

An Application for Reconsideration

- by -

Austen Chzyk, a Director of Precision Surveys Ltd.  
("Mr. Chzyk")

- 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)

**TRIBUNAL MEMBER:** Shafik Bhalloo

**FILE No.:** 2013A/86

**DATE OF DECISION:** January 10, 2014

## DECISION

### SUBMISSIONS

Austen Chzyk on his own behalf as a Director of Precision Surveys Ltd.

### OVERVIEW

1. Pursuant to section 116 of the *Employment Standards Act* (the “*Act*”), Austen Chzyk (“Mr. Chzyk”), a Director of Precision Surveys Ltd., applies for reconsideration of an appeal decision by Tribunal Member Roberts issued on November 20, 2013 (BC EST #D092/13) (the “original decision”). The original decision considered an appeal of the determination issued by a delegate of the Director of Employment Standards (the “Director”) on August 16, 2013, that ordered Mr. Chzyk to personally pay two (2) former employees of Precision Surveys Ltd., Michael Foster (“Mr. Foster”) and Michael O’Neal (“Mr. O’Neal”), the total sum of \$23,614.06, representing not more than two (2) months’ unpaid wages, vacation pay and interest (the “S. 96 Determination”).
2. Mr. Chzyk’s reconsideration application, for the most part, reiterates his submissions from his appeal of the S. 96 Determination, wherein he contended that the Director failed to observe the principles of natural justice in making the S. 96 Determination.
3. By way of a remedy, Mr. Chzyk, in the Reconsideration Application Form, has checked off the box requesting the Tribunal to “change or vary” the original decision, although his submissions would suggest that he wants the Tribunal to cancel the original decision.
4. Section 116 of the *Act* affords the Tribunal a discretionary authority to reconsider and confirm, cancel or vary its own orders or decisions. However, as indicated by the Tribunal in *Re: Eckman Land Surveying Ltd.* (BC EST # RD413/02), the Tribunal should exercise that discretionary authority with caution:

Reconsideration is not a right to which a party is automatically entitled, rather it is undertaken at the discretion of the Tribunal. The Tribunal uses its discretion with caution in order to ensure: finality of its decisions; efficiency and fairness of the appeal system; and fair treatment of employers and employees.
5. In *Director of Employment Standards (Milan Holdings Inc.)* (BC EST # D313/98), the Tribunal established a two-stage process for adjudicating reconsideration applications. In the first stage, the Tribunal considers whether the application is timely, relates to a preliminary ruling, is obviously frivolous, or is simply a clear attempt to have the Tribunal revisit factual matters that have already been appropriately determined. If the application can be so characterized, the Tribunal will summarily dismiss it without further consideration of the underlying merits. However, if the application raises a serious question of fact, law or principle, or suggests that the Tribunal’s decision should be reviewed because of its fundamental importance or because of its possible implications for future cases, the Tribunal will proceed to the second stage, at which point the underlying merits of the application are given full consideration.
6. Having said this, at this juncture, I will only address the first stage of the *Milan Holdings* test. If I am satisfied that Mr. Chzyk’s application passes the first stage, the Tribunal will inform the respondents, Mr. Foster and Mr. O’Neal and the Director, and seek their submissions on the merits of Mr. Chzyk’s reconsideration application. If, however, Mr. Chzyk’s application does not pass the first stage, it will be summarily dismissed pursuant to Rule 27 of the Tribunal’s *Rules of Practice and Procedure* (the “*Rules*”).

## PRIOR PROCEEDINGS

7. By way of background, on June 5 and 8, 2012, Mr. O’Neal and Mr. Foster (collectively, the “Complainants”) respectively filed their complaints under section 74 of the *Act* in which they claimed that David Flavin (“Mr. Flavin”), carrying on business as Precision Surveys (“Precision”), and Precision Surveys Ltd. contravened the *Act* by failing to pay them wages, vacation pay, compensation for length of service and reimbursement for business costs they personally incurred (the “Complaints”). In the case of Mr. Foster, he also claimed reimbursement for premiums he paid to Manulife for extended health benefits, which the employer was responsible to pay pursuant to his employment agreement.
8. The Director conducted an investigation into the Complaints and, on June 18, 2013, issued a determination (the “Corporate Determination”) against Mr. Flavin, carrying on business as Precision, and Precision Surveys Ltd., associating the two (2) entities and finding wages and interest were owed to the Complainants totalling \$30,263.46. The Director also imposed \$2,500.00 in administrative penalties for contraventions of sections 17, 18, 21 and 26 of the *Act* and section 46 of the *Employment Standards Regulation* (the “Regulation”).
9. The Corporate Determination, which included a notice to directors explaining their personal liability under the *Act*, was sent to Mr. Flavin, carrying on business as Precision, and Precision Surveys Ltd., together with copies to the registered and records office and to the Directors of Precision Surveys Ltd. The date for appealing the Corporate Determination expired on July 26, 2013, without an appeal by the employer.
10. Subsequently, on August 16, 2013, after finding that the Corporate Determination had not been satisfied nor appealed, the Director issued the S. 96 Determination holding Mr. Chyzyk, a Director and Officer of Precision Surveys Ltd. at the time the Complainants’ wages were earned and payable, personally liable to pay \$23,614.06 representing two months’ unpaid wages of the Complainants pursuant to section 96 of the *Act*. However, the delegate did not find any evidence that Mr. Chyzyk authorized, permitted or acquiesced in the contraventions of Precision Surveys Ltd. and, therefore, did not find Mr. Chyzyk personally liable for the administrative penalties issued against the employer.
11. On September 20, 2013, Mr. Chyzyk filed an appeal of the S. 96 Determination on the grounds that the Director failed to observe the principles of natural justice in making the said determination. Tribunal Member Roberts, in dismissing Mr. Chyzyk’s appeal and confirming the S. 96 Determination, thoroughly reviewed the S. 96 Determination and observed, with respect to the natural justice ground of appeal of Mr. Chyzyk, that while Mr. Chyzyk may be unhappy with the decision, there was no persuasive evidence that the Director had failed to comply with the principles of natural justice in making the S. 96 Determination. Member Roberts then referenced section 96 of the *Act* (Corporate Officer’s Liability for Unpaid Wages), and went on to reason as follows:

Corporate records, primarily those available through the Corporate Registry or at the corporation’s registered and records office, raise a rebuttable presumption that an individual is an officer or director of a company. That presumption can be rebutted by evidence that the individual has resigned as an officer or director. The Director may rely on those records to determine officer and director status. It is then open for an individual who is recorded as an officer or director to prove that the records are inaccurate (*Michalkovic*, BC EST #RD047/01).

Mr. Chyzyk does not assert, nor is there any evidence, that the corporate records are inaccurate. I find no evidence that the Director failed to observe the principles of natural justice in making the Determination. The Director sent information regarding the complaint to the corporate registered and records office. That information, which was confirmed received by Canada Post, also contained information regarding the corporation’s opportunity to respond.

As with the Tribunal in *Michalkovic*, I sympathize with Mr. Chzyk's circumstances. It appears that he entered into an arrangement with an individual who may be less than honourable. Mr. Chzyk says that Mr. Flavin failed to share any information with him. I accept this statement. However, Mr. Flavin's failure to communicate with his fellow director does not establish a breach of natural justice by the Director.

Although Mr. Chzyk does not expressly say so, it appears that he is concerned about enforcement efforts being directed to him rather than to Mr. Flavin, who appears to have, as the Tribunal stated in *Michalkovic*, greater 'moral' culpability. While I understand those concerns, the Tribunal is obliged to interpret the legislation, regardless of the consequences to Mr. Chzyk.

## SUBMISSIONS OF MR. CHZYK

12. In his reconsideration submissions, as indicated previously, Mr. Chzyk has largely reiterated the submissions he made in support of his appeal of the S. 96 Determination. As in his submissions in support of the appeal of the S. 96 Determination, he argues that his fellow Director, Mr. Flavin, started a new company, Precision Surveys Ltd., in Toronto "which was supposed to be clearly separate from his BC company", Precision. Mr. Chzyk submits that he did not have any involvement with the BC company, Precision, nor did he want to work for Precision because he was aware that Precision and Mr. Flavin had a problem with paying their employees in BC. Mr. Chzyk states that he "didn't want to buy into the [BC] company", and was only interested in building "a new and fresh company with a clean slate" and, thus, registered in Ontario "a separate entity", namely, Precision Surveys Ltd. The latter company, he states, has paid all its employees on time and in full. He also contends, as in his previous submissions, Mr. Foster never worked for Precision Surveys Ltd. and Mr. O'Neal, who worked for the said company in January 2012, was paid in full.
13. Mr. Chzyk concludes his submissions by reiterating his previous submissions that since January 2013, he has not had any communication with Mr. Flavin, who chose not to respond to Mr. Chzyk's emails or phone calls. Therefore, he states that Mr. Flavin failed to share with him "relevant documentation or information relating to any joint relationship with his BC company" and this, Mr. Chzyk contends, is a breach of natural justice.
14. I also note that Mr. Chzyk has attached 3½ pages of email exchanges during the period July 11, 2011, to December 13, 2011, with Mr. O'Neal, Mr. Flavin and another employee by the name of Mr. Mitch Rose. These emails largely deal with Mr. O'Neal's queries regarding outstanding wages, and Mr. Chzyk's response explaining his understanding, albeit limited, about what was happening in terms of payment and what Mr. Flavin may have conveyed to him. I do not find these emails very helpful and, therefore, do not find it necessary to set them out in any more detail here.

## ANALYSIS

15. Having reviewed the S. 96 Determination, the section 112(5) "record" of the Director, the original decision and the written submissions of Mr. Chzyk in his reconsideration application, I am not persuaded that the matter warrants reconsideration, and I dismiss Mr. Chzyk's application summarily, pursuant to Rule 27 of the *Rules* for the reasons set out below.
16. I do not find anything in the written submissions of Mr. Chzyk that challenges specifically the analysis of Member Roberts in the original decision and, particularly, her reasons for confirming the S. 96 Determination, with which reasons I agree.

17. I note that neither in the appeal of the S. 96 Determination, nor in this reconsideration application, has Mr. Chzyk challenged, or provided sufficient evidence to challenge, the delegate's decision to associate Precision and Precision Surveys Ltd. Mr. Chzyk also has not challenged the records upon which the Director relied to determine that Mr. Chzyk was an Officer or Director of Precision Surveys Ltd. at the material time the Complainants' wages were earned and payable.
18. I also note that I agree with Member Roberts that there is no evidence proffered by Mr. Chzyk showing that the Director failed to observe the principles of natural justice in making the S. 96 Determination. To the contrary, there is ample evidence showing that the Director made concerted efforts and did send information regarding the Complaints to the address of the corporate registered and records office. The Corporate Determination was also sent to Precision and to Precision Surveys Ltd., with copies to the registered and records office and to the Directors of Precision Surveys Ltd., but the Corporate Determination was not appealed. As with Member Roberts, I sympathize with Mr. Chzyk's circumstances, and appreciate that there was a breakdown in the relationship between Mr. Chzyk and Mr. Flavin which appears to have resulted in a failure by Mr. Flavin to communicate with Mr. Chzyk during the material period the Complainants' Complaints were before the Director, but this does not constitute a breach of natural justice by the Director.
19. Having said this, I also find that Mr. Chzyk's reconsideration application is effectively an attempt by the latter to have the reconsideration panel re-weigh the evidence and arguments he adduced in his appeal of the S. 96 Determination with a view to obtaining a different, favourable, outcome on this occasion. The reconsideration process in s. 116 of the *Act* is not meant to allow dissatisfied parties a further opportunity to re-argue their cases. In the circumstances, I find that Mr. Chzyk's application for reconsideration fails at the first stage of the *Milan Holdings* test.
20. Mr. Chzyk's application under s. 116 of the *Act* to reconsider the original decision (BC EST # D092/13) is dismissed.

## ORDER

21. Pursuant to subsection 116(1)(b) of the *Act*, the original decision is confirmed.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**