

An Application for Reconsideration

- by -

Hong Qian
(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: Robert E. Groves

FILE No.: 2019/191

DATE OF DECISION: January 28, 2020

DECISION

SUBMISSIONS

Hong Qian on his own behalf as a Director of Sinorama Travel Vancouver Inc.

OVERVIEW

1. This is an application for reconsideration brought by Hong Qian (the “Applicant”) pursuant to section 116 of the *Employment Standards Act* (the “ESA”).
2. The Applicant challenges a decision of the Tribunal dated October 22, 2019, and referenced as 2019 BCEST 111 (the “Appeal Decision”).
3. On August 1, 2019, a delegate of the Director of Employment Standards (the “Director”) issued a determination (the “Determination”) ordering that the Applicant, in his capacity as a director of Sinorama Travel Vancouver Inc. (“STV”), pay \$15,977.03 in respect of wages and interest owed by the company to five of its former employees (the “Complainants”).
4. The Applicant’s liability was found to arise pursuant to section 96 of the *ESA*, the relevant part of which reads:

96 (1) 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.
5. The Applicant appealed the Determination pursuant to section 112 of the *ESA*. The Appeal Decision confirmed the Determination.
6. The Applicant’s seeks an extension to the reconsideration period. He requests that the period for his seeking a reconsideration be extended to January 31, 2020.
7. I have before me the Applicant’s appeal form and application for reconsideration, his submissions delivered in support, the Determination and its accompanying Reasons, and the record the Director was required to deliver to the Tribunal pursuant to subsection 112(5) of the *ESA*.

FACTS

8. I accept, and incorporate by reference, the facts set out in the Determination and the Appeal Decision. What follows is a selective summary.
9. In August and September 2018, the Director received complaints from a number of former employees of STV alleging that the company had failed to pay them wages.

10. A BC Registry Services search conducted by the Director in 2018 revealed that STV was a corporation registered in British Columbia and that the Applicant was a director.
11. The Director's Reasons for the Determination note that a determination against STV, and another determination against the Applicant, personally, in his capacity as an STV corporate director, were issued in January 2019 in respect of complaints of unpaid wages similar to those filed by the Complainants.
12. In March 2019 the Director sent a preliminary findings registered letter regarding the complaints of the Complainants to STV and its corporate directors, including the Applicant. The communication also included information on the liability of corporate directors for unpaid wages.
13. STV did not dispute the Director's findings that the Complainants were owed wages. It advised, instead, that Consumer Protection BC had forced the company to cease doing business, and had "frozen" its bank accounts, including the account out of which the Complainants' wages would otherwise have been paid.
14. On August 1, 2019, the Director issued a determination (the "Corporate Determination") stating that STV had contravened the *ESA* and that the company owed the Complainants wages and interest in the amount noted above. The Corporate Determination was forwarded to the company, and to its corporate directors, including the Applicant. The communication included a notification to STV's corporate officers and directors explaining their personal liability for unpaid wages under the *ESA*.
15. The Director also issued the Determination addressing the liability of the Applicant, personally, on August 1, 2019. The Director's Reasons state that the Determination was issued on the same day as the Corporate Determination because STV was no longer carrying on business and there was a risk its assets might disappear. They also state the Director's conclusion that the Applicant was liable for unpaid wages because he was an STV corporate director when the Complainants' wages were earned or should have been paid.
16. The Applicant's appeal engaged subsection 112(1)(c) of the *ESA*. It alleged that evidence had become available that was not available at the time the Determination was being made. The Applicant's submission presented substantially the same argument that STV had offered in the proceedings leading to the Corporate Determination. He asserted that STV's failure to pay the outstanding wages was due to the actions of Consumer Protection BC, when the regulator suspended the company's operating licence and froze its bank accounts because it had insufficient working capital. The Applicant also argued that the Tribunal should recover the unpaid wages from Consumer Protection BC.
17. The rationale for the Tribunal's confirmation of the Determination was that the evidence the Applicant sought to tender was not new, as it was merely repetitive of the matters to which the Applicant had referred in the proceedings leading to the Corporate Determination, and to the determinations issued in January 2019. In addition, the Appeal Decision affirmed the conclusion of the Director in the prior proceedings I have identified, and of the Tribunal in the case of an STV appeal of the January 2019 corporate determination, that the evidence was irrelevant.
18. The Appeal Decision also noted that since the Applicant did not deny he was a corporate director of STV at the relevant times, or that the Complainants were owed the wages sought, there was no basis for the Tribunal to conclude that the Determination revealed an error.

ISSUE

19. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:
1. Does the request meet the threshold established by the Tribunal for reconsidering a decision?
 2. If so, should the decision be confirmed, cancelled, varied or referred back to the original panel or another panel of the Tribunal?

DISCUSSION

20. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116 of the *ESA*, the relevant portion of which reads as follows:
- 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.
21. As the Tribunal has stated repeatedly, the reconsideration power is discretionary and must be exercised with restraint. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal.
22. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *ESA*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the statute. It is also derived from a desire to preserve the integrity of the appeal process mandated in section 112.
23. With these principles in mind, the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party who wishes to have the Tribunal's appeal decision overturned.
24. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal considers the applicant's submissions, the record that was before the Tribunal in the appeal proceedings, and the decision the applicant seeks to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. The prerequisite for the answer to be "yes" is that the applicant must raise questions of fact, law, principle or procedure flowing from the appeal decision which are so important that they warrant reconsideration (see *Re Milan Holdings*, BC EST # D313/98).
25. In general, the Tribunal will be disinclined to reconsider if the primary focus of the application is to have the reconsideration panel re-weigh arguments that failed in the appeal. It has been said that reconsideration is not an opportunity to get a "second opinion" when a party simply does not agree with an original decision of the Tribunal (see *Re Middleton*, BC EST # RD126/06).

26. If the applicant satisfies the requirements of the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.
27. In this case, the Applicant's application may be resolved at the first stage of the analysis. In the result, the application must be dismissed. It raises no questions of fact, law, principle or procedure flowing from the Appeal Decision which warrant a reconsideration. It follows that I also decline to grant an extension.
28. The Applicant merely repeats, in substance, the arguments delivered by him in the proceedings leading to his filing this application, and those tendered by STV in the corporate proceedings. He submits that in the months since Consumer Protection BC forced STV to cease doing business he has received no information from the regulator apart from advice that matters are "in the process". He contends that STV is the victim of the piece, and that he hopes to achieve "a fair decision" that provides "a correct answer". For these reasons, the Applicant requests an extension of the time for a reconsideration to January 31, 2020. No rationale is provided supporting the choice of that date, rather than another.
29. I cannot accede to the Applicant's request for an extension. The Applicant's liability for wages arises pursuant to his obligations as a corporate director that are set out in the *ESA*. I have no reason to doubt the veracity of the Applicant's statements identifying the actions of Consumer Protection BC as the source of STV's financial inability to pay the wages owed. However, financial distress attributable to these actions can in no way act as a plausible answer to the claims for wages made by the Complainants in this instance. As the Tribunal affirmed in its Appeal Decision, the reasons the Applicant has given for the financial embarrassment of the company, and its inability to pay the wages owed to the Complainants, are entirely irrelevant.

ORDER

30. The Applicant's application for reconsideration is denied. Pursuant to section 116 of the *ESA*, the Appeal Decision, 2019 BCEST 111, is confirmed.

Robert E. Groves
Member
Employment Standards Tribunal