

An Application for Reconsideration

- by -

Treasure Gallery Inc.  
(“TGI”)

- 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.:** 2013A/14

**DATE OF DECISION:** March 21, 2013

## DECISION

### SUBMISSIONS

Majid Mojahed

on behalf of Treasure Gallery Inc.

### OVERVIEW

1. Treasure Gallery Inc. (“TGI”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of a decision, BC EST # D015/13, made by the Tribunal on February 5, 2013 (the “original decision”).
2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on November 2, 2012.
3. The Determination was made by the Director on a complaint filed by Sam Mousavi (“Mr. Mousavi”), who alleged TGI had contravened the *Act* by failing to pay regular and overtime wages and annual vacation pay. The Determination found that TGI had contravened Part 3, sections 17 and 18 and Part 4, section 40 of the *Act* and ordered TGI to pay Mr. Mousavi \$3,256.41, an amount which included both wages and interest.
4. The Director also imposed administrative penalties on TGI under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,500.00.
5. The appeal filed by TGI sought to have the Determination referred back to the Director.
6. The Tribunal Member of the original decision dismissed the appeal under section 114(1) (f) of the *Act* and confirmed the Determination.
7. This application is identical to a companion reconsideration request filed by Darya Construction Inc., a company related to TGI and in respect of whom the Director had also issued a Determination involving Mr. Mousavi and one other former employee of that company. As a result of the similarity in the two applications, the reasons provided in this decision to the reconsideration request will also be similar. In this application, as it did in the appeal, TGI requests the Tribunal to do what the Tribunal Member of the original decision would not do, which is to refer the matter back to the Director.

### ISSUE

8. 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 grant the request to reconsider the original decision and refer the matter back to the Director.

### ARGUMENT

9. The reasons provided by TGI to support this application for reconsideration echo, with some minor differences in form but not substance, the reasons in its appeal. In brief, TGI says there is evidence available that was not available when the Determination was being made. The evidence described in this application comprises the testimony of two witnesses, although only one witness was referred to in the appeal

submission. The application also attaches the submission filed with the appeal and adds those submissions to this application. The application also refers to the existence of expert evidence revealing that his computer was tampered with and documents were removed.

## ANALYSIS

10. Section 116 of the *Act* states:

- 116 (1) On application under subsection (2) or on its own motion, the tribunal may
- (a) reconsider any order or decision of the tribunal, and
  - (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 named in a decision or order of the tribunal may make an application under this section
- (3) An application may be made only once with respect to the same order or decision.

11. As the Tribunal has stated in numerous reconsideration decisions, the authority of the Tribunal under section 116 is discretionary. A principled approach to the exercise of this discretion has been developed. The rationale for this approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is “to provide fair and efficient procedures for resolving disputes over the interpretation and application” of its provisions. Another stated purpose, found in subsection 2(b), is to “promote the fair treatment of employees and employers”. The approach is fully described in *Milan Holdings Ltd.*, 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 the 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” is not 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 favor of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

12. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. 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.
13. The Tribunal has accepted an approach to applications for reconsideration that resolves 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 reasonably 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.
14. 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.
15. 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 by the reconsideration.
16. Having reviewed the original decision, the material in the appeal file and the submissions of TGI on the reconsideration request, I find this matter does not warrant reconsideration.
17. As noted above, the focus of a reconsideration request is the correctness of the original decision.
18. TGI has, however, in this application requested, once more, that the Tribunal revisit the Determination in the context of alleged “new evidence” – a request that was examined and denied in the original decision. There is no reference at all in the application to there being any error in the original decision, and I can find none. The application simply expresses a disagreement with the conclusion of the Tribunal Member in the original decision about the merits of the appeal and the prospects for its success. In short, this application seeks to have another panel of the Tribunal examine the merits of the appeal and reach a different conclusion than did the Tribunal Member in the original decision. This is an inappropriate use of the reconsideration power in the *Act*.
19. In any event, based on the material in the file and the recitation of the facts in the original decision, I agree completely with the findings made on the appeal and with the disposition of the appeal. Faced with an appeal having no reasonable prospect of succeeding, it was entirely correct and appropriate for the Tribunal Member in the original decision to take an approach that, in result, accepted it is neither fair nor efficient to put parties through the delay and expense of an appeal process in such circumstances: *Gerald Knodel a Director of 0772646 B.C. Ltd. carrying on business as Home Delivery*, BC EST # D083/11.
20. The fact that TGI now alleges one additional witness is available to testify and that he can provide evidence that his computer was tampered with adds nothing to this application. The facts set out in the original decision and the comments at paras. 25-27 would apply equally to two witnesses as to one.
21. The assertion relating to the company’s computers being tampered with and information being lost was made to the Director during the investigation, but no effort was ever made at that time to establish the validity of that assertion and it was never raised as a basis for appealing the Determination. Nor was there any attempt made during the investigation to have the information allegedly lost (which purportedly had been contained in an e-mail provided to Mr. Mojahed, the principal of TGI, by an accountant), to have that information re-sent by the accountant and provided to the Director. The assertions made about the computers lack an element of credibility. As well as concerns about whether such evidence could be accepted as credible and probative, I do not find there is any relevance to this evidence in the context of this application. Finally, it is well past the time for making such an assertion and it is, in any event, unsupported by anything but a bald statement made in the reconsideration submission. I cannot imagine that the Tribunal Member of the original decision if given the opportunity to consider the admissibility of this evidence would have allowed it or been convinced to change his mind about the merits to the appeal.

22. In sum, TGI has not shown the original decision was wrong in any respect. The Tribunal will not revisit the arguments made by TGI in its appeal. The application for reconsideration is denied.

**ORDER**

23. Pursuant to section 116 of the *Act*, the original decision is confirmed.

---

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