An Application for Reconsideration

\- by -

Q & A Investments Ltd. carrying on business as "LipoLaser & Spa"
(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)

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2011A/169

DATE OF DECISION: January 19, 2012

DECISION

SUBMISSIONS

Jason Ackerman	on behalf of Q & A Investments Ltd. carrying on business as Lipolaser & Spa
Theresa Robertson	on behalf of the Director of Employment Standards

INTRODUCTION & FACTUAL BACKGROUND

1. I have before me an application for reconsideration of a Tribunal decision. The history relating to this matter may be briefly summarized as follows. On December 2, 2010, Ms. Linda Miller filed an unpaid wage complaint under section 74 of the *Employment Standards Act* (the "*Act*") against her former employer, Q & A Investments Ltd. carrying on business as "LipoLaser & Spa" (the present "Applicant"), an aesthetics studio located in Kelowna. A delegate of the Director of Employment Standards (the "delegate") investigated Ms. Miller's complaint and on July 8, 2011, issued a Determination and accompanying "Reasons for the Determination" (the "Determination" and the "delegate's reasons", respectively) upholding the complaint. The delegate ordered the Applicant to pay Ms. Miller the sum of $1,425.73 on account of unpaid wages and interest and, in addition, also levied two separate $500 monetary penalties (see *Act*, section 98) against the Applicant based on its contraventions of sections 18 (failure to pay wages) and 28 (failure to keep employment records) of the *Act*.

2. The statutory deadline for appealing the Determination to the Tribunal, calculated in accordance with section 122 of the *Act*, was August 15, 2011, – this deadline was set out in a text box marked "Appeal Information" contained on the second page of the Determination. On August 15, 2011, Mr. Jason Ackerman, who I understand is the Applicant's principal, attempted to file an appeal by fax, however, the Tribunal did not receive the communication. A Tribunal staff member contacted Mr. Ackerman by telephone and advised him that his fax communication had not been properly transmitted. Mr. Ackerman then resent his appeal documents. Thus, the appeal was not formally filed until August 16, 2011, thus rendering the appeal late, albeit only by one day.

3. The sole ground of appeal was that the delegate erred in law (subsection 112(1)(a)) in determining that Ms. Miller was an employee rather than, as was asserted by the Applicant, "a contractual worker". Elsewhere in the appeal documents, the Applicant asserted that Ms. Miller "was never an employee"; that the parties agreed she "would be a contractual employee"; that she "was employed as a contractual labourer"; and that she was "hir[ed]…as my marketing coordinator…on a contractual basis". It would appear that the Applicant's intended argument was that Ms. Miller was an independent contractor and thus outside the statutory definition of "employee" contained in section 1 of the *Act* in which case she would not be entitled to access the *Act's* wage protection provisions.

4. Since the appeal was not filed within the statutory deadline, the Tribunal was obliged to consider whether it would nonetheless proceed to adjudicate the appeal on its merits after granting an extension of the appeal period under section 109(1)(b) of the *Act*: "In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following: …(b) extend the time period for requesting an appeal even though the period has expired". By letter dated August 18, 2011, the Tribunal invited the parties to file their submissions and specifically asked them to address the relevant criteria governing such applications as established by prior Tribunal decisions.

5. The Applicant and the delegate filed submissions and in a decision issued by Tribunal Member Roberts on October 13, 2011, (BC EST # D109/11), the decision now being challenged by way of the present application for reconsideration under section 116 of the *Act*, the application to extend the appeal period was refused. Accordingly, as matters now stand, the Determination is a valid and subsisting order binding the Applicant.

6. On October 13, 2011, Mr. Ackerman sent an e-mail to the Tribunal asserting that the Tribunal's decision was "a contravention of my legal rights" and that his company "will not be honouring your decision". He characterized the Tribunal's decision as "unethical" and lacking "legality". By letter dated October 17, 2011, the Tribunal informed the Applicant that if it wished, it could apply to have the Tribunal's decision reconsidered.

7. On November 14, 2011, the Applicant filed a reconsideration application consisting of the Tribunal's "Reconsideration Application Form" (Form 2), an appended 2-page typed memorandum, and some other documents.

8. The Applicant made the following assertions, among others, in the memorandum appended to its Reconsideration Application Form:

- "I have attached a fax sent report and fax recd report from my store indicating that the labour relations tribunal [*sic*] did in fact receive my appeal application on time. Hence rendering their claim that my appeal was not received on time to be a falsehood."
- "I was notified by them that they had a fax communication error which somehow they have attributed to me, and tried writing that i have taken responsibility for such thing when in fact, what i did was the next day refax the documents they claimed they did not receive and on this refax i stated that documents were not received due to fax transmission error." [*sic*]
- "…there is much merit to the fact that there was an err in law [*sic*] in the determination of one of my contract workers to be an employee of my spa/company."

FINDINGS AND ANALYSIS

9. The Applicant's position appears to be twofold. First, it is asserted that the appeal was filed within the statutory appeal period and thus the Tribunal never should have turned its mind to whether an extension would be granted under section 109(1)(b). Second, the Applicant says that its position on the merits is very strong and that Ms. Miller ought not to have been determined to be an "employee" as defined in section 1 of the *Act*. I find that neither assertion is tenable.

10. The Applicant appended a "Fax Send Report" to its Reconsideration Application Form and this document appears to confirm that the Applicant faxed the form along with other appended documents (8 pages in total) to the Tribunal's fax number on Monday, August 15, 2011, (*i.e.*, on the last day of the statutory appeal period) and that the communication "result" was "O.K.". However, the "Fax Send Form" indicates that the fax was transmitted at 5:22 P.M. and that the transmission was completed at 5:24 P.M.

11. Rule 6(6) of the Tribunal's *Rules of Practice and Procedure* provides as follows: "A party may file a document with the tribunal during a business day. If the tribunal receives a document outside of a business day, it will consider the document to be filed on the next business day." A "business day" is defined in Part 1 of the Tribunal's *Rules* as follows: "business day" means 8:30 am to 4:30 pm Monday through Friday, excluding holidays. Accordingly, even if the Applicant's Reconsideration Application Form was faxed to the Tribunal on August 15, 2011, the *Applicant's own material* shows that it was filed after normal business hours and,

accordingly, would not have been lawfully filed until August 16, 2011, (*i.e.*, after the statutory appeal period had expired). That being the case, the Tribunal did not have any statutory authority to deal with the appeal on its merits without first considering whether the appeal period would be extended.

12. Tribunal Member Roberts, at paras. 18 to 21 of her reasons for decision, correctly identified the principles governing an extension application and, in my opinion, correctly applied those principles at paras. 22 to 28 of her reasons. Although the appeal was filed only 1 day after the expiration of the statutory appeal period, it is clear and obvious, based on the review of the Applicant's appeal materials, that this appeal had virtually no prospects for success. Given the broad section 1 definition of "employee", it is apparent that the Applicant employed Ms. Miller during the period in question. Although, the parties structured Ms. Miller's compensation consistent with an "independent contractor" relationship, it is the *substance* of the parties' relationship that governs, not its *form*. In order to succeed on appeal, the Applicant would have had to persuade the Tribunal that the delegate erred in finding that Ms. Miller was an "employee" and, given the overwhelming evidence in favour of an employment relationship (set out at pages R6 to R8 of the delegate's reasons), there was simply no reasonable prospect of that occurring. I might add that the Applicant correctly noted that Tribunal Member Roberts misstated this issue at para. 27 of her reasons but I am fully satisfied this was simply a clerical error and that the final sentence of this paragraph should have read as follows: "In this case, Mr. Ackerman must persuade the Tribunal that the Director erred in law in concluding that Ms. Miller was *not* a self-employed contractor".

13. Subsections 114(1)(b) and (f) of the *Act* provide as follows:

> 114 (1) At any time after an appeal is filed and without a hearing of any kind the tribunal may dismiss all or part of the appeal if the tribunal determines that any of the following apply:
>
> …
>
> (b) the appeal was not filed within the applicable time limit;
>
> …
>
> (f) there is no reasonable prospect that the appeal will succeed;

14. In my view, each of the above-referenced subsections applies here and accordingly, I propose to dismiss the application for reconsideration on the basis that it fails to meet the first stage of the two-stage *Milan Holdings* test (see *Director of Employment Standards and Milan Holdings Inc. et al.*, BC EST # RD313/98). However, and for greater clarity, I will vary Tribunal Member Robert's order under subsection 116(1)(b) of the *Act*.

ORDER

15. Pursuant to subsection 116(1)(b) of the *Act*, the Order issued by Tribunal Member Roberts is varied to read as follows:

> Pursuant to section 109(1)(b), I deny LipoLaser's application to extend the time for filing an appeal. Accordingly, and pursuant to subsections 114(1)(b) and (f) of the *Act*, this appeal is dismissed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal