

An Application for Reconsideration

- by -

Fraser Valley Management Consultants Canada Ltd.
(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.: 2019/141

DATE OF DECISION: August 30, 2019

DECISION

SUBMISSIONS

Sunanda Kikla on behalf of Fraser Valley Management Consultants Canada Ltd.

INTRODUCTION

1. This is an application for reconsideration filed by Fraser Valley Management Consultants Canada Ltd. (the “Applicant”) pursuant to section 116 of the *Employment Standards Act* (the “ESA”). This application concerns Tribunal Decision Number 2019 BCEST 57, an appeal decision issued on June 13, 2019 (the “Appeal Decision”).
2. By way of the Appeal Decision, the Tribunal confirmed a Determination (the “Determination”) issued on January 11, 2019, against “Windsor Hotel Ltd. carrying on business as Pacific Grill Restaurant”. The Determination and accompanying “Reasons for the Determination” (the “delegate’s reasons”), were issued by a delegate of the Director of Employment Standards (the “delegate”). The Determination ordered Windsor Hotel Ltd. to pay the two respondent complainants a total of \$44,946.84 in unpaid wages and section 88 interest and a further \$3,500.00 in administrative penalties (see section 98). Thus, the total amount payable under the Determination is \$48,446.84.
3. In my view, this application is wholly misconceived and must be dismissed since it does not raise, even on a *prima facie* basis, an arguable case that the Appeal Decision is tainted by any sort of legal error or any other due process failing (see *Director of Employment Standards and Milan Holdings Inc.*, BC EST # D313/98).

BACKGROUND FACTS

4. The two complainants worked as cooks at a restaurant known as the “Pacific Grill” in Greenwood, B.C. This restaurant ceased operations in early August 2018. The complainants, originally from India, secured their employment through the Temporary Foreign Worker Program. As delineated in the delegate’s reasons, the complainants were exploited by an employer that failed to pay them wages as provided for in their employment contracts and required them to work excessive hours (up to 12 hours per day). The employer did not pay the complainants overtime pay, vacation pay, or statutory holiday pay, and it failed to keep proper employment records. The delegate ordered Windsor Hotel Ltd. to pay one complainant \$25,940.65 in unpaid wages and interest and \$19,006.19 in unpaid wages and interest to the other complainant.
5. An appeal of the Determination was filed under section 112 of the *ESA* by “Windsor Hotel Ltd (AKA Fraser Valley Management Consultants Canada Ltd)” [*sic*]. The appeal was based on all three statutory grounds, namely, the delegate erred in law, the delegate failed to observe the principles of natural justice, and that evidence was now available that was unavailable when the determination was being made.
6. As set out in the Appeal Decision, the Tribunal found that none of the grounds had any presumptive merit and, that being the case, dismissed the appeal under section 114(1)(f) of the *ESA* – “there is no reasonable prospect that the appeal will succeed”. I do not intend to address the grounds of appeal further – they

are extensively addressed in the 19-page Appeal Decision. I will say that I wholly endorse and adopt the reasons outlined in the Appeal Decision for summarily dismissing the appeal.

THE APPLICATION FOR RECONSIDERATION

7. As previously noted, this application was filed in the name of “Fraser Valley Management Consultants Canada Ltd.” by one of the company’s directors. The identity of the complainants’ employer was specifically addressed in the Appeal Decision as follows (para. 1):

On February 19, 2019, pursuant to section 112 of the *Employment Standards Act* (the “ESA”), Windsor Hotel Ltd. (“Windsor Hotel”) carrying on business as Pacific Grill Restaurant filed an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on January 11, 2019 (the “Determination”). On November 19, 2018, before the Determination was made, Windsor Hotel amalgamated with several other companies or businesses operated by or associated with Mr. Nitai Chand Goswami (“Mr. Goswami”) and Ms. Kikla, namely, Fraser Valley Educational Consultants Inc., Fraser Valley Management Consultants Canada Ltd., Greenwood Motel Ltd., and Pacific Hotel Ltd. As a result of the amalgamation, Windsor Hotel and other entities involved in the amalgamation ceased to exist. Instead, a new legal entity was formed. The new entity retained the name of one of the amalgamating companies and it is called Fraser Valley Management Consultants Canada Ltd. (“FVMCC”). Therefore, effectively, the appellant and “the Employer” in this case is FVMCC.

8. The Applicant’s sole (and rather confusing) reason provided in support of its section 116 application is set out below:

Reasons: Fraser Valley Management Consultants Canada Ltd (BC 1202835) was amalgamated on March 27, 2019. The Employment Standard Tribunal to notify the correct company as Windsor Hotel Ltd does not operate Pacific Grill and Fraser Valley Management Consultants Canada Ltd was not an employer during the period notified in the decision and the Determination to be made on who the employer is and the contract signed by the applicants to be clarified and enforced.
[sic]

9. The Applicant also appended to its Reconsideration Application Form several corporate records relating the amalgamation

FINDINGS AND ANALYSIS

10. While this is not entirely clear, it appears that the Applicant is saying that the Determination and Appeal Decision should be cancelled because of some irregularities relating to the identification of the complainants’ employer. As noted above, the question of the proper identity of the employer was specifically addressed in the Appeal Decision. However, by way of the Appeal Decision, the Determination was simply confirmed as issued, thus leaving the party liable under the Determination as “Windsor Hotel Ltd.”.
11. In my view, the more appropriate course would have been to vary the Determination under section 115(1)(a) by naming the present Applicant as the party liable for the unpaid wages and monetary penalties.

12. In this instance, I consider the correct identification of the employer in the Determination to be a “technical irregularity” that could have been rectified by a variance order (see section 123). Thus, subject to an order varying the Determination to name the present Applicant in place of Windsor Hotel Ltd., the Appeal Decision should stand.
13. I am further fortified in my view of this matter by the following provisions of the *Business Corporations Act*:
- 282 (1) At the time that amalgamating corporations are amalgamated as an amalgamated company under this Division, ...
- (h) the amalgamated company continues to be liable for the obligations of each amalgamating corporation,
 - (i) an existing cause of action, claim or liability to prosecution is unaffected,
 - (j) a legal proceeding being prosecuted or pending by or against an amalgamating corporation may be prosecuted, or its prosecution may be continued, as the case may be, by or against the amalgamated company, and
 - (k) a conviction against, or a ruling, order or judgment in favour of or against, an amalgamating corporation may be enforced by or against the amalgamated company.
14. In light of these provisions, the Applicant is liable for the unpaid wages owed to the complainants and also for the \$3,500 in monetary penalties payable to the Director of Employment Standards.

ORDER

15. Pursuant to section 116(1)(b) of the *ESA*, paragraph 79 of the Appeal Decision is deleted and the following is substituted:
- Pursuant to section 115 of the *ESA*, the Determination is varied such that Fraser Valley Management Consultants Canada Ltd. is named in place of Windsor Hotel Ltd. as the party liable to pay the unpaid wages and interest, and the administrative penalties, itemized in the Determination. Fraser Valley Management Consultants Canada Ltd. is additionally liable for any further interest that has accrued pursuant to section 88 of the *ESA* as and from the date of the Determination.
16. In all other respects, the Appeal Decision is confirmed as issued.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal