An Application for Reconsideration

- by -

Barry Hodgkin, a Director or Officer of Fairwinds National Boating Inc.
("Hodgkin")

- 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

ADJUDICATOR: David B. Stevenson

FILE No.: 2002/491, 2002/492 and 2002/493

DATE OF DECISION: January 6, 2003

DECISION

OVERVIEW

Barry Hodgkin, a Director or Officer of Fairwinds National Boating Inc. ("Hodgkin"), seeks reconsideration under Section 116 of the *Employment Standards Act* (the "*Act"*) of three decisions of the Tribunal, BC EST #D356/02, BC EST #D357/02 and BC EST #D358/02, all dated August 12, 2002 (the "original decisions"). The original decisions considered appeals of Determinations issued under Section 96 of the *Act* on April 10, 2002 and which concluded concluded Hodgkin was liable under that provision to several former employees of Fairwinds National Boating Inc.

Each of the original decisions considered the same ground of appeal. Simply put, Hodgkin contended he had resigned as a director and officer of Fairwinds National Boating Inc. on October 30, 2001 and should not have been held liable under Section 96 of the *Act* for any unpaid wages of former employees of that corporation.

Hodgkin seeks a reconsideration of those decisions. He has raised to following reasons for seeking reconsideration of the original decisions:

1. The Adjudicator did not have before him, and therefore did not consider, two affidavits that had been submitted to the Tribunal in support of the appeals, one signed by Hodgkin and the other signed by Gordon W. Mains. The application contends it was inappropriate, in the circumstances, to have based the original decisions on written submissions rather than conducting an oral hearing.

2. The original decisions are inconsistent with the evidence considered by the Adjudicator.

3. The failure to properly record Hodgkin's resignation was the fault of the President of Fairwinds National Boating Inc., Mr. David Pratt, and Hodgkin should not be penalized for the negligence of Mr. Pratt.

In respect of the application for reconsideration of BC EST #D358/02, Hodgkin also contends that one of the persons included in the Determination, Mr. Paul Sievwright, was not an employee of Fairwinds National Boating Inc. For the purposes of the *Act*, but was an independent contractor.

ISSUE

In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case is appropriate for reconsideration, the substantive issues raised in this application arise out of the three points listed above.

ANALYSIS OF THRESHOLD ISSUE

The legislature has conferred an express reconsideration power on the Tribunal in Section 116 which provides:

> *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) cancel or vary the order or decision or refer the matter back to the original 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.*

Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is *"to provide fair and efficient procedures for resolving disputes over the interpretation and application"* of its provisions. Another stated purpose, found in subsection 2(b), is to *"promote the fair treatment of employees and employers"*. The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. An assessment is also be made of the merits of the Adjudicator's decision. Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the Tribunal as including:

- 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.

If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration.

I am not satisfied that this application raises any matter that warrants reconsideration.

I shall first address the application as it relates to the question of the status under the *Act* of Mr. Sievwright. The Tribunal has consistently noted that in an appeal of a Determination made under Section 96, the appellant is precluded from seeking to relitigate the liability of the corporation and is confined to only those issues which arise under Section 96 of the *Act* (*cf., Penner and Hauff*, BC EST #D371/96, *Kerry Steinemann*, BC EST #D180/96 and *Perfecto Mondo Bistro*, BC EST #D205/96). There are sound legal and policy grounds supporting the position espoused by the Tribunal. As the Adjudicator noted in BC EST #D358/02:

> A separate determination with respect to the eight employees' unpaid wage claims were issued against Fairwinds on April 4, 2002. So far as I am aware, this latter determination was never appealed to the Tribunal. I should note, at the outset, that there is no dispute before me regarding the calculation of the employees' unpaid wage claims;

Even if Hodgkin was generally allowed to challenge the inclusion of Mr. Sievwright as an employee on the corporate Determination, there are two insurmountable problems with raising it at this stage. First, it is inappropriate to raise such an issue for the first time at the reconsideration stage. Reconsideration is a process designed to address errors by the Tribunal in their decision making process. No error by the Tribunal has been alleged. Second, the time limited for appealing the Determination has long passed.

The other reasons given in support of this application do no more than challenge the conclusion that Hodgkin had not proven, by credible and cogent evidence, that the corporate records of Fairwinds National Boating Inc. filed with the Registrar of Companies, and showing him to be a director and officer of that corporation, were inaccurate.

With respect to the unavailability to the Adjudicator of Hodgkin's and Mr. Mains' affidavits, I note from the original decisions that the Adjudicator cited three problems with the assertion by Hodgkin that he tendered his resignation to Mr. Pratt on October 30, 2001. Only the first referred to the absence before him of the affidavit referred to. The second was the absence of any corroboration of that assertion from Mr. Pratt and the third was the statement by Hodgkin that the resignation was given 'verbally' and not in writing. The absence of the affidavit does not have any consequence on the latter two concerns. In fact, viewing the contents of the affidavit raises another concern, as the affidavit does not state anywhere in it that the 'resignation' was verbal and incorrectly leaves the impression that a written resignation was delivered to Mr. Pratt on or about October 30, 2001.

I am not certain what implications for the original decisions are being advanced by raising the point that the Adjudicator did not have Mr. Mains' affidavit. Having read Mr. Mains' affidavit, I agree with the disposition of that affidavit in the original decisions. The affidavit is entirely hearsay on whether Hodgkin resigned.

Finally, Hodgkin argues that the conclusion drawn by the Adjudicator of the original decisions from the evidence provided by Mr. Gary Shannon is an 'error of logic'. The Adjudicator found a statement made by Mr. Shannon, that Mr. Pratt had informed Mr. Shannon in a conversation on November 4, 2001 of Hodgkin's "desire to cease being a director" of Fairwinds National Boating Inc. was quite inconsistent with Hodgkin's evidence that he had tendered his resignation before the date of that conversation. Hodgkin's says the statement should have been accepted and given probative value, notwithstanding it was hearsay, as supporting Hodgkin's evidence that he had tendered his resignation at approximately that time. I agree with the reasoning in the original decisions. It follows that I do not find any "error of logic" in the reasoning about the value of Mr. Shannon's evidence.

Hodgkin's position on the appeals was that the records maintained by the Registrar of Companies listing him as a director and officer of Fairwinds National Boating Inc. were not correct as he had resigned as a director and officer on October 30, 2001. As noted in the original decisions, the Registrar's records are presumptively accurate and Hodgkin's burden in the appeals required him to rebut that presumption by credible and cogent evidence. In that context, the difference between a stated 'desire' to cease being a director of a corporation and the physical act of tendering an effective resignation is not simply a matter of form. When the stated 'desire' is identified as having been made after the alleged resignation, it is an inconsistency on the very point that Hodgkin was required to establish on "credible and cogent" evidence. In addition, when the evidence is hearsay, the value of such a statement has little probative value for any purpose.

The Tribunal will not exercise its discretion to reconsider the original decisions.

ORDER

Pursuant to Section 116 of the *Act*, I order the original decisions, BC EST #D356/02, BC EST #D357/02 and BC EST #D358/02, all dated August 12, 2002 be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal