

An Application for Reconsideration

- by -

Yapi Aim Group Inc.
("YAGI")

- 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: Shafik Bhalloo

FILE No.: 2020/059

DATE OF DECISION: May 26, 2020

DECISION

SUBMISSIONS

Feroz Dean

agent on behalf of Yapi Aim Group Inc.

OVERVIEW

1. Pursuant to section 116 of the *Employment Standards Act* (the “ESA”), Yapi Aim Group Inc (“YAGI”) seeks reconsideration of a decision of the Tribunal (2020 BCEST 17) issued on March 10, 2020 (the “original decision”).
2. The original decision considered an appeal of a determination issued by the delegate of the Director (the “Director”) on September 11, 2019 (the “Determination”).
3. The Determination was made by the Director on a complaint filed by Alessandro Ferrari (“Mr. Ferrari”), who alleged that YAGI owed him regular wages, overtime, vacation pay, expenses, and compensation for length of service. The Determination concluded that YAGI was liable to pay to Mr. Ferrari the sum of \$25,525.44 for wages, annual vacation pay, compensation for length of service, and accrued interest. The Determination also levied \$2,000 in administrative penalties for violation by YAGI of sections, 17, 18, 27 and 63 of the *ESA*.
4. YAGI appealed the Determination alleging the Director had failed to observe the principles of natural justice in making the Determination. YAGI sought to have the Determination varied.
5. The Tribunal Member making the original decision dismissed the appeal and found that the Director did not fail to observe principles of natural justice. The Tribunal Member also considered the other statutorily-permitted grounds of appeal in section 112(1), although not invoked by YAGI. However, the Tribunal Member found there was no error of law in the Director’s Determination and that YAGI did not argue that new evidence has become available that would affect the Determination, nor presented any new evidence. In the result, the original decision confirmed the Determination.
6. The deadline for filing an application to reconsider the original decision was April 9, 2020.
7. On April 14, 2020 the Tribunal received a submission from Feroz Dean (“Mr. Dean”), representative of YAGI, consisting of an email cover that included the written reasons for filing an application for reconsideration and the reason for requiring an extension of time to the statutory reconsideration period. With respect to the request for an extension of time to file the reconsideration application, Mr. Dean says that YAGI is late in submitting its request for reconsideration because “we are all engrossed in the PANDEMIC”.
8. On April 16, 2020, the Tribunal’s Manager of Appeals contacted Mr. Dean by telephone and informed him that the application for reconsideration is incomplete as it did not include a completed and signed Application for Reconsideration Form nor the date the reconsideration period is requested to be extended to. The Manager informed Mr. Dean that YAGI should provide the Tribunal with a completed and signed

Application for Reconsideration Form including the date the statutory reconsideration period is requested to be extended to by April 22, 2020. The Manager followed up this conversation with Mr. Dean with an emailed letter to Mr. Dean, dated April 20, 2020. In the letter, the Manager notes that the deadline of April 22, 2020, is not an extension to the statutory reconsideration period, but is a deadline for YAGI to provide the requested documents to the Tribunal.

9. On April 22, 2020, the Tribunal received YAGI's signed Reconsideration Application Form and request that the statutory date for filing the application should be extended to May 30, 2020.

10. YAGI's application seeks to have the original decision varied.

ISSUE

11. 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 this panel of the Tribunal should vary or cancel the original decision.

SUBMISSIONS OF YAGI

12. In support of YAGI's reconsideration application, Mr. Dean submits that the Determination "is not fair towards the employer" for the following reasons:

- 1) The employee was hired by the company to perform a set of duties as requested by the employer.
- 2) He was given a generous salary of \$6,000.00 per month (net) for the duties he was required to perform.
- 3) He informed the company after the first year that he is unable to live on the salary he was making. The owner of the company met with him and without any question increased his net salary to \$8,000 per month.
- 4) He claimed to have been wearing many hats, unfortunately there was no result that he produced from his duties.
- 5) His attendance was tardy and he always had an excuse that he had to call on a client but never provided any details of his meeting with a client.
- 6) All the company's customer records were in his possession and when he left, those records went missing.
- 7) I personally spoke to him on a number of occasions with regards to his performance but he shrugged it off to show me that he did not report to me.
- 8) The damage he has inflicted on this small company is beyond repair because a number of clients have stopped dealing with the company.
- 9) A large stock worth approximately is still in the company's yard because it was a special order for a particular client which we have not been able to unload. This will now be sent for recycling.

