Citation: Andrew Chengalath (Re)
2018 BCEST 74

An Application for Reconsideration

- by -

Andrew Chengalath
(the "Applicant")

- 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)

PANEL: Kenneth Wm. Thornicroft

FILE No.: 2018A/66

DATE OF DECISION: August 1, 2018

DECISION

SUBMISSIONS

Tyler R. Fulkerth	counsel for Andrew Chengalath, a Director of Martketer Marketing & Design Inc.

INTRODUCTION

1. Andrew Chengalath (the "Applicant") has applied under section 109(1)(b) of the *Employment Standards Act* (the "*ESA*") for an order extending the reconsideration application period. The application concerns 2018 BCEST 55, an appeal decision issued by Tribunal Member Bhalloo (the "Tribunal Member") on May 16, 2018 (the "Appeal Decision").

2. By way of the Appeal Decision, the Tribunal Member confirmed a determination issued against the Applicant on January 19, 2018, pursuant to which the Applicant was ordered to pay $21,127.76 on account of unpaid wages and interest owed to five former employees of a firm known as Martketer Marketing & Design Inc. ("Martketer"). Carrie H. Manarin, a delegate of the Director of Employment Standards (the "delegate"), issued this determination under section 96(1) of the *ESA*. I shall refer to it as the "Section 96 Determination".

3. Section 96(1) of the *ESA* states: "A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee."

4. A section 116 application for reconsideration of an appeal decision "may not be made more than 30 days after the date of the order or decision" (subsection 116(2.1) of the *ESA*). The instant application was filed on June 18, 2018, and thus was filed after the 30-day application period expired. The application was also incomplete – although the Applicant submitted a completed "Reconsideration Application Form" (Form 2), the Applicant did not provide his "reasons and argument" supporting the reconsideration request.

5. Rule 28(1) of the Tribunal's *Rules of Practice and Procedure* addresses applications to extend the reconsideration application period:

> 28 (1) The written request to extend the reconsideration period should include, at a minimum,
>
> (a) A completed Reconsideration Application Form
>
> (b) A reasonable and credible explanation for the extension sought if the request is being made before the statutory reconsideration period has expired or a reasonable and credible explanation for failing to request a reconsideration within the statutory limit if the appellant has filed the request after the reconsideration period;

(c) Submissions on the reconsideration in sufficient detail to allow the Tribunal to determine whether the reconsideration request, on its face, is meritorious.

6. The Applicant's legal counsel, by way of response to the above criteria, makes the following submission:

> In compliance with (b) above, [the Applicant] has been out of the country for extended periods of time with respect to business obligations. [The Applicant], due to his business activities, did not have sufficient time to review the Appeal Determination [*sic*] as pronounced by [the Tribunal Member]. Once [the Applicant] reviewed the Appeal Determination he sought further instructions from our firm with respect to submitting submissions for reconsideration.
>
> In reference to (c) above, [the Applicant] will provide submissions in his reconsideration materials based on the following: …

7. The Applicant's counsel then identified the following grounds upon which the Applicant's reconsideration application would be based. First, counsel maintains that the delegate erred in law by a "misapplication or misinterpretation of the law of functional test" [*sic*; this test concerns a person who is not formally named in corporate records as a director or officer]; "misapplied the general principle of burden of proof"; and "made the [Section 96] Determination when there is not sufficient evidence to conclude [the Applicant] was a director". Second, counsel maintains that the delegate made other errors concerning "general legal principles" and, in particular, made a finding that the Applicant was a Martketer director without a proper evidentiary foundation; drew an improper adverse inference against the Applicant when considering the evidence; and improperly applied the civil burden of proof. Surprisingly, the Applicant's counsel did not address in his application – or even mention – the *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98), the latter being the adjudicative framework the Tribunal has consistently applied when assessing section 116 applications.

BACKGROUND FACTS

8. As recounted in the delegate's "Reasons for the Determination" issued concurrently with the Section 96 Determination (the "delegate's reasons"), the five former Martketer employees' unpaid wage claims were originally the subject of a determination issued against that firm on November 24, 2017. I shall refer to this determination as the "Corporate Determination". In addition to the wage payment order issued in favour of the five former employees, the Corporate Determination also included three separate $500 monetary penalties levied against Martketer.

9. The Corporate Determination was properly served on Martketer and no appeal was ever filed regarding that determination. Accordingly, the Corporate Determination now stands as a final order and it cannot be the subject of any sort of collateral attack by way of the present section 116 application (see *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460 and *Penner v. Niagara (Regional Police Services Board)*, [2013] 2 S.C.R. 125).

10. Martketer apparently ceased business operations in early October 2017 and is insolvent. The only Martketer director listed in the B.C. Corporate Registry records was Ariele Parker ("Ms. Parker"). Ms. Parker made an assignment into bankruptcy on November 9, 2017. Although Ms. Parker was the only listed director, the overwhelming evidence from both Martketer employees (both the five original complainants as well as some other employees), as well as from former Martketer clients, was that the

Applicant was deeply involved in the financing and management of Martketer before it ceased operations. During the relevant time frame, the Applicant and Ms. Parker were living together and engaged to be married.

11. Ms. Parker refused to participate in the director's investigation preceding the issuance of the Corporate Determination. The delegate also contacted the Applicant prior to issuing the Section 96 Determination. The Applicant's position throughout was that while he conceded to having been a "consultant", he denied having invested any funds in Martketer, or having received any monies from the company. His position was that, at most, he was merely an ordinary "manager". He specifically denied that he acted in a manner that could be reasonably characterized as "functioning" as a Martketer director. He denied any and all allegations from former Martketer employees and clients that demonstrated he was functioning as a "managing partner" or "director" of the firm.

12. The delegate correctly identified the applicable legal principles regarding persons, not named in corporate records as directors, who nonetheless conducted themselves and otherwise "functioned" as corporate directors. The delegate, applying these principles, determined that the Applicant was a "director" for purposes of section 96 of the *ESA*.

13. The Applicant appealed the Section 96 Determination, alleging all three section 112(1) statutory grounds of appeal (error of law, breach of natural justice, and "new evidence"). In the Appeal Decision, the Tribunal Member concluded that the appeal had no presumptive merit and, as such, he dismissed the appeal under subsection 114(1)(h) [*sic*] of the *ESA* – "there is no reasonable prospect that the appeal will succeed".

14. The Applicant subsequently filed a late section 116 application to have the Appeal Decision reconsidered.

FINDINGS AND ANALYSIS

15. In considering the Applicant's explanation for having failed to file a timely application, I am struck by the following omissions in the Applicant's material:

a. Counsel asserts that the Applicant was "out of the country for extended periods of time" dealing with unspecified "business obligations", but has not provided any further details or any corroborating documentation.

b. Counsel suggests that the Applicant "due to his business activities, did not have sufficient time to review the [Appeal Decision]" but, again, in the absence of any further particulars, I am unable to assess the legitimacy or credibility of this assertion.

c. The application does not disclose when the Applicant first "sought instructions" regarding the filing of a section 116 application or when he first reviewed the Appeal Decision.

d. Further, in the absence of any further details, I find it highly unlikely that the Applicant was so busy that he was wholly unable to communicate (either by telephone or electronically) with his legal counsel while he was away. I simply do not accept that it was impossible for a timely section 116 application to have been filed. I note that the same legal firm represented the Applicant during the delegate's investigation preceding the issuance of the

Section 96 Determination, on appeal, and now again in this section 116 application. I find it hard to believe that the Applicant would not have been, at least, in electronic communication with his legal counsel while he was away on business given that this important legal decision was pending and might well be issued while he was away.

e. Finally, the assertions regarding the Applicant's out of country business activities – wholly unparticularized and uncorroborated as they are – stand as pure hearsay assertions from the Applicant's counsel. At the very least, I would have expected some evidence from the Applicant himself regarding these circumstances.

16. In sum, in my view, the Applicant has manifestly failed to provide, using the language of Rule 28(1)(b), "a reasonable and credible explanation for failing to request a reconsideration within the statutory limit". On that basis alone, this application must be dismissed. However, I will not rest my decision solely on that foundation. Separate and apart from Rule 28(1)(b), an applicant seeking an extension of the reconsideration application period must demonstrate that the application is presumptively meritorious (see Rule 28(1)(c); this criterion is also reflected in the first stage of the *Milan Holdings* test).

17. The Applicant's proposed challenge to the Appeal Decision is simply a verbatim rehash of the central arguments the Applicant advanced in his appeal submissions. These matters were extensively addressed in the Appeal Decision at paras. 81 – 108. I fully endorse the Tribunal Member's findings and analysis.

18. The Applicant was apparently never formally elected as a Martketer director. I say "apparently" because the company's relevant internal records were never provided to the delegate (although the delegate did request these documents from the company). It is conceded that the Applicant was not listed in the B.C. Corporate Registrar's records as a Martketer director. Notwithstanding that fact, a person may be held liable as a corporate director under subsection 96(1) of the *ESA* if he or she "functions" as a director.

19. Subsection 136(1) of the *Business Corporations Act* states that directors "must…manage or supervise the management of the business and affairs of the company". The evidence before the delegate overwhelmingly demonstrated that the Applicant was actively and intimately involved in managing and supervising Martketer's business affairs. This evidence was entirely consistent and included statements from both Martketer employees and clients. The Applicant's *own admissions* and other statements to these individuals further corroborated his status as a director.

20. The subsection 96(1) personal liability equally applies to corporate "officers". The Tribunal has held that, as is the case with directors, the functional test can be equally applied to determine if a person who is not formally named as a corporate officer in the firm's internal records, is nevertheless properly characterized as an officer for purposes of subsection 96(1). In a small firm such as Martketer, the lines of authority between managing directors and officers is often somewhat blurry, and although there are important legal distinctions between officer and directors, the *Business Corporations Act* frequently places directors and officers on the same footing regarding such things a notification, disclosure, authority to bind the firm, duties etc. Indeed, the phase "director or officer" appears 68 times in the statute and the phrase "director or senior officer" appears 52 times. In my view, the Applicant was

properly named as a corporate director in the Section 96 Determination and he could also have been held liable as a Martketer officer.

ORDER

21. This application to extend the time for applying for reconsideration of the Appeal Decision is refused. Pursuant to subsection 116(1)(b) of the *ESA*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Panel
Employment Standards Tribunal