

An Application for Reconsideration

- by -

Erich Jaeger
("Jaeger")

- 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.: 2009A/155

DATE OF DECISION: January 12, 2010

DECISION

SUBMISSIONS

Erich Jaeger	on his own behalf
Bahar Mashreghi	Counsel for Erich Jaeger
Mark C. Stacey and Veronica S. C. Rossos	Counsel for ARA Development Ltd.
Megan Roberts	on behalf of the Director of Employment Standards

OVERVIEW

1. Mr. Jaeger was employed as a project manager for ARA Development Ltd. (“ARA”), from November 15, 2005, to November 15, 2006. He filed a complaint against ARA alleging that the latter had contravened the *Act* in failing to pay him overtime wages, annual vacation pay, compensation for length of service and bonus wages. The only unresolved issue at the hearing of his complaint was Mr. Jaeger’s bonus claim.
2. A hearing of Mr. Jaeger’s complaint was held on July 23, 2007 (the “First Hearing”). The main issue at the hearing pertained to the authenticity of a written contract between Mr. Jaeger and ARA in which the latter purportedly was to pay Mr. Jaeger a bonus. The delegate heard oral evidence from ARA’s director, Esmail Marzara (Mr. Mazara”), and Mr. Jaeger and subsequently issued a determination on October 18, 2007 (the “First Determination”) in which she found that ARA had contravened the *Act* in failing to pay Mr. Jaeger his bonus. The delegate explained in her reasons that she preferred the evidence of Mr. Jaeger to Mr. Marzara’s as the basis for her decision in the First Determination. ARA appealed the First Determination on the grounds that the delegate erred in law. The Tribunal, in a decision issued on January 29, 2008 (the “Original Decision”), found that the delegate had “erred in law in drawing unreasonable conclusions and failing to properly analyze the evidence” and referred the matter back to the Director for a new hearing before a new delegate (BC EST # D012/08).
3. On April 23, 2008, a new delegate of the Director held a hearing (the “Second Hearing”) into Mr. Jaeger’s complaint and issued a determination on September 5, 2008 (the “Second Determination”) finding Mr. Jaeger was entitled to the bonus monies he claimed and ordered ARA to pay Mr. Jaeger a total of \$8,619 in wages (comprising of \$7,500 on account of unpaid bonus, \$300 for vacation pay on the first amount and \$819 for accrued interest on the first two amounts). In addition, pursuant to section 29(1) of the *Employment Standards Regulation* (the “Regulation”), the delegate also imposed an administrative penalty of \$500 against ARA for breach of section 18 of the *Act*.
4. ARA appealed the Second Determination arguing that the delegate erred in law and sought to have the Second Determination cancelled. The matter came back before the Tribunal member (the “Member”) who issued the Original Decision. The Member considered the submissions of both parties and concluded in her decision made on December 18, 2008 (the “Second Appeal Decision”), that the delegate, in the Second Hearing, was obliged to consider the evidence of both parties at the first hearing in assessing their credibility and the reliability of their evidence, which the delegate failed to do. In the result, the Member cancelled the Second Determination and referred the matter back to the Director for a new hearing before a different delegate (BC EST # D123/08).

5. On June 9, 2009, a new delegate conducted a fresh hearing (the “Third Hearing”) and after considering the evidence of both parties including the evidence of the parties at the previous two hearings and assessing their credibility and the reliability of their evidence, concluded, on a balance of probabilities, that she was not persuaded that there was an agreement for payment of bonus to Mr. Jaeger. As a result, the delegate held that ARA did not contravene the *Act* and no wages were outstanding or due to Mr. Jaeger (the “Third Determination”).
6. On August 13, 2009, Mr. Jaeger appealed the Third Determination on the grounds that the delegate failed to observe the principles of natural justice in making the Determination and that evidence had become available that was not available at the time the Determination was being made. The matter once again returned before the Member. In a decision made on October 28, 2009 (the “Third Appeal Decision”) (BC EST # D108/09), the Member dismissed Mr. Jaeger’s appeal holding that Mr. Jaeger had not made out a case to show a breach of the principles of natural justice on the part of the delegate who made the Third Determination and also failed to satisfy the test for adducing new evidence set out in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03.
7. Mr. Jaeger now seeks reconsideration under section 116 of the *Act* of the Third Appeal Decision on the same exact grounds of appeal he advanced in the appeal of the Third Determination, namely:
 1. The Director of Employment Standards failed to observe the principles of natural justice in making the Determination;
 2. Evidence has become available that was not available at the time the Determination was being made.
8. As a remedy, Mr. Jaeger is seeking:

...pursuant to section 115 of the *Act*, the Determination, dated July 14, 2009, be cancelled and the matter be referred to the Director of Employment Standards for a new hearing before a different delegate.
9. Pursuant to section 36 of the *Administrative Tribunal’s Act* (the “*ATA*”), which is incorporated into the *Act* (s. 103) and Rule 26 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, an oral hearing of the reconsideration application is not necessary and therefore I propose to adjudicate the reconsideration application based on the written submissions of the parties, the record adduced by the Director and a review of the Third Determination and the Third Appeal Decision.

ISSUES AND ANALYSIS

10. Section 116 of the *Act* confers the Tribunal with the authority to reconsider and confirm, cancel or vary its own orders or decisions:

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.

(3) An application may be made only once with respect to the same order or decision.

11. The authority of the Tribunal in section 116 of the *Act* is discretionary in nature as the Tribunal “may” reconsider its own orders or decisions. Further, the Tribunal’s discretion in this regard is to be exercised with caution as indicated by the Tribunal in *Re Eckman Land Surveying Ltd.*, BC EST # D413/02:

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.

12. In *Re British Columbia (Director of Employment Standards) (sub nom. Milan Holdings Ltd.)*, BC EST # D313/98, the Tribunal delineated a two-stage process that it employs in determining whether or not to exercise its reconsideration power. First, 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 such factors as: (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 Member; (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.
13. If the Tribunal, after weighing the factors in the first stage, concludes that the application is not appropriate for reconsideration then the Tribunal will reject the application and provide its reason for not reconsidering. However, if the Tribunal finds that one or more issues in the application is appropriate for reconsideration, the Tribunal will proceed to the second stage in the analysis which entails consideration of the substantive issues raised by the reconsideration.
14. The circumstances where the Tribunal will exercise its discretion in favour of reconsideration include:
- failure to comply with the principles of natural justice;
 - mistake of law or fact;
 - significant new evidence that was not reasonably available to the original panel;
 - inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
 - misunderstanding or failure to deal with a serious issue; and
 - clerical error.
15. Having said this, in the case at hand, I have carefully reviewed the submissions of Mr. Jaeger’s counsel in the Reconsideration application side-by-side with her submissions in the appeal of the Third Determination (which was before the Member who issued the Third Appeal Decision) and I find them, substantively speaking, to be very similar and in many instances identical. I find that counsel’s sole focus in the Reconsideration Application is to revisit and re-appeal the Third Determination and in this regard I am in agreement with the able submissions of both ARA’s counsel and the Director that Mr. Jaeger’s Reconsideration Application is premised on a request that this Tribunal reweigh the evidence that was before the Member in the appeal of the Third Determination (and which the Member, in my view, very thoroughly and persuasively dealt with). This is most evident on the first page of both submissions of counsel for Mr.

Jaeger and I propose to set them out verbatim below with one exception, namely, the part in italics is my emphasis:

Submission of Mr. Jaeger’s counsel in the Reconsideration Application

Erich Jaeger is filing a Reconsideration Application *re-appealing a determination issued by the delegate of the Director of Employment Standards on July 14, 2009* on the following grounds:

1. The Director of Employment Standards failed to observe the principles of natural justice in making the Determination;
2. Evidence has become available that was not available at the time the Determination was being made.

Submission of Mr. Jaeger’s counsel in the Appeal of the Third Determination

Erich Jaeger is *appealing a determination issued by a delegate of the Director of Employment Standards on July 14, 2009* on the following grounds:

1. The Director of Employment Standards failed to observe the principles of natural justice in making the Determination;
2. Evidence has become available that was not available at the time the Determination was being made.

16. I also note in terms of the remedies counsel for Mr. Jaeger is seeking in Mr. Jaeger’s Reconsideration Application, it is identical to that she sought for Mr. Jaeger in the Appeal of the Third Determination under section 115 of the *Act* and not section 116(2) of the *Act*. Again, I propose to set out the relevant passages from both submissions verbatim below except for the italics which is my emphasis:

Remedies sought by Mr. Jaeger in the Reconsideration Application

Erich Jaeger respectfully requests that in [sic] *pursuant to Section 115 of the Act, the Determination dated July 14, 2009 be cancelled and the matter be referred to the Director of Employment Standards for a new hearing before a different delegate.*

Remedies sought by Mr. Jaeger in the Appeal of the Third Determination

Erich Jaeger respectfully requests that in [sic] *pursuant to Section 115 of the Act, the Determination dated July 14, 2009 be cancelled and the matter be referred to the Director of Employment Standards for a new hearing before a different delegate.*

17. Section 115 of the *Act* is a provision that sets out remedies in respect of an appeal of a determination of the Director that the Tribunal has discretion to meet out or order. Section 115 does not apply to Reconsideration Applications, but Section 116(1)(b) does. It provides that the Tribunal, on a Reconsideration Application, may “confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel”. The “order or decision” referred to in section 116(1)(b) is that of the Tribunal, not the Director’s determination, as the focus of a reconsideration application is the decision of the Original Tribunal and this is evident in the language of section 116(1)(a) of the *Act* which states that the Tribunal may “reconsider any order or decision of the tribunal” without any mention of the determination of the Director.
18. I simply make this point to show that Mr. Jaeger’s focus in the Reconsideration Application is misapplied to the Third Determination and its re-appeal as opposed to a reconsideration of the Third Appeal Decision (i.e.

the original decision here), which should have been Mr. Jaeger's focus. This, in my view is fatal to Mr. Jaeger's Reconsideration Application.

19. A Reconsideration is not an opportunity for a party, who having been unsuccessful in the appeal of a determination, to take the proverbial "second kick at the can" before a different panel with a view to having a favourable outcome. This Tribunal will not countenance such an attempt by Mr. Jaeger, as it is inappropriate and unfair to ARA and contrary to the stated objective of the *Act* in section 2(d), namely, the fair and efficient procedure for resolving disputes.
20. In the circumstances, I find that Mr. Jaeger's application does not warrant reconsideration and I therefore do not need to pursue the second stage analysis of it as set out in *Re Milan Holdings, supra*.

ORDER

21. Pursuant to Section 116 of the *Act*, I order the Third Appeal Decision (i.e. the original decision) dated October 28, 2009, (BC EST # D108/09) be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal