

An Application for Reconsideration

- by -

Blok Printing Ltd.  
("Blok")

- 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.:** 2016A/9

**DATE OF DECISION:** February 3, 2016

## DECISION

### SUBMISSIONS

Rick Blok on behalf of Blok Printing Ltd.

### OVERVIEW

1. Blok Printing Ltd. (“Blok”) seeks reconsideration of a decision of the Tribunal, BC EST # D134/15 (the “original decision”), dated December 16, 2015.
2. The original decision considered an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on June 19, 2015.
3. The Determination was issued on a complaint filed by William J. Smith, (“Mr. Smith”) who alleged Blok owed him \$3,725.20 for unpaid commission earnings for November 2014.
4. In the Determination, the Director found Mr. Smith was not entitled to commission earnings as claimed, but found that Blok had failed to pay him all regular wages and vacation pay earned, and in so doing, had contravened Part 3, sections 17 and 18 of the *Employment Standards Act* (the “Act”). The Director ordered Blok to pay Mr. Smith wages and interest in the amount of \$2,746.93 and imposed administrative penalties on Blok in the amount of \$1,000.00.
5. The appeal filed by Blok raised natural justice concerns for the Tribunal Member who made the original decision and, in an interim decision, he referred the matter back to the Director for further investigation (see BC EST # D078/15). The Director did so, and filed a report back to the Tribunal Member, who provided an opportunity to the other parties to respond to the report. Based on the submissions of the parties and the section 112(5) record, the Tribunal Member making the original decision dismissed the appeal and confirmed the Determination.
6. The Tribunal Member considered what he referred to as “two broad issues”: error of law and failure to observe principles of natural justice in making the Determination.
7. He noted the alleged “errors of law” exclusively concerned findings of fact made by the Director and decided Blok had not demonstrated that any of the alleged errors in findings of fact amounted to errors of law. The Tribunal Member accurately set out the test for how a finding of fact may constitute an error of law.
8. The Tribunal Member also found the Director had not failed to observe principles of natural justice, accepting the Director had met the obligation to provide Blok with the opportunity to present their case and was not wrong in deciding either the weight to be given hearsay evidence provided by Blok or what evidence was relied on.

### ISSUE

9. In any application for reconsideration, there is a threshold, or preliminary, issue of whether the Tribunal will exercise its discretion under section 116 of the *Act* to reconsider the original decision. If satisfied the case warrants reconsideration, the issue raised in this application is whether the Tribunal should cancel the original decision and refer the matter back to the original panel or, if more appropriate, to the Director.

## ARGUMENT

10. It is difficult to compress the argument made by Blok in this application. Although it is only four short paragraphs, the submission accompanying the application expresses dissatisfaction with the process, alleges false testimony, seeks to explain away the gaps in their evidence to the Director, submits “new” evidence (none of which is relevant to vacation pay entitlement) and disagrees with the finding on vacation entitlement made in the Determination and confirmed in the original decision.

## ANALYSIS

11. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally. As a result of amendments to the *Act* made in the *Administrative Tribunals Statutes Amendment Act, 2015*, parts of which came into effect on May 14, 2015, section 116 reads:

- 116** (1) *On an application under subsection (2) or on its own motion, the tribunal may*
- (a) *reconsider any order or decision of the tribunal, or*
  - (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 served with an order or a decision of the tribunal may make an application under this section.*
- (2.1) *The application may not be made more than 30 days after the date of the order or decision.*
  - (2.2) *The tribunal may not reconsider an order or decision on the tribunal's own motion more than 30 days after the date of the decision or order.*
- (3) *An application may be made only once with respect to the same order or decision.*
- (4) *The director and a person served with an order or a decision of the tribunal are parties to a reconsideration of the order or decision.*

12. Except for the inclusion of statutory time limits for filing an application for reconsideration and for the Tribunal reconsidering its own orders and decisions, the amendments are unlikely to alter the Tribunal's approach to reconsiderations.

13. In that respect, the Tribunal has said the authority of the Tribunal under section 116 of the *Act* is discretionary. A principled approach to this discretion has been developed and applied. The rationale for this approach is grounded in the language and purposes of the *Act*. One of the purposes of the *Act*, found in section 2(d), is “*to provide fair and efficient procedures for resolving disputes over the application and interpretation*” of its provisions. Another stated purpose, found in section 2(b) is to “*promote the fair treatment of employees and employers*”. The approach is fully described in *Milan Holdings Inc.*, BC EST # D313/98 (Reconsideration of BC EST # D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In *The Director of Employment Standards (Re Giovanni (John) and Carmen Valoroso)*, BC EST # RD046/01, the Tribunal explained the reasons for restraint:

. . . the *Act* creates a legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute.

There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the “winner” not be deprived of the benefit of an adjudicator's decision without good reason. A third is to avoid the spectre of a Tribunal process skewed

in favour of persons with greater resources, who are able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

14. In deciding whether to reconsider, the Tribunal considers such factors as timeliness, the nature of the issue and its importance both to the parties and the system generally. Undue delay in filing for reconsideration will mitigate against, and likely lead to a denial of, an application. An assessment is also made of the merits of the original decision. The focus of a reconsideration application is, generally, the correctness of the original decision.
15. The Tribunal has accepted an approach to applications for reconsideration that resolves itself 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 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 in the reconsideration.
18. I am not satisfied this application warrants reconsideration. I find, based on the material before the Tribunal Member in the appeal and considering the allowable scope of review under section 112 of the *Act*, there was no error made in the original decision.
19. This application is clearly within that category where its primary focus is to have the reconsideration panel re-visit the original decision, accept the factual challenges as valid and all the assertions being made and come to a different conclusion. That weighs heavily against this application. The insurmountable difficulty for Blok in this application is that virtually all of the submissions made in this application are, as they were in the appeal, supported by nothing more than allegation and assertion. As was made clear in the original decision, there is no legal basis for these arguments. All of them were, in one form or another, raised in the appeal and addressed in the original decision. Based on the material considered in the original decision, I agree completely with the analysis and the result.
20. To some extent, I can understand Blok's frustration, but they need to appreciate the *Act* speaks to the minimum statutory entitlements of employees and statutory obligations on employers. Neither the Director nor the Tribunal has the authority to rewrite those entitlements and obligations to suit particular circumstances and while the process relating to the enforcement of the provisions of the *Act* may at times seem clumsy, it generally functions as the legislature has contemplated. Blok has invoked the spectre of "justice being done" and while that may be a genuine belief, I echo the view of the Tribunal Member in the

original decision that they “[have not done themselves] any favours by failing to maintain proper payroll records and to ensure that such records were securely maintained”. The Determination was soundly and correctly grounded in the provisions of the *Act*, its entitlements and its requirements.

21. In sum, there is nothing in this application that would justify the Tribunal using its authority to allow reconsideration of the original decision and accordingly the application is denied.

### **ORDER**

22. Pursuant to section 116 of the *Act*, the original decision, BC EST # D134/15, is confirmed.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**