

An Application for Reconsideration

- by -

Belong Plumbing and Heating Ltd.
(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.: 2011A/2

DATE OF DECISION: March 2, 2011

DECISION

SUBMISSIONS

Wayne Belong on behalf of Belong Plumbing and Heating Ltd.
Ravi Sandhu on behalf of the Director of Employment Standards

OVERVIEW

1. This is an application filed by Belong Plumbing and Heating Ltd. (the “Applicant”) pursuant to section 116 of the *Employment Standards Act* (the “*Act*”) for reconsideration of Tribunal Decision BC EST # D127/10 issued on December 6, 2010. By way of this latter decision, the Tribunal refused to extend the time for filing an appeal and also refused to suspend the Determination that was being appealed. Consequently, the appeal relating to the Determination issued on June 15, 2010 ordering the Applicant to pay its former employee, Robert Lafreniere (“Lafreniere”), the sum of \$10,682.53 on account of unpaid wages and section 88 interest, was dismissed (see *Act*, section 114(1)(b)). I should also note that the Determination included \$1,500 in monetary penalties (section 98) and thus the total amount payable under the Determination is \$12,182.53.
2. In my view, this application does not meet the first step of the two-step *Milan Holdings* test (see *Director of Employment Standards and Milan Holdings Inc. et al.*, BC EST # RD 313/98) and, accordingly, must be summarily dismissed.
3. I am adjudicating this application based on the parties’ written submissions and in that regard I have a brief submission filed on behalf of the Applicant and the Director of Employment Standards. Mr. Lafreniere did not file a submission in this matter.

PRIOR PROCEEDINGS

4. Mr. Lafreniere filed a timely unpaid wage complaint against the Applicant. In due course, the complaint was scheduled to be heard on May 13, 2010, and both parties were duly notified of the hearing date. However, the Applicant did not appear at the complaint hearing. Although efforts were made to contact the Applicant on May 13, 2010, these proved to be unsuccessful.
5. The delegate conducting the hearing heard *viva voce* evidence from Mr. Lafreniere and also received certain corroborating documents such as a “time worked” spreadsheet and various e-mails. The delegate found Mr. Lafreniere’s evidence to be credible and cogent. Thus, as noted above, by way of a Determination issued on June 15, 2010, Mr. Lafreniere was awarded unpaid wages in the total amount (including section 88 interest) of \$10,682.53. This sum included unpaid regular wages, statutory holiday pay, vacation pay and 1 week’s wages as compensation for length of service.
6. The appeal period relating to the Determination expired on July 23, 2010. The Applicant filed an appeal over two months later – on September 30, 2010 – on the ground that it had new and relevant evidence that was not available when the Determination was being made (section 112(1)(c)). The first issue to be addressed was whether the appeal period would be extended pursuant to section 109(1)(b) of the *Act*.

7. Tribunal Member Roberts considered the matter and issued written reasons refusing to extend the appeal period. This decision is the subject of the present reconsideration application. In dismissing the application to extend the appeal period, Tribunal Member Roberts noted the following points:
- The Applicant did not provide a reasonable and credible explanation for having filed a late appeal (para. 31);
 - The evidence suggested that the Applicant simply “ignored” the Determination when it was served on its principal representative (para. 32); and
 - The Applicant’s case on the merits was weak (para. 33).

THE APPLICATION FOR RECONSIDERATION

8. The Application for reconsideration includes the Tribunal’s Form 2 and an appended 2-page handwritten memorandum. The Applicant also submitted, at a later date, a 1-page e-mail. In essence, these documents set out the Applicant’s continuing position that Mr. Lafreniere was an “independent contractor” rather than an “employee” and that he “quit” rather than being terminated. Both these issues were addressed in the delegate’s “Reasons for the Determination” (at pages R5 – R6 and R9) and by Tribunal Member Roberts in her decision (at paras. 33 – 35).
9. Given the record before the delegate, there was ample evidence suggesting that the parties were in an employment relationship and that Mr. Lafreniere was terminated rather than having voluntarily quit. The present application simply seeks to have these issues revisited for a third time in the absence of any demonstrated error regarding the first two decisions (the Determination and Tribunal Member Roberts’ decision) on these points. The reconsideration process is not intended to serve as a mechanism for a fresh review of matters that have already been fully argued and determined.
10. Further, and perhaps most compellingly, it should be remembered that the issue originally before the Tribunal was not whether the Determination should be set aside on the basis of new evidence (and, clearly, the Applicant failed to present any new admissible evidence) but *whether the appeal period should be extended*. The present application does not even purport to address the correctness of Tribunal Member Robert’s decision regarding that application. For my part, I see absolutely no reason to question her decision refusing to extend the appeal period. Tribunal Member Roberts turned her mind to the governing principles and carefully applied those principles to the facts at hand. Indeed, in my view, her decision to refuse to extend the appeal period was the only proper decision to be made in light of the record before the Tribunal.

ORDER

11. The application to reconsider BC EST # D127/10 is refused. Accordingly, pursuant to section 116(1)(b) of the *Act*, that latter decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal