

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/168

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 # D118/15 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 searching 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, Bai Xiang Zhao (“Mr. Zhao”) filed an unpaid wage complaint against Elite Furniture seeking slightly more than \$11,000 in unpaid wages. Mr. Zhao’s complaint was the subject of a hearing before a delegate of the Director of Employment Standards (the “delegate”) on July 7, 2015, at which both Mr. Zhao and Elite Furniture appeared.
5. On August 7, 2015, the delegate issued a Determination ordering Elite Furniture to pay Mr. Zhao the total sum of \$11,714.62 on account of regular wages, overtime pay, statutory holiday pay, vacation pay and section 88 interest. Further, and also by way of the Determination, four separate \$500 monetary penalties were levied against Elite Furniture based on its contraventions of sections 17, 18 and 27 of the *Act* and section 46 of the *Employment Standards Regulation*. Thus, the total amount of the Determination was \$13,714.62.
6. On September 10, 2015, Elite Furniture filed an appeal challenging the Determination on the ground that the delegate erred in law (see subsection 112(1)(a) of the *Act*). More specifically, Elite Furniture seemingly alleged that Mr. Zhao was an independent contractor rather than employee, and thus not entitled to the benefit of the wage recovery provisions of the *Act*. Elite Furniture asserted: “We understand how much we owe Bai Xiang Zhao, but we clearly stated before we subcontracted the work to him that there was no overtime pay nor were there going to be vacation pay as work are done on their own accord and how much time it would take would be on their own time” [*sic*]. However, Elite Furniture also asserted, somewhat incompatibly with its previously outlined argument, that it was prepared to accept liability for the full amount of the Determination provided it could be paid by way of instalments: “As we are currently struggling with financial issues we are only willing to pay \$500/month for now”.
7. It should be noted 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. Further, if Mr. Zhao *was* an employee rather than an independent contractor, any agreement that might have been reached with respect to the non-payment of overtime pay or vacation pay would have no legal force or effect in light of section 4 of the *Act*.

8. By way of the Appeal Decision, Tribunal Member Stevenson concluded that the delegate did not make any legal errors in making the Determination. He thus dismissed the appeal and confirmed the Determination.
9. First, Member Stevenson was not persuaded that Elite Furniture met its evidentiary burden of showing that Mr. Zhao was an independent contractor rather than an employee (at paras. 20 – 21):

First, in raising the status of Mr. Zhao under the *Act*, Elite does nothing more than baldly assert he was not an employee of Elite but a sub-contractor. Elite makes this assertion without providing a single argument, based either in law or in fact, why their position is correct and the Director was wrong.

As indicated above, the burden of showing error of law is on Elite and they have fallen far short of meeting this burden. There is nothing in the “record” or in the appeal that would show Mr. Zhao was not an employee of Elite applying the definitions of “employer” and “employee” under the *Act* to the circumstances of Mr. Zhao’s employment.

10. Second, Member Stevenson was also satisfied that the delegate’s findings of fact were adequately supported by the evidence before him (para. 22): “There is nothing perverse or inexplicable about the findings made by the Director; they are rational and firmly grounded in the evidence provided and accepted in the Determination, and included in the “record” [and these] findings are unaffected by anything in the appeal.”
11. In light of these two conclusions, Member Stevenson was satisfied that Elite Furniture’s appeal had no reasonable prospect of succeeding and, accordingly, dismissed the appeal under subsection 114(1)(f) of the *Act*.

THE APPLICATION FOR RECONSIDERATION

12. 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”. The Appeal Decision was issued on November 5, 2015, but the present reconsideration application was not filed until December 10, 2015.
13. 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: “our reason for reconsideration is the same reason for Form 1” [*sic*]. In other words, Elite Furniture simply reiterates the identical position it advanced in its appeal documents.
14. Both the record and the delegate’s “Reasons for the Determination” indicate that the *only* parties to testify at the complaint hearing were Mr. Zhao, on his own behalf, and Nancy Hui Lin-Liu and Wayne Guorong Liu, for Elite Furniture. Despite this fact, Elite Furniture – seemingly confusing this application with another application relating to a different employee’s unpaid wage claim – purports to attack the credibility of other individuals who did not even testify at the complaint hearing regarding Mr. Zhao’s claim.
15. In order to afford Elite Furniture an opportunity to clarify its position regarding evidence at the complaint hearing, and to provide some explanation for its tardy reconsideration application, the Tribunal’s Appeal Manager wrote to Elite Furniture on December 8, 2015, requesting information regarding its reasons for seeking reconsideration of the Appeal Decision in question (rather than the decision relating to the other

employee) and an explanation for having failed to file a timely reconsideration application. Elite Furniture was given until 4:30 PM on December 14, 2015, to deliver the requested information to the Tribunal but, inexplicably, Elite Furniture did not provide the requested information.

FINDINGS AND ANALYSIS

16. 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. I note that Elite Furniture failed to provide any sort of explanation for its tardy application despite being expressly requested to do so.
17. 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 the appeal, on its merits, had no reasonable prospect of succeeding.

ORDER

18. 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