An application for Reconsideration

- by -

Ioridge Technology Ltd.

- 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.: 2007A/26

DATE OF DECISION: May 14, 2007

DECISION

SUBMISSIONS

Joon Goo (Jason) Lee	on behalf of Ioridge Technology Ltd.
Rod Bianchini	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an application by Ioridge Technology Ltd. ("Ioridge") under Section 116 (2) of the *Employment Standards Act* (the "*Act*") for a reconsideration of Decision #D109/96 (the "Original Decision"), issued by the Tribunal on October 26, 2006.

2. Section 116 of the *Act* 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.

3. Heewon Kim filed a complaint to the Director of Employment Standards contending that he was entitled to wages. At issue before the delegate was whether Mr. Kim was an employee, whether he was entitled to wages, whether Ioridge and Mr. Lee were associated pursuant to section 95 of the *Act*, and whether the complaint was properly before the Director. The delegate held an oral hearing on April 7, 2005 and April 15, 2005, with closing arguments made in 2006.

4. In a Determination issued June 15, 2006, the delegate concluded that the complaint was properly before him, that Lee and Ioridge were not associated companies under section 95, and that Mr. Kim was an employee and entitled to wages.

5. Ioridge appealed the Determination to the Tribunal on July 26, 2006, contending that the delegate had failed to observe the principles of natural justice and that evidence had become available that was not available at the time of the hearing. Because the appeal was received after the appeal deadline, the Tribunal sought submissions on whether the Tribunal should exercise its discretion to extend the time period in which Ioridge could file the appeal under section 109 of the *Act*.

6. The Tribunal Member reviewed sections 112, 109 and 2 of the *Act* as well as Tribunal decisions in *Niemisto* (BC EST #D099/96) and *Re Wright* (BC EST #D132/97). The Member applied the *Niemisto* criteria, and concluded that there was no credible explanation for the delay in filing the appeal, that Ioridge had not communicated its intention to appeal to either the Director or to Mr. Kim, and, most importantly, that Ioridge had not demonstrated a *prima facie* case on either of its two grounds of appeal. The Member noted that the "new evidence" asserted by Ioridge was not new, and could have been raised at the hearing before the delegate. With respect to the allegation that the delegate had failed to observe the

principles of natural justice, the Member addressed all the arguments advanced by Ioridge and concluded that they were all without merit. The Member declined to extend the time limit for submitting the appeal.

7. In its reconsideration application, Ioridge submits that Mr. Kim "misrepresented his association with [Ioridge] and its principal as that of employee employer" and that the Director's delegate erred in concluding that he had jurisdiction over the complaint. Ioridge submits, in the alternative, that if the delegate did have jurisdiction, the Delegate erred in "failing to apply the principles of natural justice". Attached to the reconsideration request are four Schedules. In schedule A, Ioridge says that the Determination was *ultra vires*, the Director failed to observe the principles of natural justice, and that the Tribunal "failed to observe principles of natural justice in making its decision to not allow the Appeal to proceed due to late filings". Schedule B asserts that Ioridge is no longer in business and that Mr. Lee, its director and officer, has no personal assets. In Schedule C, Ioridge asserts that it was unrepresented by a lawyer and had no knowledge that it had any further appeal remedies until the judicial review application was filed. In Schedule D, Ioridge sets out the remedies it seeks, including a "setting aside" of both the Director's Determination as well as the Tribunal's decision. Ioridge seeks to have the appeal heard on its merits.

8. The Director's delegate says that the request is untimely, as it was not made until almost five months following the issuance of the Tribunal's decision. The delegate says that there is no reasonable explanation for the delay in filing the reconsideration application. The delegate submits that the delay can be inferred, in part, from the claim that Ioridge initiated a judicial review application prior to the reconsideration request. The delegate also says that although Ioridge was represented at the complaint hearing and process by a non-lawyer, it was assisted by counsel on appeal. The Director's delegate submits therefore, that there is no merit to Ioridge's claim that the Determination should be reconsidered because the delay was caused by its lack of representation.

9. The Director further objects to the timeliness of the reconsideration request because Ioridge provides no explanation for a second 5 week delay between the time when counsel for both the Tribunal and the Director advised Mr. Lee and Ioridge's counsel that their request for judicial review was premature, and the filing of the reconsideration request.

10. The Director further submits that, apart from the untimeliness of the request, there are no substantive grounds on which the reconsideration should be granted. The Director says that the grounds for the reconsideration are the same claims it made on appeal, and that restated reconsideration arguments are not reason to disturb the Tribunal's decision. The Director argues that the Tribunal should not exercise its discretionary power under section 116 because Ioridge's request does not raise questions of law, fact, principle or procedure that are significant enough to warrant reconsideration.

11. Finally, the Director notes that, in addition to naming Ioridge as the party seeking reconsideration, Mr. Lee has named himself. He says that if Mr. Lee is attempting to appeal the Determination issued against him as an Officer or Director of Ioridge on February 16, 2007, Mr. Lee's appeal is not made in the proper manner, and that as the Decision relates only to Ioridge, only Ioridge can be a party to the reconsideration request.

12. In a reply submission, Ioridge denies having the assistance of legal counsel in the Employment Standards matters, asserting that counsel was involved only in the filing of the judicial review application and a Supreme Court action. Mr. Lee confirms that the reconsideration application is brought by Ioridge, and that it was prepared in his name only because Ioridge is no longer in business. Ioridge contends that the Tribunal Member made his decision without hearing his evidence, and "chose to disbelieve me".

ISSUES

13. There are three issues to be decided on this reconsideration application:

1) Is the application timely?

2) If so, does the request meet the threshold established by the Tribunal for reconsidering a decision?; and

3) If so, should the decision be cancelled or varied or sent back to the Member?

ANALYSIS

Is the application timely?

14. As the Tribunal noted in Eva Daniel (BC EST #RD 557/02):

> While there is no specific time limit contained in the Act governing applications for reconsideration, the Tribunal has held in a number of decisions that applications for reconsideration must be filed within a reasonable time after the adjudicator's original decision. While parties have a right to appeal and, correspondingly, the Tribunal has a duty to hear and decide such appeals, the Tribunal is not obliged to consider all applications for reconsideration on their merits. If an application is untimely, the Tribunal may choose to exercise its discretion not to adjudicate the substantive merits of the application. In this latter regard, it should be noted that one of the explicit policies underlying the Act is the "efficient" resolution of disputes [see section 2(d)].
>
> The Tribunal has observed that the determination of a "reasonable time" for filing an application depends on, among other considerations, the particular complexities of the case at hand, unusual circumstances that prevented a timely application and prejudice to other parties. A party who does not file a reconsideration application within a "reasonable time" must provide a cogent explanation for their tardiness (see *Unisource Canada Inc*., B.C.E.S.T. Decision No. D122/98 and *MacMillan Bloedel*, B.C.E.S.T. Decision No. D279/00). In the absence of a reasonable excuse for filing an untimely application, the Tribunal will exercise its discretion to simply refuse to reconsider the decision in question.

15. Ioridge's reconsideration application was filed March 22, 2007, almost six months after the Tribunal decision. The application contains no explanation for the delay in filing, other than what might be inferred due to Ioridge's assertion that it was unrepresented by counsel. The material submitted by the delegate indicates that on February 2, 2007, Mr. Lee and Ioridge filed an application for judicial review of the Determination and the Tribunal's decision. The petition was provided to the Tribunal by John Piamonte, a Barrister and Solicitor. On Feburary 13 and February 14, 2007 respectively, counsel for the

Tribunal and the Director both advised Mr. Piamonte that the judicial review application was untimely as Ioridge had not exhausted its administrative remedies under the *Act.* On February 19, 2007, Mr. Piamonte advised counsel for the Director that his clients would extend the time for delivery of a response to the petition, and indicated that his "client" did wish to have the Tribunal review the decision. In a letter dated February 21, 2007, Mr. Piamonte wrote that "we accept that Mr. Lee will need to exhaust the internal review mechanisms and he does wish to do so". Mr. Piamonte then advised counsel for both the Tribunal and the Director that he was not solicitor of record for Ioridge on the Employment Standards matters.

16. Ioridge was aware of the Tribunal's decision in late October. Even if I assume that Ioridge was unaware of its ability to seek reconsideration of the Tribunal's decision on at least February 13, 2007 for good reason, which I am unprepared to do in the absence of any explanation, there is no explanation for why it took Ioridge an additional five weeks to file the application. Ioridge's application contains no explanation at all as to why it was not filed within a reasonable time. As noted above, the Tribunal will exercise its discretion to simply refuse to reconsider a decision in the absence of a reasonable excuse.

17. Furthermore, the application is, in my view, devoid of merit.

18. The Tribunal reconsiders a Decision only in exceptional circumstances. 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.

19. In its application, Ioridge repeats the arguments it made before the Tribunal at first instance on the merits of the appeal; that is, that the Director had no jurisdiction to hear and decide the complaint, and that the Director's delegate failed to observe the principles of natural justice. Merely repeating arguments made on appeal is of no assistance in a reconsideration application, and particularly where the original decision was on the issue of timeliness, a decision on which Ioridge makes no submissions. Ioridge also contends that the Member failed to observe principles of natural justice, but provides no evidence or submissions in support of this assertion. The Member was not obliged to hold an oral hearing and hear argument from Mr. Lee. I have reviewed the record, the appeal submissions and the decision, and find that the Member fully addressed Ioridge's arguments on whether the Tribunal ought to exercise its discretion to extend the time in which to file an appeal. The Member considered the *Act*, the Tribunal's jurisprudence, and whether Ioridge had met the criteria for extending the time in which the appeal should be filed. There is no basis for Ioridge's assertion that the Tribunal Member denied it natural justice.

20. While it is clear Ioridge is not satisfied with the Tribunal's decision not to allow an extension of time to file an appeal, there is nothing in its application that raises significant questions of law, fact, principle or procedure. Further, there is nothing in the application that relates to any of the factors set out in *Zoltan Kiss* (BC EST#D122/96*)*.

21. I find that the reconsideration power should not be exercised in this case.

ORDER

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

Carol L. Roberts
Member
Employment Standards Tribunal