

An Application for Reconsideration

- by -

Dale Pepper  
("Dr. Pepper")

- of a Decision issued by -

The Employment Standards Tribunal  
(the "Tribunal")

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

**TRIBUNAL MEMBER:** David B. Stevenson

**FILE No.:** 2018A/5

**DATE OF DECISION:** January 31, 2018

## DECISION

### SUBMISSIONS

Dale Pepper on his own behalf

### OVERVIEW

1. Dale Pepper (“Dr. Pepper”) seeks reconsideration of a decision of the Tribunal, BC EST # D121/17 (the “original decision”) dated December 6, 2017.
2. The original decision considered an appeal of a Determination issued by Tyler Siegmann, a delegate of the Director of Employment Standards (the “Director”), on September 5, 2017, which found Dr. Pepper was a director of MedviewMD Inc. (“Medview”) at the time wages of eighteen employees of Medview were earned or should have been paid and under section 96 of the *Employment Standards Act* (the “*ESA*”) was personally liable for wages in the amount of \$73,019.01, representing not more than two months’ wages to each of the eighteen employees, plus interest in the amount of \$1,333.11. That amount was later amended by the Director to wages in the amount \$70,812.45, including interest, when it was discovered that one of the eighteen employees was not owed any wages under the *ESA*.
3. An appeal of the Determination was filed by Dr. Pepper alleging the Director erred in law and failed to observe principles of natural justice in making the Determination. Briefly, Dr. Pepper submitted that as he had never been properly appointed as a director of Medview the Director was wrong in law to have found him liable under section 96 as a director of Medview and the Director had offended principles of natural justice by failing to provide reasons for not accepting the evidence provided by several persons about whether Medview’s shareholders had voted on or approved his appointment as a director of the company.
4. The Tribunal Member dismissed the appeal under section 114 of the *ESA*, finding the Director made no error of law in finding Dr. Pepper was a director of Medview or commit an error of law by failing to provide reasons in the Determination for not accepting some of the statements provided to support Dr. Pepper’s claim that he was not a director of Medview and did not fail to observe principles of natural justice in making the Determination.
5. This application was received by the Tribunal on January 5, 2018. The application disputes the comments made and conclusions reached in the original decision at paragraphs 32 through 35.

### ISSUE

6. 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 the Tribunal should cancel the original decision and refer the matter back to the original panel or, if more appropriate, to the Director.

## ARGUMENT

7. The submissions made by Dr. Pepper in this application express his disagreement with the conclusions reached in the original decision on arguments made to the Director during the complaint process and reiterated to the Tribunal Member in the appeal of the Determination.
8. In his submission, Dr. Pepper contends it was wrong for the Director to find he had not provided “credible and cogent evidence” that the corporate records showing him to be a director of Medview were inaccurate and wrong for the Tribunal Member making the original decision to find no error in that finding.
9. Dr. Pepper also contests the relevance of his comment to the Director in a June 20, 2017, e-mail to the effect that he “was a director of Medview from mid October 2016 to February of 2017”, when he says he was only confirming what the corporate records indicated and had nothing to do with whether he was properly appointed.
10. He makes the same point in respect of paragraph 35 of the original decision: arguing the fact he filed a letter in February 2017 resigning as a director of Medview had nothing to do with whether he was properly appointed.
11. Finally, he disputes the statement in paragraph 35 of the original decision that the evidence of persons who were shareholders of Medview concerning the apparent absence of shareholder confirmation of his appointment as director was “of limited relevance”. He submits the comment misses the point that, without shareholder confirmation, he was never properly appointed.
12. Dr. Pepper seeks to have the matter returned to the either the Tribunal Member who made the original decision or to another appeal panel.

## ANALYSIS

13. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally.
14. Section 116 of the *ESA* reads:

- 116** (1) *On an application under subsection (2) or on its own motion, the tribunal may*
- (a) *reconsider any order or decision of the tribunal, or*
  - (b) *confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.*
- (2) *The director or a person served with an order or a decision of the tribunal may make an application under this section.*
- (2.1) *The application may not be made more than 30 days after the date of the order or decision.*
  - (2.2) *The tribunal may not reconsider an order or decision on the tribunal's own motion more than 30 days after the date of the decision or order.*

- (3) *An application may be made only once with respect to the same order or decision.*
- (4) *The director and a person served with an order or a decision of the tribunal are parties to a reconsideration of the order or decision.*

15. The authority of the Tribunal under section 116 is discretionary. A principled approach to this discretion has been developed and applied. The rationale for this approach is grounded in the language and purposes of the *ESA*. One of the purposes of the *ESA*, found in section 2(d), is “to provide fair and efficient procedures for resolving disputes over the application and interpretation” of its provisions. Another stated purpose, found in section 2(b) is to “promote the fair treatment of employees and employers”. The approach is fully described in *Milan Holdings Inc.*, BC EST # D313/98 (Reconsideration of BC EST # D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In *The Director of Employment Standards (Re Giovanni (John) and Carmen Valoroso)*, BC EST # RD046/01, the Tribunal explained the reasons for restraint:

. . . the *Act* creates a legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute. . . .

There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the “winner” not be deprived of the benefit of an adjudicator’s decision without good reason. A third is to avoid the spectre of a Tribunal process skewed in favour of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

16. In deciding whether to reconsider, the Tribunal considers timeliness and such factors as the nature of the issue and its importance both to the parties and the system generally. Delay in filing for reconsideration will likely lead to a denial of an application. An assessment is also made of the merits of the original decision. The focus of a reconsideration application is, generally, the correctness of the original decision.

17. The Tribunal has accepted an approach to applications for reconsideration that resolves itself into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. The circumstances where the Tribunal’s discretion will be exercised in favour of reconsideration are limited and have been identified by the Tribunal as including:

- failure to comply with the principles of natural justice;
- mistake of law or fact;
- significant new evidence that was not available to the original panel;
- inconsistency between decisions of the Tribunal that are indistinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

18. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively re-visit the original decision and come to a different conclusion.

19. If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised in the reconsideration.
20. I find this application does not warrant reconsideration.
21. The application does nothing more than reiterate the arguments that were not accepted by either the Director in making the Determination, or by the Tribunal Member in the original decision. It does not show any discreet error in the original decision. It does not address the legal basis for the original decision; the focus of the application is a continuing disagreement with the Determination and a disagreement with the confirmation of the Determination in the original decision.
22. I agree with and accept the analysis done in the original decision for denying the appeal. In particular, I accept the conclusion in the original decision that the cumulative effect of the evidence that was before the Director did not overcome the presumption arising from Dr. Pepper's inclusion in the corporate records listing him as a director of Medview, which allowed the Director to find that he was a director for the purposes of section 96 of the *ESA*.
23. In sum, there is nothing in this application that would justify the Tribunal using its authority to allow reconsideration of the original decision and accordingly the application is denied.

## **ORDER**

24. Pursuant to section 116 of the *ESA*, the original decision, BC EST # D121/17, is confirmed.

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