- 10) The company does not owe him the amount he claims. We have already provided the Director with the record of amounts paid and amounts owing.
- 11) We owe him one-month salary plus benefits.
- 12) The employee was always busy doing something else on his personal computer and hid a lot of things from the company.
- 13) When he left the company he went to start his own business with some partners, having stolen company customer records, and company propriety rights to technology.
[sic]

13. Mr. Dean concludes his submissions by requesting the Tribunal “to give a fair ruling since the company is a small entity and does not have the capacity to engage legal counsel to put forward its arguments based on legal issues.”

ISSUE

14. In any application for reconsideration, there is a threshold issue of whether the Tribunal will exercise its discretion under section 116 of the *ESA* to reconsider the original decision. If the Tribunal is satisfied that the case is appropriate for reconsideration, the issue raised in the application is whether this panel of the Tribunal should vary the original decision. The substantive issues raised in the reconsideration application will be considered.

ANALYSIS

15. Section 116 of the *ESA* delineates the Tribunal’s statutory authority to reconsider any order or decision of the Tribunal:

Reconsideration of orders and decisions

- 116 (1) On application under subsection (2) or on its own motion, the tribunal may
- (a) reconsider any order or decision of the tribunal, and
 - (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 named in a decision or order 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.

16. Reconsideration is not an automatic right of any party who is dissatisfied with an order or a decision of the Tribunal. That said, reconsideration is within the sole discretion of the Tribunal, and the Tribunal must be very cautious and mindful of the objects of the *ESA* in exercising its discretion. (See *Re: Eckman Land Surveying Ltd.*, BC EST # RD413/02).

17. *In Director of Employment Standards (Re Giovanni (John) and Carmen Valoroso)*, BC EST # RD046/01, the Tribunal explained the reasons why it should exercise reconsideration power with 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.
18. *In Re: British Columbia (Director of Employment Standards) (sub nom) (Milan Holdings Ltd.)*, BC EST # D313/98, the Tribunal delineated a two-stage approach for the exercise of its reconsideration power under section 116. In the first stage, the Tribunal must decide whether the matters raised in the application warrant reconsideration. In determining this question, the Tribunal will consider a non-exhaustive list of factors that include:
- (i) whether the reconsideration application was filed in a timely fashion;
 - (ii) whether the applicant’s primary focus is to have the reconsideration panel effectively “re-weigh” evidence already provided to the adjudicator;
 - (iii) whether the application arises out of a preliminary ruling made in the course of an appeal;
 - (iv) whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases;
 - (v) whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. If the applicant satisfies the requirements in the first stage, then the Tribunal will proceed to the second stage of the inquiry, which focuses on the merits of the original decision.
19. Having delineated the parameters governing reconsideration applications, both statutory and in the Tribunal’s own decisions, I am of the view that this is not a case that warrants the exercise of the Tribunal’s discretion in favour of reconsideration of the original decision. I find that the application fails to meet the requirements in the first stage of the analysis in *Milan Holdings Ltd., supra*. More particularly, I find YAGI has not made out an arguable case of sufficient merit to warrant the reconsideration, nor has YAGI raised any important questions of law, fact, principle or procedure of importance to the parties and/or their implications for future cases. Instead, YAGI’s application is nothing short of a transparent attempt to have this panel re-visit its appeal and change the original decision by varying it. This I will not do.
20. I find the reasons delineated by the Tribunal Member in the original decision for dismissing the appeal of the Determination to be both reasonable and correct.
21. Lastly, I note that Mr. Dean, in his emailed submissions requesting an extension of the statutory deadline to file YAGI’s reconsideration application, refers to the Covid-19 pandemic as the cause of YAGI’s delay in

filing its application. I have not weighed the factor of an untimely application in my decision to dismiss YAGI's reconsideration application. The application has been dismissed for the reasons noted above.

22. In the result, I deny this application.

ORDER

23. Pursuant to section 116 of the *ESA*, the original decision, 2020 Bcest 17, is confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal