

An Application for Reconsideration

- by -

Nitai Chand Goswami
("Mr. Goswami")

- 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.: 2019/142

DATE OF DECISION: August 30, 2019

DECISION

SUBMISSIONS

Sunanda Kikla

on behalf of Nitai Chand Goswami

INTRODUCTION

1. This is an application for reconsideration filed by Nitai Chand Goswami (“Mr. Goswami”) under section 116 of the *Employment Standards Act* (the “ESA”) and it concerns Tribunal Decision Number 2019 BCEST 58, an appeal decision issued on June 17, 2019 (the “Appeal Decision”).
2. By way of the Appeal Decision, the Tribunal confirmed a determination issued against Mr. Goswami on February 12, 2019, pursuant to section 96(1) of the *ESA*. This latter provision provides as follows: “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”. I shall refer to the determination issued against Mr. Goswami, in the total amount of \$24,328.91, as the “Section 96 Determination”.
3. In my view, this application is entirely without merit and that being the case, must be dismissed since it does not pass the first stage of the two-stage *Milan Holdings* test (see *Director of Employment Standards and Milan Holdings Inc.*, BC EST # D313/98).

BACKGROUND FACTS

4. The unpaid wages at issue in this matter arise from two complaints filed by individuals who worked as cooks at a restaurant known as the “Pacific Grill” in Greenwood, B.C. (the “complainants”). The complainants, originally from India, secured their employment through the Temporary Foreign Worker Program. The Pacific Grill restaurant ceased operations in early August 2018.
5. The complainants’ unpaid wage claims were investigated by a delegate of the Director of Employment Standards and, in due course, a determination was issued against their employer, Windsor Hotel Ltd., on January 11, 2019 (the “Corporate Determination”). The Corporate Determination was appealed to the Tribunal, and on June 13, 2019, the Tribunal issued reasons for decision (2019 BCEST 57) summarily dismissing this appeal as having no reasonable prospect of succeeding (see section 114(1)(f) of the *ESA*). Subsequently, this decision was the subject of a section 116 application for reconsideration. I dismissed the employer’s section 116 application (subject to a minor variance order), and my reasons for decision with respect to the employer’s reconsideration application are being issued contemporaneously with these reasons.
6. This application stems from the Tribunal’s confirmation of the Section 96 Determination issued against the present applicant, Mr. Goswami. The Tribunal summarily dismissed Mr. Goswami’s appeal of the Section 96 Determination based on the following considerations (Appeal Decision, paras. 24 – 25 and 28 – 29):

Notwithstanding the issue of the late appeal submissions and failure to make any submissions for an extension of time to appeal the S.96 Determination, I find that Mr. Goswami's failure to include a copy of the Director's written reasons for the S.96 Determination means that Mr. Goswami's appeal has not been perfected. More particularly, by failing to submit the Director's reasons for the S.96 Determination, Mr. Goswami contravened the requirement of section 112(2)(a)(i.1) of the *ESA* which makes it a mandatory requirement for a person wishing to appeal a determination to the Tribunal to provide, *inter alia*, a copy of the director's written reasons for the determination. Pursuant to section 114(1)(h) of the *ESA* the Tribunal has discretion to dismiss an appeal where the appellant has failed to meet one or more of the requirements of section 112(2) of the *ESA*. In the circumstances, Mr. Goswami's appeal is dismissed for failing to comply with the requirements of subsection 114(1)(h) of the *ESA*.

Having said this, I also find, under subsection 114(1)(f) of the *ESA*, there is no reasonable prospect that Mr. Goswami's appeal will succeed.

...

In this case, the delegate properly relied on the corporate records of Windsor filed with, and maintained by, the Registrar of Companies, to make the S. 96 Determination against Mr. Goswami. Mr. Goswami does not dispute he was a director of Windsor (an amalgamated corporation under FVMCC) during the material time the Complainants were employed by Windsor and should have been paid wages. Mr. Goswami also does not dispute the amount of the liability imposed on him, or present evidence of any circumstances that would relieve him of personal liability under subsection 96(2) of the *ESA*.

While Mr. Goswami has invoked the error of law, the natural justice and the new evidence grounds of appeal under subsections 112(1)(a), (b), and (c) of the *ESA*, I find that he has not established any or sufficient factual basis under these grounds of appeal. I also find that Mr. Goswami's appeal of the S.96 Determination is an attempt to challenge the Corporate Determination. An appeal of the S.96 determination is not an opportunity for a director to challenge the corporate decision. In the circumstances, I do not find there is any presumptive merit in Mr. Goswami's appeal and I would also dismiss it under section 114(1)(f) of the *ESA*.

THE APPLICATION FOR RECONSIDERATION

7. The reconsideration application now before me is a joint application filed by Mr. Goswami and the complainants' employer relating to both 2019 BCEST 57 (the appeal of the Corporate Determination) and 2019 BCEST 58 (the appeal of the Section 96 Determination). Thus, the reasons given in support of the reconsideration application regarding 2019 BCEST 57 are identical to those concerning the present application filed by Mr. Goswami regarding 2019 BCEST 58. Essentially, the basis for the reconsideration application relates to how the complainants' employer was identified in the original Corporate Determination.
8. This latter matter was specifically addressed in the Tribunal's reasons for decision regarding the appeal of the Corporate Determination (at 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.

9. The sole (and rather confusing) reason provided in support of this 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]

10. Several corporate records relating the amalgamation are also appended to the Reconsideration Application Form.

FINDINGS AND ANALYSIS

11. It is important to stress that the reasons given in support of this section 116 application do not, in any fashion, speak to whether Mr. Goswami was a corporate officer and/or director when the complainants’ unpaid wage claims crystallized. They do not speak to the delegate’s 2-month unpaid wage calculations, nor do they speak to any of the defences to personal liability that are set out in section 96(2) of the *ESA*. Further, Mr. Goswami’s reasons for challenging the Appeal Decision do not address the Tribunal’s rationale for dismissing his appeal and confirming the Section 96 Determination. In short, there is absolutely nothing before me that would call into question the correctness of the Appeal Decision. Finally, I wish to observe that I wholly endorse and adopt the reasons outlined in the Appeal Decision for summarily dismissing Mr. Goswami’s appeal of the Section 96 Determination.
12. While this is not entirely clear, it appears that the Mr. Goswami maintains that the Section 96 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. I have addressed this matter in my reasons for decision issued with respect to the employer’s reconsideration application.
13. Insofar as this application is concerned, as previously noted, there is simply no proper basis for cancelling or varying the Appeal Decision as it relates to Mr. Goswami’s personal liability to the complainants under section 96(1) of the *ESA*.

ORDER

14. Pursuant to section 116(1)(b) of the *ESA*, the Appeal Decision is confirmed as issued.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal