

An application for Reconsideration

- by -

Esther Briner, a Director or Officer of World Hockey Association Corp.

- 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: Carol L. Roberts

FILE No.: 2008A/13

DATE OF DECISION: April 9, 2008

DECISION

SUBMISSIONS

Esther Briner

on her own behalf

OVERVIEW

1. This is an application by Esther Briner for a reconsideration of Decision #D008/08 (the "Original Decision"), issued by the Tribunal on January 16, 2008.
2. ON April 25, 2007, the Director issued a Determination against the World Hockey Association Corp. ("WHA") in favour of four employees. The Determination was sent to WHA, its registered and records office and to its listed directors and officers, including Ms. Briner. An appeal of the Determination was dismissed on August 12, 2007. (BC EST #D063/07)
3. WHA was incorporated in Florida on September 19, 2003 and registered in British Columbia as an extra-provincial company on October 4, 2006. As of March 29, 2007, Ms. Briner was listed as one of the five director/officers of WHA in the Florida corporation registry. In a Determination issued September 21, 2007, a delegate of the Director found Ms. Briner to be a director/officer of WHA at the time the wages were earned and determined that she was personally liable under Section 96 of the Act for an amount of \$18,631.86.
4. Ms. Briner appealed the Determination, alleging that the delegate failed to observe the principles of natural justice in making the Determination. She also alleged that evidence had become available that was not available at the time the Determination was made.
5. The member reviewed the submissions, the facts and the law, and concluded that the delegate had not erred in finding Ms. Briner to be a director of WHA.
6. The member noted that the appeal submission had not identified what that new evidence was, but noted that all of the key evidence she took no issue with had been before the delegate at the time the Determination was being made. He concluded that the new evidence had not met the test in *Merilus Technologies Inc.* and did not accept it on appeal.
7. The member also noted that, in any event, the conclusion that Ms. Briner was a director/officer of WHA was primarily a finding of fact based on the corporate records and an assessment of whether there was any cogent evidence showing that they were inaccurate. He concluded that

Ms. Briner did not, as a matter of fact, provide sufficiently cogent evidence to outweigh the presumption created by her being listed as a director/officer of WHA and the other evidence which both supported the conclusion generated by that presumption and did not support her alleged resignation.
8. The member was also not persuaded that the delegate failed to observe principles of natural justice in making the Determination and dismissed the appeal.

ISSUE

9. There are two issues on reconsideration:
 1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?
 2. If so, should the decision be cancelled or varied or sent back to the member?

ARGUMENT

10. Ms. Briner contends that the Tribunal did not give sufficient consideration to her position that she delivered her resignation to the corporation's records and registration office. She also submits that the Tribunal "failed to recognize that a director could be listed as a director even though they had met the legal criteria for submitting a resignation".

THE FACTS AND ANALYSIS

11. The *Employment Standards Act*, R.S.B.C. 1996 c. 113 ("Act") confers an express reconsideration power on the Tribunal. Section 116 provides
 - (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.

The Threshold Test

12. The Tribunal reconsiders a Decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *Act* detailed in Section 2 "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act."
13. In *Milan Holdings (BCEST # D313/98)* the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. The primary factor weighing in favour of reconsideration is 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. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

14. The Tribunal may agree to reconsider a Decision for a number of reasons, including:
- The member fails to comply with the principles of natural justice;
 - There is some mistake in stating the facts;
 - The Decision is not consistent with other Decisions based on similar facts;
 - Some significant and serious new evidence has become available that would have led the member to a different decision;
 - Some serious mistake was made in applying the law;
 - Some significant issue in the appeal was misunderstood or overlooked; and
 - The Decision contains a serious clerical error.
- (*Zoltan Kiss* BC EST#D122/96)
15. While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.
16. After weighing these and other factors, the Tribunal may determine that the application is not appropriate for reconsideration. Should the Tribunal determine that one or more of the issues raised in the application is appropriate for reconsideration, the Tribunal will then review the matter and make a decision. The focus of the reconsideration member will in general be with the correctness of the decision being reconsidered.
17. In *Voloroso* (BC EST #RD046/01), the Tribunal emphasized that restraint is necessary in the exercise of the reconsideration power:
- .. the Act creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute...
18. I am not persuaded that the reconsideration power should be exercised.
19. The Tribunal has held that corporate records raise a rebuttable presumption that a person is a director. A defense to section 96 liability can be successfully raised if a director can show, on credible and cogent evidence, that the Registrar's records are inaccurate, either because the person resigned or is not properly appointed: (*Wilnofsy* (BC EST #D 106/99) and *Michalkovic*). The member referred to these cases in arriving at his conclusion and I find no error of law or inconsistency with other decisions. Contrary to Ms. Briner's submissions, the member did consider her argument that she had delivered her written resignation to the corporate office, an argument she continues to advance in her reconsideration application. However, he found no cogent and compelling evidence that the delegate erred in concluding that she had not done so, and I find no basis to exercise the reconsideration power on this issue. I also note that Ms. Briner states that she only sent her resignation to the Florida state corporate records office on April 20, 2007. It is only by sending the state forms, with the appropriate filing fee, that an officer/director can remove their name from the corporate registry. I agree with the member's conclusion that there is no cogent evidence the Registrar's records were inaccurate prior to this date.

20. Likewise, the member also considered Ms. Briner's argument that she was listed as a director without her consent. He noted that uncorroborated evidence of a resignation was insufficient to rebut the presumption of the accuracy of corporate records and concluded that the delegate had not erred in her conclusion.
21. I find that Ms. Briner's application is a re-argument of the issues she raised on appeal, issues that were fully and correctly addressed by the member in the Original decision.

ORDER

22. Pursuant to Section 116 of the *Act*, I deny the application for reconsideration.

Carol L. Roberts
Member
Employment Standards Tribunal