

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/169

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 # D119/15 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, David Cheung (“Mr. Cheung”) filed an unpaid wage complaint against Elite Furniture. Mr. Cheung sought nearly \$13,000 in unpaid wages. Mr. Cheung’s complaint was the subject of a hearing before a delegate of the Director of Employment Standards (the “delegate”). On July 10, 2015, the delegate issued a Determination ordering Elite Furniture to pay Mr. Cheung the total sum of \$15,530.13 on account of regular wages, overtime pay, statutory holiday pay, vacation pay, recovery of business costs paid (see section 21 of the *Act*) 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, 21, 27, 40, 45 and 58 of the *Act* and section 46 of the *Employment Standards Regulation*. Thus, the total amount of the Determination was \$19,530.13.
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 17, 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. Cheung was “subcontracted” to do some painting and framing work and that he was “not an Elite Furniture employee”. However, in a seeming admission of liability, Elite Furniture also says that “we are unable to pay the full amount due to David Cheung immediately” and “[a]s we [are] struggling with financial issues, we are willing to pay \$500/month to David Cheung”. In regard to this latter proposal, 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 purview of the Director of Employment Standards.

7. With respect to the appeal deadline extension application, Elite Furniture says the following:

The reason why we're late was because we did not fully understand what the documents were and had to find someone to translate it for us. Until we found someone to translate it for us, the deadline has [*sic*] already passed and we also sent our appeal to the wrong email address.

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 (paras. 19 – 21):

This appeal has been filed more than three weeks late. The explanation provided by Elite is that some unspecified documents needed to be translated and by the time that was done the appeal period had expired. The delay caused by seeking translation was apparently compounded by the appeal being sent to a wrong email address. I do not find the reasons provided for the late filing of the appeal are reasonable.

Elite is responsible for ensuring it understands the Determination and its legal ramifications. The obligation to ensure timely filing of an appeal is on the person seeking to appeal, in this case Elite. That obligation, by necessity, includes acquiring an understanding of the requirements for filing an appeal in a timely way. It is apparent Elite failed to do this.

If Elite had been diligent, it would have seen that the Determination contains information indicating the last day for delivering an appeal and that such appeal must be delivered to the Tribunal. That information is prominently displayed on the Determination. It would have seen 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, again prominently displayed, provides further notice that the Appeal Form must be delivered to the Tribunal and contains an encouragement to a party completing the Appeal Form to "read the Guide to the Appeal Form" that is provided with the it.

9. Member Stevenson 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*) and thus could be summarily dismissed under subsection 114(1)(h) of the *Act*. Finally, he was of the view that the grounds of appeal were "very weak" and accordingly 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

10. 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". Elite Furniture failed to comply with this directive since the present application was filed on December 10, 2015. I note this is the second time Elite Furniture has failed to meet a deadline for filing material with the Tribunal.
11. 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 for Form 1" [*sic*]. In other words, Elite Furniture simply reiterates the identical position it advanced in its appeal documents. Elite also says that the delegate erred in accepting the evidence of certain witnesses who testified on Mr. Cheung's behalf.

12. Elite Furniture has not advanced *any* argument suggesting that Tribunal Member Stevenson erred in refusing to extend the appeal period or otherwise failed to properly evaluate the *Niemisto* criteria (see BC EST # D099/96) that govern subsection 109(1)(b) applications.

FINDINGS AND ANALYSIS

13. 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.
14. 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 his comments on this point, quoted above.
15. 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 also endorse and adopt Member Stevenson’s comments with respect to these matters (at paras. 26 – 28):

On its face, this appeal does nothing more than baldly assert Mr. Cheung was not an employee of Elite but a sub-contractor. Elite makes this assertion without a providing a single argument, based either in law or in fact, why their position is correct and the Director was wrong.

There is no merit to the challenges made by Elite for at least two reasons. First, there is no indication in any of the material in the “record” that Elite ever raised a question of the status of Mr. Cheung during the complaint process. Elite provided no evidence of the nature of its relationship with Mr. Cheung. To give effect to this argument would require the Tribunal to ignore the long established principle enunciated in cases such as *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97, which states that barring special circumstances parties may not fail or refuse to cooperate or participate in the complaint process and later seek to file an appeal of the Determination when they disagree with it. In this case Elite failed to participate in the complaint process. This failure compels a finding that they may not now seek to challenge the Determination by seeking to make a case they should have attempted to make in the complaint process. Simply put, if Elite believed Mr. Cheung was not an employee, it should have submitted this argument, along with any supporting evidence, to the Director during the complaint process.

Second, and in any event, 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”, as indicated above, and nothing in their appeal that might indicate Mr. Cheung was not an employee of Elite applying the definitions of “employer” and “employee” under the *Act* to the circumstances of Mr. Cheung’s employment.

16. Thus, Elite Furniture’s appeal was summarily dismissed on three separate grounds – it was an untimely appeal (subsection 114(1)(b) of the *Act*); Elite Furniture failed to fully comply with subsection 112(2) of the *Act* (subsection 114(1)(h) of the *Act*); and the appeal had no reasonable prospect of succeeding (subsection 114(1)(f) of the *Act*).
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, 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

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