An Application for Reconsideration

- by -

Matthew Wren carrying on business as Ad Star Advertising, aka Ad Star Advertising Ltd.
("Wren")

- 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: David B. Stevenson

FILE No.: 2010A/165

DATE OF DECISION: February 9, 2011

DECISION

SUBMISSIONS

Terry J. Hewitt	counsel for Matthew Wren carrying on business as Ad Star Advertising, aka Ad Star Advertising Ltd.
Glen Smale	on behalf of the Director of Employment Standards

OVERVIEW

1. Matthew Wren carrying on business as Ad Star Advertising, aka Ad Star Advertising Ltd. ("Wren") seeks reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision, BC EST # D102/10, made by the Tribunal on September 28, 2010 (the "original decision"). The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on June 9, 2010. The Determination considered complaints filed by Nathan Gatabaki, Darrell Little and Scott Moloney, who alleged Wren had contravened requirements of the *Act* in respect of their employment by failing to pay wages and requiring the complainants to pay Wren's business expenses.

2. The Determination found that Wren had contravened sections 16, 18, 21, 27, 45 and 58 of the *Act* and ordered the payment of minimum wages, statutory and annual vacation pay, employer expenses and interest under section 88 of the *Act* in the amount of $25,771.82 and imposed administrative penalties on Wren for contraventions of the *Act* in the amount of $3000.00.

3. Wren appealed the Determination on the ground the Director erred in law and failed to observe principles of natural justice in making the decision. Wren also sought to introduce new evidence on the appeal.

4. The Tribunal Member of the original decision found the grounds of appeal were not established, refused to allow additional evidence and, as a result, dismissed the appeal and confirmed the Determination.

5. In this Application for Reconsieration, which was filed outside of the time limit for filing a reconsideration under section 116 of the *Act* and the Rules of the Tribunal, Wren says the Tribunal Member of the original decision considered the wrong question and if the proper questions had been asked and answered in the original decision, the result should have been different. Wren also says the Tribunal erred by not holding an oral hearing on the appeal and contravened its own Rules by failing to set out the procedure that would be followed for the appeal or notifying him that the Tribunal intended to decide the appeal on written submissions.

ISSUE

6. There are a number of issues that arise in this application. The first two are preliminary issues: whether the Tribunal should extend the time for filing the application; and whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. A third issue, which arises only if the Tribunal is satisfied the case is appropriate for reconsideration, is the substantive issue raised in this application: whether the Tribunal member making the original decision committed reviewable errors in dismissing the appeal.

ANALYSIS OF THE PRELIMINARY ISSUES

7. The Tribunal allows 30 days from the date of the original decision to file an application for reconsideration: see Rule 22(3). The Tribunal has discretion to extend that time period. A party wishing an extension of the time period must request an extension and provide written reasons for the delay: see Rule 22(4).

8. Counsel for Wren says this application was delayed as a result of an oversight in his office, in which the original decision was mistaken for a related decision, dealing with a suspension application under section 113, and which caused the original decision to be put aside without being brought to his attention. Counsel says the original decision came to his attention on November 6, 2010. He filed a request with the Tribunal for an extension of time on November 8, 2010. This application was delivered to the Tribunal on November 10, 2010.

9. Counsel also says his client, Wren, did not become aware of the decision until November 8, 2010.

10. I note the decision on the suspension application was issued by the Tribunal on September 20, 2010. In that decision, the Tribunal Member advised the parties that he intended to complete the decision on the main appeal within two weeks. The original decision was issued eight days after the suspension decision.

11. When considering a request to extend the time period on a reconsideration application, the Tribunal considers the same factors as those considered on a request under section 109(1)(b), which have been described in *Metty M. Tang*, BC EST # D211/96, and *Re Niemisto*, BC EST # D099/96, and applied in many Tribunal decisions. The Tribunal does not lightly grant extensions of time to file appeals. I would say, however, that it may be appropriate to adopt a less strict approach to the application for extending the time period on a reconsideration application as the Tribunal, in any event, takes a very restrained approach in exercising its reconsideration discretion and considers some of the same factors that are identified in the section 109(1)(b) decisions, as well as the general timeliness of the reconsideration application.

12. Section 116 of the *Act* reads:

> *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.*

13. The Tribunal has consistently provided an overview of the manner in which section 116 is interpreted and administered, but it always bears repeating.

14. 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 (even if an extension has been granted), the nature of the issue and its

importance both to the parties and the system generally. An assessment is also made of the merits of the original decision. The focus of a reconsideration application is the original decision.

15. 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.

16. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively re-visit the original decision and come to a different conclusion.

17. 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.

ARGUMENT

18. On the timeliness issue, counsel for Wren says this is an appropriate case to extend the time period for a reconsideration application. He relies primarily on an "oversight" committed in his office as the basis for the extension. He also says this is the first extension he has sought in the process.

19. The Director opposes any extension of time. He argues such an extension of time would be inconsistent with the purposes of the *Act* and potentially prejudicial to the established rights of the complainants.

20. On the issue of the appropriateness of the Tribunal allowing a reconsideration of the original decision, counsel for Wren says that such a result is appropriate for several reasons:

1. The Tribunal Member of the original decision failed to properly frame the questions on the issue of whether or not the Director gave Wren a reasonable opportunity to respond;
2. The Tribunal Member reached conclusions and inferences of fact that were unsupported by any evidence before him;
3. The Tribunal Member should have conducted a hearing before making the original decision – which I take to mean there should have been an oral hearing on the appeal;
4. The Tribunal should have clearly set out the procedure it was going to follow before making the original decision, as required by Rule 18(2), and then given the parties the opportunity to proceed according to that procedure; and
5. The Tribunal contravened its own Rules by deciding the appeal based solely on written submissions without notifying the appellant.

21. I shall elaborate on each of these points.

22. On the first point, counsel for Wren says the Tribunal Member in the original decision misstated the question to be addressed on appeal when, in paragraph 6, he framed the major issue in the appeal as being whether Wren "had a lawful excuse for having failed to respond to the delegate's various requests for information". He says the questions which should have been asked and answered were whether the Director made reasonable efforts to give Wren an opportunity to respond and whether Wren in fact had the opportunity to respond.

23. Counsel says both of these questions should have been answered in the negative. He sets out certain "stated facts" in support of this point. Several of the assertions of "facts" made in the appeal are not found in the section 112(5) Record, the Determination or the original decision, although they were submitted with the appeal and considered and commented on in the original decision. Counsel submits that if there was any doubt about the veracity of these assertions of fact, it was incumbent on the Tribunal to conduct a hearing in which sworn evidence could have been provided.

24. Counsel for Wren says the Tribunal Member in the original decision drew "a number" of conclusions that had no basis in fact. The application submission makes reference to two comments in support of this point: a comment at paragraph 19 of the original decision, that "it appeared [Wren] was avoiding service" and another at paragraph 18, where the Tribunal Member states, "I am fully satisfied that Mr. Wren did have an opportunity to participate in the delegate's investigation but, for whatever reason, chose not to avail himself of the opportunity that was afforded to him".

25. In respect of the first, counsel says the comment was groundless as there was nothing in the Determination or the Director's submissions on appeal that indicated the Director felt Wren was avoiding service. In respect of the second, counsel says the statement is completely contrary to the "undisputed facts" and without any evidentiary foundation. Specifically, counsel says there is no evidence Wren "chose" not to participate in the appeal process.

26. Counsel submits the Tribunal, and the Tribunal Member in the original decision, contravened Tribunal Rules 18 and 19 by failing to advise Wren how the appeal would be conducted or the potential need to file affidavit material to support the assertions being made in the appeal. While counsel does not use the terms, the submission on these points seem to raises a question of whether the Tribunal breached principles of natural justice and denied Wren procedural fairness in adjudicating the appeal.

27. The Director says the application distorts or avoids some of the facts on which the Determination and the original decision were based. The Director says the application is an attempt to have the Tribunal re-weigh evidence that was tendered in the appeal.

ANALYSIS

28. On the matter of the timeliness of this application, I am inclined to allow the extension of time for filing the application requested by counsel for Wren, choosing instead to include the delay in filing the application and those factors normally associated with applications to extend the time limits under section 109(1)(b) within the section 116 assessment.

29. In that context, I do not find the delay in this case weighs heavily against reconsideration. The prejudice to the complainants by the delay weighs more heavily and is a factor to be considered in assessing the

appropriateness of this application but is not of itself determinative of whether reconsideration will be granted.

30. Turning to the reconsideration application, I shall address the points raised by counsel for Wren, beginning with the contention that the Tribunal Member of the original decision failed to properly frame the question relating to the issue of whether Wren was given an opportunity to respond.

31. I do not accept the issue on the appeal was not properly framed in the original decision. The offending statement in the original decision does nothing more than capture the burden on Wren in the appeal, which was to show, notwithstanding section 122 and the facts provided in the Determination, that there was a lawful excuse for Wren failing to respond to the Director's communications. Oddly enough, that is the very point made in the Tribunal's decision, *Him-Mat Enterprises Ltd.*, BC EST # D123/03, a decision relied on by counsel for Wren in this application. In that decision, the following comment summarizes the burden, and the focus of the analysis, when the question is whether a failure to respond on an appeal was because the appellant was not notified of the claim:

> I am satisfied that Mr. Darbura did not have an opportunity to respond to the allegations. Although the documents were served in accordance with the *Act*, and thus are deemed to have been served, that presumption is rebuttable.

32. Even if I accepted the original decision misstated the question to be addressed in paragraph 6, it is inarguable that the Tribunal Member, in paragraphs 12 through 21, asked and answered the very question counsel says should have been addressed, which was whether the facts demonstrated the Director made reasonable efforts to provide Wren with an opportunity to respond to the complaints. That is apparent from the comment found in paragraph 18 of the original decision, where the Tribunal Member says: "I am fully satisfied that Mr. Wren did have an opportunity to participate in the delegate's investigation but, for whatever reasons, chose not to avail himself of the opportunity".

33. I appreciate the above statement, and another statement, found in paragraph 19, are challenged by counsel as having been made without any reasonable basis in fact. However, I once again find myself in disagreement with the position of counsel for Wren on this point. The Determination and the material in the section 112(5) Record, when read in their totality, provide an ample, and reasonable, factual basis for the challenged statements made in the original decision. The comments are a reasonable inference from the finding of the Director, accepted in the original decision, that notice of the complaints was delivered to Wren at his New Westminster business address and his Springfield Road home address and never claimed, that Wren had time to claim the correspondence sent by the Director and that he failed to do so.

34. When viewed from the perspective of the facts and conclusions of fact found by the Director and endorsed by the Tribunal Member considering the appeal, the entire argument of counsel for Wren on the key point in this application is premised on an assertion that those findings of facts are wrong. The burden of demonstrating such an error was not met in the appeal and the attempt to revisit that matter in this application weighs heavily against it.

35. I can deal with the final three points raised in this application collectively.

36. The Tribunal has a discretion whether to hold an oral hearing on an appeal: see Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), Rule 17 of the Tribunal's *Rules of Practice and Procedure* and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575. The decision in this case to adjudicate the appeal on written submissions has not been

shown to be an abuse of that discretion or otherwise reviewable. I note that counsel for Wren did not seek an oral hearing on the appeal at any time during the process.

37. The fact that no specific notice was given that no oral hearing would be held cannot, in the circumstances, be considered a breach of natural justice or procedural fairness. The parties had ample notice from the Tribunal, in its communication to the parties dated July 16, 2010, that the appeal would likely proceed by way of written submissions. In that communication, the Tribunal stated:

> The Tribunal will permit the parties to this appeal to file a final reply within a time limit. Once the final replies have been received, a Tribunal Member will decide this appeal. The Member will choose the means to decide this appeal. Usually, the appeal hearing will proceed as a written submission hearing.

38. The parties had no expectation an oral hearing would be held. As noted, counsel for Wren did not seek an oral hearing on the appeal. The July communication from the Tribunal was sufficient to alert the parties the matter was not likely to proceed in any way other than by written submissions. Where the parties have been alerted to the likelihood of a decision on written submissions, the Tribunal is under no duty to provide specific notice of its intention to process an appeal without an oral hearing: see *D. Hall & Associates*, *supra*, at para. 40.

39. Similarly, the Tribunal is under no duty to advise an appellant how their appeal should be conducted. That kind of involvement in directing an appeal could, with some justification, lead to allegations by other parties to the appeal that the Tribunal was assisting that party and impact adversely on the impartiality of the Tribunal.

40. In sum, I find this application raises no issues that have been identified by the Tribunal as favouring a reconsideration. I find the primary thrust of this application is to revisit the original decision by challenging and seeking a re-assessment of findings and conclusions of fact that were made in the Determination and endorsed on the original decision. That is not an appropriate use of the Tribunal's section 116 authority.

41. The application is dismissed.

ORDER

42. Pursuant to section 116 of the *Act*, this application for reconsideration is dismissed.

David B. Stevenson
Member
Employment Standards Tribunal