

An Application for Reconsideration

- by -

Elite Furniture Ltd.
("Elite Furniture")

- 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.: 2015A/167

DATE OF DECISION: January 22, 2016

DECISION

SUBMISSIONS

Nancy Liu

on behalf of Elite Furniture Ltd.

OVERVIEW

1. Elite Furniture Ltd. (“Elite Furniture”) has filed an application pursuant to section 116 of the *Employment Standards Act* (the “*Act*”) for reconsideration of BC EST # D117/15 issued on November 5, 2015, by Tribunal Member Stevenson (the “Appeal Decision”).
2. The Tribunal reviews reconsideration applications in accordance with a two-stage framework (see *Director of Employment Standards (Milan Holdings Inc.)*, BC EST # D313/98, (“*Milan Holdings*”). The Tribunal will first assess whether the application raises a sufficiently serious question of law, fact, procedure or principle so as to justify a more detailed examination of the merits of the application (the second stage). In my view, this application does not pass the first stage of the *Milan Holdings* test and, accordingly, must be summarily dismissed. My reasons for so concluding are set out in greater detail, below.
3. In assessing the present application, I have reviewed Elite Furniture’s application and supporting materials, the Appeal Decision, and the complete record that was before Tribunal Member Stevenson.

PROCEDURAL HISTORY

4. On February 17, 2015, Bobby Chi Keung So (“Mr. So”) filed an unpaid wage complaint against Elite Furniture. Mr. So sought nearly \$22,000 in unpaid wages. Mr. So’s complaint was the subject of a hearing before a delegate of the Director of Employment Standards (the “delegate”). On July 21, 2015, the delegate issued a Determination ordering Elite Furniture to pay Mr. So the total sum of \$30,881.47 on account of regular wages, overtime pay, statutory holiday pay, vacation pay and section 88 interest. Further, and also by way of the Determination, eight separate \$500 monetary penalties were levied against Elite Furniture based on its contraventions of sections 17, 18, 27, 40, 45, 46 and 58 of the *Act* and section 46 of the *Employment Standards Regulation*. Thus, the total amount of the Determination was \$34,881.47.
5. The deadline for appealing the Determination, presumably calculated in accordance with the deemed service provisions contained in section 122 of the *Act*, was August 28, 2015. This deadline, along with information regarding the appeal process, was set out in a text box headed “Appeal Information” on the third page of the Determination. On September 10, 2015, Elite Furniture filed a late appeal challenging the Determination on the ground that the delegate erred in law (see subsection 112(1)(a) of the *Act*). Given that the appeal was not filed within the statutory appeal period, Elite Furniture also applied for an extension of the appeal period under subsection 109(1)(b) of the *Act*.
6. In its appeal documents, Elite Furniture claimed that Mr. So’s “hours and wages are not correct” but also stated: “We are willing to pay for his wages but we are currently struggling with financial crisis, so we unable to pay the full amount immediately” [*sic*] and then proposed paying “\$500/month right now, if in future our financial problems are resolved we able to speed up the payments” [*sic*]. Finally, Elite Furniture stated: “We hope you can understand our current struggles and allow us to pay monthly payments instead of the full amount right away”. I should note, at this juncture, that the Tribunal has no statutory authority to order a determination to be paid by way of periodic payments – matters concerning the *payment* of a determination (as

distinct from matters concerning the legality of the determination itself) fall within the bailiwick of the Director of Employment Standards.

7. As for the appeal deadline extension application, Elite Furniture stated that it had all of its appeal materials prepared by the August 28 deadline but sent it to the delegate rather than filing their material with the Tribunal. Elite Furniture says that it learned of its error on September 2, 2015, but did not otherwise explain why, when apparently all of its material was ready for filing, it waited until September 10, 2015, before filing its appeal with the Tribunal.
8. By way of the Appeal Decision, Tribunal Member Stevenson dismissed Elite Furniture's application to extend the appeal period. Member Stevenson was not satisfied that Elite Furniture provided a satisfactory explanation for its failure to file a timely appeal. He also noted that the appeal was incomplete in that Elite Furniture failed to provide – or apparently make a timely application for (see section 81 of the *Act*) – written reasons for the Determination along with its Appeal Form (see subsection 112(2)(a)(i.1) of the *Act*). Finally, he was of the view that the grounds of appeal were “very weak” and thus characterized the appeal as having no reasonable prospect of succeeding (see subsection 114(1)(f) of the *Act*). Tribunal Member Stevenson confirmed the Determination.

THE APPLICATION FOR RECONSIDERATION

9. Rule 27(2) of the Tribunal's *Rules of Practice and Procedure* states that reconsideration applications must be filed “within 30 days after the date of the Tribunal order or decision”. Having previously filed a late appeal, Elite Furniture, demonstrating a triumph of consistency over compliance, then proceeded to file a late reconsideration application – the present application was filed on December 10, 2015.
10. Leaving aside the fact that this is a late application, Elite Furniture has wholly failed to provide any rational basis to support its application other than to state: “[o]ur reason for reconsideration is the same reason from Form 1”. In other words, Elite Furniture simply reiterates the identical position it advanced in its appeal documents. Elite Furniture does not advance *any* argument suggesting that Tribunal Member Stevenson erred in refusing to extend the appeal period.

FINDINGS AND ANALYSIS

11. Although the present application is late, it is not unduly late – less than one week. Nevertheless, the application *is* late and Elite Furniture has not provided *any* explanation, as required by Rule 28(1)(b), for its failure to file a timely application.
12. More fundamentally, Elite Furniture does not say how or why Member Stevenson erred in refusing to extend the appeal period (and this was the principal basis for rejecting the appeal). Member Stevenson's reasons in this latter regard are cogent and I entirely agree with these comments (at para. 20):

The Determination contains information indicating the last day for delivering an appeal and that it must be delivered to the Tribunal. That information is prominently displayed on the Determination. The web site for the Tribunal is provided as a source for acquiring information on how to appeal. Also, the top of the Appeal Form, provides further notice that the Appeal Form must be delivered to the Tribunal, again prominently displayed, and contains an encouragement to a party completing the Appeal Form to “read the Guide to the Appeal Form” that is provided with it. One would have to be very careless or completely disinterested in ensuring the correctness of an appeal to miss the filing requirements and statutory obligations.

13. Apart from failing to file a timely appeal, Elite Furniture filed an incomplete appeal and advanced no reasonable ground for setting aside the Determination. I endorse and adopt Member Stevenson's comments with respect to these matters.
14. In *Milan Holdings*, the Tribunal cautioned that it should not entertain reconsideration applications that amount to nothing more than attempts to reargue, without presenting any new compelling evidence or arguments, the case submitted on appeal. The present application is, on its face, an undisguised attempt to simply reargue the case presented on appeal. I fully agree with Member Stevenson that, first, this was not a proper case for the Tribunal to exercise its statutory discretion to extend the appeal period and, second, the appeal, on its merits, had no reasonable prospect of succeeding.

ORDER

15. Elite Furniture's application to have the Appeal Decision reconsidered is refused. Pursuant to subsection 116(1)(b) of the *Act*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal