

An application for Reconsideration

- by -

Power Pacific Poles (2006) Inc.
("PPP06")

- 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: Shafik Bhalloo

FILE No.: 2009A/012

DATE OF DECISION: April 14, 2009

DECISION

OVERVIEW AND FACTS

1. Darren Grant (“Mr. Grant”), Brent Jarvis (“Mr. Jarvis”), Daniel Kerr (“Mr. Kerr”), Randy Marchant (“Mr. Marchant”), Peter Plathan (“Mr. Plathan”) and Daniel Waugh (“Mr. Waugh”) (collectively the “Complainants”) were all employees of Power Pacific Poles Ltd. (“PPP”) that went bankrupt in April 2007.
2. On May 24, 2007 a receiver was appointed for PPP and Power Pacific Poles (2006) Ltd. negotiated with the receiver to operate the manufacturing plant for a short period of three months ending August 31, 2007.
3. Subsequently, PPP06 offered each of the Complainants employment on the same terms and conditions they were employed under with PPP but for a fixed term commencing June 1, 2007 and ending on August 31, 2007, which the Complainants individually accepted.
4. The Complainants, thereafter, continued working at the manufacturing plant until October 3, 2007, five weeks past the expiry date of the fixed term contracts they entered into with PPP06, when the doors to the manufacturing plant were locked by the receiver.
5. In or about November 2007, Standard Pole Ltd. (“Standard”) took over the assets of PPP06 and all Complainants, with the exception of Mr. Plathan, took employment with Standard as of November 1, 2007.
6. On or about November 8, 2007, the Complainants filed their complaints under Section 74 of the *Employment Standards Act* (the “*Act*”) alleging that Power-Pacific Poles (2006) Inc. (“PPP06”) contravened the *Act* by failing to pay them regular wages, vacation pay and compensation for length of service. A delegate of the Director of Employment Standards (the “Delegate”) investigated the complaints and received submissions and evidence from both the Complainants and PPP06 and issued a Determination August 29, 2008, finding PPP06 to have contravened Part 7, Section 58 of the *Act* in respect of the employment of the Complainants and ordered PPP06 to pay the Complainants a total sum of \$4,289.68, an amount which included both wages and interest.
7. In addition, the Director also imposed an administrative penalty on PPP06 under Section 39(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$500.00.
8. The total amount of the Determination was \$4,789.68.
9. PPP06 appealed the Determination to the Tribunal on the ground that the Director failed to observe principles of natural justice in making the Determination and asked that the Determination be varied or cancelled.
10. The Tribunal Member in the original decision (B.C. EST #D008/09) made on January 14, 2009 (the “Original Decision”), reviewed the submissions of PPP06 made by the latter’s director, Mr. Harry Rauma, but found no support for PPP06’s allegation that the Director failed to observe the principles of natural justice in making the Determination. As a result, the Tribunal Member dismissed PPP06’s appeal.

11. As the reasons of the Tribunal Member for dismissing PPP06's appeal are relatively brief, I propose to set them out verbatim below:

Parties alleging a denial of natural justice must provide some evidence in support of that allegation (see *Dusty Investments Inc. dba Honda North*, BC EST #D043/99).

There are no submissions in the appeal specific to this ground and no evidence that PPP06 was not provided an opportunity to know the position being taken by the complainants and given an opportunity to respond. I find that PPP06 has not met the burden of demonstrating on a balance of probabilities that the Director failed to observe principles of natural justice in making the Determination.

At its core, however, this appeal is not about principles of natural justice at all, but is about a disagreement by PPP06 with the conclusion reached by the Director that the complainants were employees of PPP06 for the full period covered by the Determination.

There are several difficulties for Mr. Rauma in this appeal based on review of the Determination and the section 112 record.

First, the August 21, 2007 agreement between PPP06 and the Court appointed receiver, signed by Mr. Cox, specifically states that any employees engaged in the operation of the manufacturing plant shall be under contract to PPP06.

Second, the definition of employee in section 1 of the *Act* includes "a person, including a deceased person, receiving or entitled to wages for work performed for another". There is no issue that the complainants worked and were entitled to wages. The issue raised by Mr. Rauma is whether they worked for PPP06. However, while Mr. Rauma says the complainants were not employed by PPP06 after the end of July 2007, he seems to accept that Mr. Cox had assumed control over PPP06, was a de facto director of PPP06 and "dealt exclusively with Dricos in all matters pertaining to the employees". The material indicates the work done by the complainants was done for PPP06.

Third, Mr. Rauma makes assertions of fact that are not consistent with the information in the section 112 record. For example, he says the agreement that replaced the June 2007 arrangement was between the Court appointed receiver and Mr. Dricos. The section 112 record contains a copy of that agreement; it is dated August 21, 2007 and is between the Court appointed receiver and PPP06; Mr. Cox signed on behalf of PPP06. Mr. Rauma also says Mr. Dricos "assigned duties, recorded and paid wages and took all liability of the operation of the premises". This assertion is not borne out by an examination of the documents which set out the terms on which the manufacturing plant would be operated. Those documents clearly indicate that PPP06 had the primary responsibility for the employment of the complainants and that the complainants were performing work belonging to PPP06.

Mr. Rauma has not shown the Director erred in finding the complainants were employees of PPP06 during the period covered by their respective complaints and the appeal is dismissed.

12. PPP06, dissatisfied with the result in the Original Decision, filed a Reconsideration application on February 16, 2009.
13. Pursuant to Section 36 of the *Administrative Tribunal's Act* (the "ATA"), which is incorporated into the *Act* (S. 103) and Rule 17 of the *Tribunal Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, an oral hearing of the Reconsideration application of PPP06 is not necessary and therefore, I will adjudicate PPP06's Reconsideration application based on the written submissions of the parties in a review of the Original Decision and the "Record" submitted by the Director.

ISSUE

14. In an application for reconsideration there is a preliminary or a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If the Tribunal is satisfied in its inquiry on the preliminary issue that the case is an appropriate one for reconsideration, the Tribunal then proceeds to the next stage to consider the substantive issues in the reconsideration application. In this case, the substantive issue is whether the Director failed to observe the principles of natural justice in making the Determination.

SUBMISSIONS***Submissions of PPP06***

15. Mr. Rauma, on behalf of PPP06, submits:

In reference to the decision, I submit the following in rebuttal to your interpretation of the facts as they truly reside. I will answer each paragraph as they appear in the decision and will omit any irrelevant paragraphs.

2. Administrative penalties assigned to a consideration prior to it being drawn. We received a telephone call prior to this decision that the Employment Standards Director had ruled against the complainants and then reversed their decision. The arbitrary decision to attach an administrative penalty cannot be withdrawn and then reapplied again.

3. We disagree with the accounting in whole. The Plant did not resume operations till mid to late June. I had only received the operating agreement from the receiver on the 19th of June 2007, which meant the plant was still idle and the Director of employment Standards has provided time sheets written in the hand writing of one of the complainants, Peter Plathan, on behalf of all the men, calculating time from the 6th of June 2007.

7. The complainants fixed term of employment was dated June 5th 2007, not late May. The original Agreement was not signed until June 14th 2007.

8. The Plant was closed. The complainant's employment was terminated by the receiver, August 2nd 2007. The men were escorted out by BCR Properties Security.

9. The fixed term agreement was prepared on June 1st, 2007. The men signed them on June 5th 2007 as evidenced by the copies provided by the Director of Employment Standards. The agreement was terminated by the receiver Wolridge Mahon on July 31, 2007. The New agreement between the "court appointed receiver" Price Waterhouse Cooper was not ratified until August 17th 2007 and the men did not return to work till some time after the 21st of August 2007. The plant was closed for that entire period.

10. The agreements were terminated by the receiver on July 31st 2007. The plant was closed.

11. No new Agreements were produced once the plant was operating again. The men received their instructions and pay checks from Dean Dricos and his corporate banking of Annacis Enterprises. Under the agreement between Dean Dricos, Power-Pacific Poles (2006) Inc. and PWC Dean was to pay the wages, source deductions and all employee related liabilities which he has refused or neglected to do.

12. As I stated to the Director of Employment Standards, I provided the T4's and records because I was asked to do so by them. I have never in my business career made a T4, or a pay stub or calculated holiday pay or source deductions. The numbers i provided were given to me by Mr. Rick Cox who received the records from Dean Dricos and were forwarded to me and subsequently to the Director of Employment Standards from my fax machine, which resided 4 feet from my desk.

17. Natural justice: I am being asked to submit to actions by the Director of Employment Standards in answer to allegations made by complainants, whereby the complainants have given evidence on their own behalf and on behalf of the Company. I do not believe that this is a neutral or unbiased decision.

Peter Plathan was the Plant Manager and Superintendent. He was responsible for the accounting of those hours and has retroactively supplied verification to suit his own claims. The Director of Employment Standards has taken those submissions and ensued an investigation from a \$20,000 + claim to an est. \$5000.00 claim and attached administrative penalties of \$500.00 The searches provided having absolutely no relevance to the actual events, my home, my cars. There have been no face to face meetings, even though they were promised, just one telephone conversation between the directors of the company and one complainant, to which I never uttered a sound on the basis that I had no knowledge of the events. Hardly any procedural rights enforced so we were given the proper platform to argue our evidence.

22. The August 21st Agreement was between the Interim receiver and Power Pacific Poles (2006) Inc., to my knowledge at that date had NO employees or contracts in force. The agreement signed by Mr. Cox was for the resuming of operations, not the continuance of any employment agreements.

24. The facts that I assert are actual.

- The men made a police report against Mr. Cox and had refused to work for him or Power Pacific Poles (2006) Inc. unless Dean Dricos was in charge. As told to me by Peter Plathan.
- The men took all their directions and instructions from Dean Dricos.
- The men received their pay from Dean Dricos.
- Dean Dricos billed and collect the receivables.
- Dean Dricos secured and paid for all raw materials and consumables.
- Dean was solely responsible for setting of the rate of pay and hours worked. I was never given any data until it was requested by the Director of Employment Standards and I had to have Rick Cox collect it for me and prepare the submissions. Our accountant will verify this. Mr. Steve Malish CGA.

In the searches by the Director of Employment Standards is a copy of a GSA registered with Victoria and until the writing of this submission I have never seen or had any knowledge of the document. If the Director of Employment Standards would follow through with actual copies of the registration and see who signed and in what capacity it would show the spirit of all the events that transpired. If I was in control I assume I would have been aware prior to this fraud taking place.

16. Mr. Rauma also submitted a reply on behalf of PPP06 in response to the submissions of the Director referred to below which I do not propose to reiterate here as none of them address or support the natural justice ground of PPP06's appeal and largely dispute the factual findings of the director in the Determination.

The Director's Submissions

17. The Director submits that the Reconsideration application must fail on the threshold issue because it is an attempt on the part of PPP06 to have the Tribunal re-weigh the evidence previously submitted on its merits. The Director further submits that the reconsideration process should not be “another opportunity [for PPP06] ... to have their rebuttal to the allegations against them weighed and considered”.

ANALYSIS OF THE PRELIMINARY ISSUE

18. Section 116 of the *Act* contains the Tribunal's authority to reconsider and confirm, cancel or vary its own orders or decisions:

Reconsideration of orders and decisions

- 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.*

19. The authority of the Tribunal in Section 116 of the *Act* is discretionary in nature as the Tribunal “may” reconsider its own orders or decisions. Furthermore, in exercising its discretion under Section 116, the Tribunal must act with caution. As indicated by the Tribunal in *Re Eckman Land Surveying Ltd.* BC EST #D413/02:

Reconsideration is not a right to which a party is automatically entitled, rather it is undertaken at the discretion of the Tribunal. The Tribunal uses its discretion with caution in order to ensure: finality of its decisions; efficiency and fairness of the appeal system and fair treatment of employers and employees.

Also instructive in the reconsideration process is the decision of the Tribunal in *Re British Columbia (Director of Employment Standards) (sub nom. Milan Holdings Ltd.)*, BC EST #D313/98. In this decision, the Tribunal delineated a two-stage process that it employs in determining whether or not to exercise its reconsideration power. First, the Tribunal must decide whether the matters raised in the application warrant reconsideration. In determining this question, the Tribunal will consider a non-exhaustive list of factors that include such factors as: (i) whether the reconsideration application was filed in a timely fashion; (ii) whether the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already provided to the adjudicator; (iii) whether the application arises out of a preliminary ruling made in the course of an appeal; (iv) whether the applicant has raised 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; (v) whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

If the Tribunal, after weighing the factors in the first stage, concludes that the application is not appropriate for reconsideration then the Tribunal will reject the application and provide its reason for not reconsidering. However, if the Tribunal finds that one or more issues in the application is appropriate for reconsideration, the Tribunal will proceed to the second stage in the analysis. The second stage in the analysis involves a reconsideration of the merits of the application.

20. In this case, the submissions filed on behalf of PPP06 clearly show that the primary focus of PPP06 is to challenge or dispute the findings of fact of the Director in the Determination and also to have the reconsideration effectively reweigh the evidence already tendered before the adjudicator in the appeal of the Determination with a view to obtaining a favourable decision this time. The Tribunal has indicated time and again that reconsideration is not an opportunity to rehear the evidence and re-determine the matter afresh. In the circumstances, PPP06's application must fail at the preliminary stage.
21. While at this stage I am not required to proceed to the second stage of the reconsideration process in *Milan Holdings, supra*, and review PPP06's application on the merits, I have reviewed PPP06's reasons for asking Reconsideration and find them without any merit. More specifically, I agree with the Adjudicator in the Original Decision that a party alleging a denial of natural justice must provide some evidence in support of that allegation and in this case, PPP06 has not provided any support for its allegation that Director failed to observe principles of natural justice in making the Determination.
22. I also wish to note that Mr. Rauma, in his submissions on behalf of PPP06 set out verbatim above, at paragraph 17, alleges bias on the part of the Director or his delegate when he states "I do not believe that this is a neutral or unbiased decision". As indicated by the British Columbia Court of Appeal in *Adams v. British Columbia (Workers' Compensation Board)*, [1989] B.C.J. No 2478 an allegation of bias against a decision maker is serious and should not be made speculatively. Further, the onus is on the party alleging bias to show with clear objective evidence that a bias or a reasonable apprehension of bias has occurred. In the case at hand, having carefully reviewed Mr. Rauma's submissions, I can say unequivocally that his allegation of bias against the decision-maker is without any foundation. In my view it is a bare assertion made against the Director because the Determination was unfavourable for PPP06. Accordingly, I reject PPP06's allegation of bias.

ORDER

23. Pursuant to Section 116 of the *Act*, I order the Original Decision, BC EST #D008/09 be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal