An Application for Reconsideration

- by -

Vancity Sub Owners Ltd. carrying on business as Subway
(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.: 2010A/177

DATE OF DECISION: February 3, 2011

DECISION

SUBMISSIONS

Narinder Nijjar	on behalf of Vancity Sub Owners Ltd. carrying on business as Subway
Jennifer R. Redekop	on behalf of the Director of Employment Standards

OVERVIEW

1. I have before me an application filed by Vancity Sub Owners Ltd. carrying on business as Subway (the "Applicant") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") to reconsider BC EST # D116/10 issued on November 3, 2010 (the "Appeal Decision"). By way of the Appeal Decision, the Tribunal confirmed a Determination issued on June 17, 2010, ordering the Applicant to pay its former employee, Elina Papule ("Papule"), the sum of $1,196.73 on account of unpaid wages and section 88 interest and, further, ordering it to pay the additional sum of $2,500 on account of five separate monetary penalties (see *Act*, section 98). Thus, the total amount payable under the Determination was $3,696.73.

2. In my judgment, this application does not pass the first step of the two-step *Milan Holdings* test (see *Director of Employment Standards and Milan Holdings Inc.*, BC EST # D313/98) and, accordingly, I am summarily dismissing the application. I briefly set out my reasons below.

PRIOR PROCEEDINGS

3. The Applicant operates several "Subway" sandwich shops and Ms. Papule was employed at one of its restaurants from February 26 to September 24, 2009 (approximately seven months). Her employment was terminated without cause or notice and without payment of any compensation for length of service (see *Act*, section 63). Accordingly, Ms. Papule filed a timely complaint claiming compensation for length of service as well as overtime pay, statutory holiday pay, and vacation pay. The complaint was subsequently investigated resulting in the Determination being issued as noted above.

4. The Director's delegate determined that the Applicant failed to pay Ms. Papule overtime pay, statutory holiday pay, vacation pay and compensation for length of service in accordance with the provisions of the *Act*. The five monetary penalties were levied based on these four separate contraventions as well as a fifth contravention relating to a failure to deliver employment records (see *Employment Standards Regulation*, section 46). The Applicant appealed the Determination on the ground that it had new and relevant evidence (see *Act*, section 112(1)(c)). In fact, the Applicant did not tender any new evidence (the documents tendered were either before the delegate when the Determination was being made or were otherwise simply not new since they could have been submitted if the Applicant had chosen to more fully participate in the delegate's investigation). However, the Tribunal Member also turned her mind to whether the delegate had breached the principles of natural justice in making the Determination (see *Act*, section 112(1)(b)) because this ground appeared to arise from the assertions advanced by the Applicant in its appeal submission.

5. The appeal was dismissed and the Determination confirmed. As noted at the outset of these reasons, the Applicant now applies for reconsideration of the Appeal Decision under section 116(1) of the *Act*:

> 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.

ANALYSIS

6. The Applicant's submission – consisting of a 1 ½ page letter appended to its Reconsideration Form (Form 2) and payroll records that were previously filed with the delegate and the Tribunal – is somewhat problematic. Although the Applicant seemingly takes issue with certain findings of fact made by the delegate and confirmed by the Appeal Decision and continues to assert that it has been treated with a "heavy hand" and unjustly, it also states: "Now under the circumstances we agree to pay the amount determined by the branch to the worker".

7. The Applicant's present concern appears to relate solely to the five $500 administrative penalties that were levied against it. The Applicant states that these penalties impose a serious financial hardship on its business and threaten its continued viability. The Applicant seeks the following relief: "Under the circumstances we are paying the worker as per your decision but you can remove the penalty imposed on us by the Branch which is creating hardship on this business…A cheque for the worker is enclosed to your office and you can forward it to the branch so they can give it to the worker."

8. The fundamental (and decisive) problem with the Applicant's position is that the Tribunal does not have the statutory authority to cancel administrative penalties based on grounds of economic hardship. If one or more contraventions of the *Act* are proven – as is the case here – there is no statutory authority vested in the Tribunal to grant relief against any penalties imposed by the Director. Once the penalties have been confirmed as having been properly levied, the Tribunal has no authority to grant relief and thus the matter of collection can now only be addressed directly between the Applicant and the Director of Employment Standards.

9. Since this application does not raise an important question of "law, fact, principle or procedure" (see *Milan Holdings*, *supra*), there is simply no basis to proceed further into an inquiry regarding the merits of the application. To put the matter another way, the application is fatally flawed on its face and, therefore, must be summarily dismissed.

10. I might add, simply for the sake of completeness, that insofar as the Applicant still maintains that the Appeal Decision is incorrect, I find that position to be wholly untenable. In my view, and in light of the record in this matter, the Appeal Decision reflects the only rational decision that was open to the Tribunal Member.

ORDER

11. The application to reconsider the Appeal Decision is refused. According, pursuant to section 116 of the *Act*, BC EST # D116/10 is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal