instance, that the Tribunal must defer to the factual conclusions drawn by a delegate unless it is established that the conclusions are perverse or inexplicable.

45. Here, the Appeal Decision states, and I agree, that the factual conclusions of the Delegate were adequately supported by the evidence before her, and so it was not open to the Tribunal to reassess that material and arrive at a different result. This approach based on deference to a delegate's findings is what the law requires, even in those cases where the Tribunal may have reached a different result, having regard to the evidence the parties presented.

46. Accordingly, Wee Bee's submission that the Member erred when he declined to reassess the evidence before the Delegate, and to make findings of fact more advantageous to Wee Bee, must be dismissed.

Did the Member err when he confirmed that the four administrative penalties the Delegate ordered Wee Bee to pay were lawfully imposed?

47. The Delegate imposed four administrative penalties of $500.00, one each for Wee Bee's failure to pay regular wages, overtime wages, and vacation pay in a timely manner, and one penalty for its failure to keep employment records of all the hours worked by Mr. Yates.

48. Wee Bee argues that since the payment regime set out in Mr. Yates' employment contract was agreed to by him, and a delegate of the Director confirmed, in 2016, that the regime was *ESA* compliant, no wages are owed to Mr. Yates, and the orders for the payment of administrative penalties should be set aside.

49. As I have noted earlier, the Member confirmed the Delegate's determination that Wee Bee's interpretation of Mr. Yates' contract was incorrect. Wee Bee has offered no basis, apart from repetition, for a finding that the Appeal Decision contains an error regarding that conclusion.

50. The Delegate's Reasons set out the contraventions of the *ESA* in respect of which the administrative penalties were imposed. The Delegate's rationale for the imposition of the four penalties is clearly set out in her Reasons. Section 98 of the *ESA* makes it mandatory that determinations include a statement of the applicable penalties. Absent extraordinary circumstances, none of which is present in this case, the *ESA* provides no power enabling the Tribunal to interfere.

51. Wee Bee's request that the administrative penalties be waived is dismissed.

What is the appropriate remedy?

52. The reconsideration power contained in section 116 of the *ESA* authorizes the Tribunal to confirm, vary, or cancel an appeal decision or refer it back to the Member or to another panel of the Tribunal.

53. Since I have determined that the Application fails to establish grounds for a reconsideration, the Appeal Decision must be confirmed.

ORDER

54. Pursuant to section 116(1)(b) of the *ESA*, I order that the Appeal Decision referenced as 2024 BCEST 87 be confirmed.

/S/ Robert E. Groves

Robert E. Groves
Member
Employment Standards Tribunal