

EMPLOYMENT STANDARDS TRIBUNAL

An application for reconsideration  
pursuant to section 116 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113 (as amended)

- by -

L.W. Murphy Ltd.

- of a Decision issued by -

The Employment Standards Tribunal

**PANEL:** Kenneth Wm. Thornicroft

**FILE No.:** 2023/151

**DATE OF DECISION:** November 3, 2023

## DECISION

### SUBMISSIONS

Lloyd Murphy

on behalf of L.W. Murphy Ltd.

### OVERVIEW

1. This is an application filed under section 116 of the *Employment Standards Act* (“ESA”) for reconsideration of 2023 BCEST 61, an appeal decision issued by the Tribunal on August 10, 2023 (“Appeal Decision”). This application is filed by L.W. Murphy Ltd. (“applicant”).
2. By way of the Appeal Decision, the Tribunal dismissed the applicant’s appeal of a determination issued by a delegate of the Director of Employment Standards (“delegate”) on February 28, 2023 (“Determination”). The delegate also issued his “Reasons for the Determination” (“delegate’s reasons”) concurrently with the Determination.
3. This application is untimely and, in my view, the applicant has failed to provide a reasonable explanation for its failure to file a timely application. Further, and in any event, this application does not pass the first stage of the two-stage *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98). Accordingly, this application is dismissed.

### PRIOR PROCEEDINGS

4. The delegate determined that the applicant owed a former employee (“complainant”) a total of \$13,811.64 on account of unpaid wages and section 88 interest. Additionally, the delegate levied three separate \$500 monetary penalties against the applicant based on its contraventions of sections 18, 58, and 63 of the *ESA*. Accordingly, the applicant’s total liability under the Determination is \$15,311.64.
5. The applicant appealed the Determination on the grounds that the delegate erred in law and failed to observe the principles of natural justice (see sections 112(1)(a) and (b) of the *ESA*). The Tribunal held that neither ground was meritorious, and dismissed the appeal, holding that it had no reasonable prospect of succeeding (see section 114(1)(f) of the *ESA*).

### THE APPLICATION FOR RECONSIDERATION - TIMELINESS

6. The first issue that I must address is the timeliness of the application for reconsideration. Section 116(2.1) of the *ESA* states that a section 116 reconsideration application must be filed not more than 30 days after the date of the appeal decision in question. In this case, the Appeal Decision was issued on August 10, 2023, but the reconsideration application was not filed until September 18, 2023, when the applicant’s principal forwarded an e-mail to the Tribunal setting out his dissatisfaction with Appeal Decision, and asking for directions regarding “the steps necessary to undertake an appeal of the Tribunal’s decision.” The applicant filed its Reconsideration Application Form on September 25, 2023.

7. Section 109(1)(b) of the *ESA* empowers the Tribunal to extend the time for applying for reconsideration. The applicant's entire explanation for its failure to file a timely reconsideration application is as follows:
- Lloyd Murphy, the principal of the Company was unable to file the application for reconsideration prior to the reconsideration deadline due to ongoing health problems including diabetes, rheumatoid/arthritis, Parkinson's disease, heart/high blood pressure problems and the prescribed medications thereto sometimes make it difficult to respond in a timely manner to submission requirements and deadlines.
- Also, I'm awaiting a hip replacement operation and experiencing considerably [sic] discomfort.
8. The applicant's principal did not provide any corroborating medical information, although, for purposes of this application, I will accept the principal's statement regarding his specific medical problems as being factual. However, even accepting that the applicant's principal has health problems, he was able to file a section 116 application on September 18, 2023, and further material about one week later. There is nothing in the material before me, other than a vague assertion about health problems and medications, that explains why the applicant's principal was unable to file a timely application.
9. Further, I note that the applicant's principal had already filed written submissions as part of both the complaint investigation and the appeal processes, and the submissions filed in support of the reconsideration application largely replicate those that had previously been filed.
10. In my view, the applicant has not provided a reasonable explanation for its failure to file a timely section 116 application. That being the case, the applicant's section 109(1)(b) request to extend the reconsideration application period is refused.

### **THE APPLICATION FOR RECONSIDERATION - MERITS**

11. Apart from the timeliness of the application, this application is not, on its face, meritorious. Thus, even if I were inclined to extend the reconsideration application period, I would, in any event, dismiss the application since it does not pass the first stage of the *Milan Holdings* test.
12. With respect to the merits of the application, the applicant advances the following assertions:
- "...the Tribunal has been totally prejudicial to the claim of the [complainant] and the information he has provided in support of his claim and totally ignored the information provided by the [applicant]."
  - the payroll records that the delegate relied on in making an award in the complainant's favour were "done secretly" and "was never discussed and reviewed with the [applicant] nor was it approved by the [applicant]."
  - "...the [complainant] never discussed or reviewed with the [applicant] any salary that he may have thought was outstanding to him."
  - "...the [complainant] did not provide any Notice to Quit."
  - "As far as I am aware [the complainant] is not due any holiday pay except for the 2021 period. As he just took his normal salary for the period he was on holidays." [sic]

13. The applicant's assertions, as set out above (other than the first), simply replicate those advanced during the complaint investigation process and, again, on appeal. All were rejected, and in my view, rightly so.
14. There is no evidence whatsoever that the Tribunal member adjudicating the appeal was biased in favour of the complainant. The applicant's evidence was not "ignored"; rather, the applicant's position was considered and rejected for legitimate reasons.
15. The applicant's claim that the complainant prepared payroll records "in secret" was rejected by the delegate at pages R5 and R6-R7. Whether the complainant did or did not raise a question with the applicant's principal regarding unpaid wages prior to leaving the applicant's employ is not relevant. I also note that the complainant's evidence is that he *did* raise the matter of unpaid wages and, indeed, this precipitated his decision to quit.
16. Although the complainant apparently did not provide any prior notice to the applicant before he quit, he was not obliged to do so under the *ESA*. Despite having quit his employ, the complainant was entitled to section 63 compensation for length of service, since the delegate determined that there was a "constructive dismissal" under section 66 of the *ESA* (see delegate's reasons, page R6). I am unable to conclude that the delegate erred in law in making that determination.
17. Finally, and with respect to the matter of vacation pay, the delegate addressed this claim at pages R7-R8 of his reasons. The delegate refused to award any vacation pay for the period prior to October 2020. The delegate's vacation pay award spanning the period from October 2020 to March 2021 (at page R8) are both transparent and intelligible (see also Appeal Decision, para. 40).

## **ORDER**

18. Pursuant to section 116(1)(b) of the *ESA*, this application is refused and the Appeal Decision is confirmed.

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**Kenneth Wm. Thornicroft**  
**Member**  
**Employment Standards Tribunal**