Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Efilcon Consulting Tech Ltd.
("Efilcon")

- 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.: 2017A/5

DATE OF DECISION: March 17, 2017

DECISION

SUBMISSIONS

Shuang Xie	on behalf of Efilcon Consulting Tech Ltd.
Shelley Chrest	on behalf of the Director of Employment Standards

INTRDUCTION

1. This is a reconsideration application filed by Efilcon Consulting Tech Ltd. ("Efilcon") under section 116 of the *Employment Standards Act* (the "*Act*"). Efilcon's application concerns BC EST # D162/16 issued by Tribunal Member Roberts on December 20, 2016 (the "Appeal Decision"), and, in essence, Efilcon seeks to have the Appeal Decision cancelled.

BACKGROUND FACTS

2. On September 20, 2016, a delegate of the Director of Employment Standards (the "delegate") issued a Determination (and accompanying "Reasons for the Determination" – the "delegate's reasons") ordering Efilcon to pay its former employee, Oscar Guo ("Guo"), the total sum of $7,208.87 on account of unpaid regular wages ($6,720.00), vacation pay ($268.80) and section 88 interest ($220.07). Further, and also by way of the Determination, the delegate levied two separate $500 monetary penalties (see section 98) against Efilcon for having contravened section 18 of the *Act* (payment of wages on termination of employment) and section 46 of the *Employment Standards Regulation* (the "*Regulation*") (failure to comply with a demand for production/delivery of employment records). Thus, the total amount payable by Efilcon under the Determination was $8,208.87.

3. Efilcon appealed the Determination arguing that it should be "changed or varied" because the delegate failed to observe the principles of natural justice; however, the thrust of Efilcon's appeal was that the delegate erred in determining that there was an employment relationship between Efilcon and Mr. Guo and, in any event, did not properly calculate Mr. Guo's wage entitlement. In this latter regard, Efilcon asserted that the delegate failed to account for all payments made by Efilcon to Mr. Guo.

4. At this juncture, I should note that it now seems clear that there was, in fact, a calculation error regarding Mr. Guo's wage entitlement. I shall return to this issue later on in these reasons.

5. Although Efilcon's appeal was filed solely on the natural justice ground of appeal (subsection 112(1)(b) of the *Act*), Member Roberts addressed both this ground of appeal and she also turned her mind to whether or not the delegate erred in law (subsection 112(1)(a) of the *Act*) by making one or more findings of fact that were wholly unsupported by the evidence before her.

6. Member Roberts rejected the "natural justice" ground of appeal noting (at para. 32):

> Ms. Xie was notified of the basis of the complaint and indeed, responded to the allegations both by email as well as in person at a hearing before the delegate. She had every opportunity to present her case and respond to that of Mr. Guo. Efilcon did not allege, nor is there any basis for me to conclude, that the Director was impartial to either party.

7. With respect to Efilcon's arguments regarding the delegate's findings of fact, Member Roberts concluded that there was sufficient evidence before the delegate to support her finding that Mr. Guo was in an employment relationship with Efilcon, and as for the arguments advanced regarding Mr. Guo's wage entitlement, Member Roberts held (at para. 38):

> I also find no error in the delegate's conclusion that Mr. Guo was not paid for his labour. The record indicates that the delegate considered all of the payments made to Mr. Guo, as well as the invoices and the expense claims in arriving at her conclusion. In my view, there was sufficient evidence before the delegate to arrive at her conclusion on this issue.

8. Accordingly, Member Roberts dismissed Efilcon's appeal and confirmed the Determination as issued. Efilcon subsequently applied to have the Appeal Decision reconsidered.

EFILCON'S RECONSIDERATION APPLICATION

9. Efilcon's reconsideration application consists of the Tribunal's Form 2 and several attachments including copies of e-mails and other documents that were provided to the Employment Standards Branch during the course of the investigation into Mr. Guo's unpaid wage complaint. Efilcon asks the Tribunal to "change or vary" the Appeal Decision although its grounds for seeking that order are set out in its materials in a somewhat haphazard manner. Ms. Xie (an Efilcon director and officer) makes the following assertions on Efilcon's behalf:

- "…my request is for Oscar [Guo] pay me back $1700 [because] Oscar was never requested to do anything by me and Efilcon" (*sic*);
- "I overpaid Oscar $1700";
- "It is obvious that Efilcon never hired Oscar Guo for any work involving Efilcon";
- "And Guo has received $8000 for his trip for Electra Stone which is not considered in the Determination"; and
- "Efilcon and I refuse to make any further payment".

FINDINGS

10. Reconsideration applications are adjudicated using the two-stage *Milan Holdings* test (see BC EST # D313/98). The reconsideration panel in *Milan Holdings* stressed that section 116 applications are not "automatically" granted. The substantive merits of such applications will only be addressed if the applicant first raises one or more serious "questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases". The applicant must raise "an arguable case of sufficient merit to warrant the reconsideration" such as "a serious mistake in applying the law". The reconsideration process is not an opportunity for the applicant to have the Tribunal to "reweigh" evidence or to review findings of fact unless they are manifestly unsupportable. (see *Milan Holdings* at page 7).

11. In essence, Efilcon's application is grounded on two assertions: first, that it never was in an employment relationship with Mr. Guo; second, and in any event, Mr. Guo was paid (indeed, allegedly overpaid) for all services rendered.

12. These arguments were originally advanced before the delegate – see delegate's reasons at pages R4 – R5 – and rejected (see delegate's reasons, pages R8 – R9, regarding Mr. Guo's employment status and at pages R10 – R12 concerning his unpaid wage entitlement). The delegate specifically addressed the "$8,000 payment" that Efilcon now says was "not considered in the Determination", concluding that this latter payment was for expenses and that "no evidence was provided by Efilcon or Electra challenging the legitimacy of the Complainant's expenses" (page R10). Indeed, the delegate noted that *Efilcon's own documents* corroborated Mr. Guo's position this latter payment was a reimbursement of incurred expenses and not a wage payment.

13. As discussed, above, Member Roberts was satisfied that the delegate's determination as to an employment relationship was sound both in law and fact. As for the $8,000 payment, Member Roberts found, as do I, that this matter was carefully considered by the delegate and her conclusion with respect to this matter did not constitute an error of law. The instant application is simply a rehash of the arguments that were advanced both in the original investigation and, subsequently, on appeal. There is no serious issue before me regarding the correctness of the Appeal Decision – at least as advanced by Efilcon – and thus this application must be dismissed since it does not pass the first stage of the *Milan Holdi*ngs test.

14. However, that conclusion does not quite end the matter. In the course of reviewing the documentation in this matter I came across an anomaly relating to the wage payment order. Throughout the delegate's reasons, she referred to the evidence before her to the effect that Mr. Guo's agreed wage rate was $30 per hour – see, for example, page R3 (two references), page R6 (one reference), page R10 (one reference), page R11 (one reference). Although the delegate ultimately concluded that the contractually agreed wage rate was $30 per hour, her final wage award was based on a $32 per hour wage rate (see page R12).

15. Efilcon never raised this discrepancy, either on appeal or on reconsideration; however, and consistent with sections 2(b) (fair treatment) and 2(d) (fair and efficient dispute resolution procedures) of the *Act*, I thought it would be fundamentally unfair to confirm a wage payment order that was quite possibly predicated on a clerical error. Further, it made no sense to me to refer this matter back to the delegate for further investigation (by way of a variance of Member Robert's order) when it could be relatively quickly addressed within the reconsideration process.

16. Accordingly, by letter dated February 1, 2017 (copied to all parties), the Tribunal requested the delegate to clarify whether or not there was a clerical error regarding the final wage payment order. The delegate replied, by letter date February 8, 2017, that there was an error in the wage payment calculation and that she erroneously utilized a $32 per hour rate instead of a $30 per hour rate. The delegate provided revised calculations. By letters dated February 14 and 16, 2016, the Tribunal provided this report to both Efilcon and Mr. Guo and sought their submissions with respect to it. Mr. Guo did not respond. Efilcon did reply, by way of an e-mail received on February 21, 2017, but this communication did not address, in any fashion, the calculation error; rather, Efilcon once again asserted its position that the $8,000 expenses reimbursement payment should have been applied toward any wages otherwise owing to Mr. Guo: "I do not understand why the amount paid to Oscar Guo is not considered in the Determination. He has been paid $8000 for the trip and already overpaid from my account. Efilcon does not own any of his work or his money" (*sic*). I will only say (and for the last time) that this $8,000 payment was appropriately addressed by both the delegate (in her reasons) and Member Roberts (in the Appeal Decision).

17. It now seems clear that there was a calculation error regarding Mr. Guo's unpaid wage entitlement and I propose to rectify this error by way of a variance of Member Roberts' order.

ORDER

18. Pursuant to subsection 116(1)(b) of the *Act*, the Appeal Decision is varied by deleting paragraph 40 (the final order) and substituting in its place the following:

> 40. Pursuant to section 115 of the *Act*, I order that the Determination, dated September 20, 2016, be varied to reflect a total wage payment order of $6,758.30 consisting of regular wages in the amount of $6,300.00, vacation pay in the amount of $252.00 and section 88 interest in the amount of $206.30. In addition, Mr. Guo is entitled to any further section 88 interest that has accrued since the date of the Determination. In all other respects, the Determination is confirmed as issued.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal