An Application for Reconsideration

\- by -

Unity Wireless Systems Corporation
(“the Employer”)

\- 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

TRIBUNAL MEMBER: Alison H. Narod

FILE No.: 2004A/213

DATE OF DECISION: April 1, 2005

DECISION

This Decision concerns an application for reconsideration by Unity Wireless Systems Corporation (the "Employer") of Tribunal Decision BC EST#D194/04, dated November 15, 2004 (the "Tribunal's Decision"), pursuant to s. 116 of the *Employment Standards Act* (the "*Act*").

The Tribunal's Decision dismissed, as untimely, the Employer's appeal of a Determination issued on August 6, 2004 (the "Determination") by a Delegate of the Director of Employment Standards (the "Delegate"). The Determination ordered that the Employer pay vacation pay of $2,380.08, plus interest of $116.05, as well as an administrative penalty of $500.00 pursuant to ss. 58 and 88 of the *Act* and s. 29(1) of the *Employment Standards Regulation*.

More particularly, the Member who issued the Tribunal's Decision found that the Employer failed to file its appeal within the time frames stipulated under the *Act* and declined to extend the time to file the appeal. In so doing, the Member considered the principles and circumstances in which the appeal period had been extended by the Tribunal, in the past. She wrote:

> Various courts and tribunals have established the following non-exhaustive list of principles concerning when, and under what circumstances, appeal periods should be extended. (See *Niemisto*, BCEST #D099/96 and *Re Pacholok*, BCEST #D511/97).
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> i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
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> ii) there has been a genuine and on-going *bona fide* intention to appeal the Determination;
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> iii) the respondent party (*i.e.*, the employer or employee), as well as the Director, must have been made aware of this intention;
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> iv) the respondent party will not be unduly prejudiced by the granting of an extension; and
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> v) there is a strong *prima facie* case in favour of the appellant.

The Member noted that the parties were advised of the above-listed criteria to assist them in filing their documents for the appeal. The reasons for tardy filing given on the Appeal Form were that the person who signed the form had filed late "due to extenuating circumstances and illness". A supplemental letter indicated that the person who filed the form had been on vacation from August 4 to 9 and September 9 to 15, during which latter time she was ill. No information was provided concerning the nature of the illness or the "extenuating circumstances" referred to on the Appeal Form. No explanation was given as to why the appeal could not have been filed during the intervening period of August 9 to September 8.

The Member concluded there was no reasonable explanation for the delay in filing the appeal. Moreover, despite the fact that the Employer was aware of the time limits for filing an appeal, it failed to demonstrate a *bona fide* intention to appeal the Determination. There was no evidence that it had advised the respondent employee or the Director that it intended to appeal.

The Member went on to consider whether there was a strong *prima facie* case in favour of the Employer. She noted that the Employer claimed the Director erred in calculating the employee's vacation entitlement by using as the employee's 2002 gross earnings, an amount which included the employee's vacation pay, and by using as his 2003 gross earnings, an amount which exceeded the amount listed on his 2003 T4 form. Additionally, the Member noted that the Employer submitted supporting documentation on appeal which it had failed to supply during the course of the Delegate's investigation, despite the Delegate's request for information.

The Member quoted the Delegate's comments, in the Determination, that the Employer failed to respond to her multiple requests for information and records regarding whether vacation pay had been properly calculated on all wages earned in 2002 and 2003. The Member said that since the Employer chose not to submit information when it was requested, it could not now provide evidence on appeal which it failed to submit in the investigation. The Member observed that the Tribunal will not consider new evidence in the context of an appeal which could have been provided by the Employer at the investigation stage. Accordingly, the new evidence, which was available at the time of the investigation, would not be considered on appeal. The Member concluded that the appellants had failed to demonstrate a strong *prima facie* case.

In the result, the Member, in the Tribunal's Decision, found the application for reconsideration was untimely and declined to extend the time to file the appeal. The appeal was therefore dismissed and the Determination confirmed.

The Employer applies for reconsideration of the Tribunal's Decision on the grounds that: the Employer did not contravene s. 58(1) of the *Act* as found by the Delegate; the Delegate's calculation of unpaid vacation pay was incorrect; and the administrative penalty imposed was too onerous for the Employer to bear, given its limited resources. The respondent employee contests the Employer's allegations that it did not contravene s. 58(1) and that the unpaid vacation pay was incorrectly calculated.

The Delegate opposes the application for reconsideration. The Delegate notes that the Tribunal has adopted a two-stage approach to applications for reconsideration (*Milan Holdings Ltd.* BCEST No. D313/98). At the first stage, the Tribunal decides whether any of the matters raised in the application warrant reconsideration. The following factors have been held to weigh against reconsideration:

a) where the application has not been filed in a timely fashion and there is not valid cause for the delay: see *Re British Columbia (Director of Employment Standards)*, BC EST #D122/98. In this context, the Tribunal will consider the prejudice to either party in proceeding with or refusing the reconsideration: *Re Rescan Environmental Services Ltd.*, BC EST #D522/97 (Reconsideration of BC EST #D007/97).

b) where the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the Member (as distinct from tendering new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): *Re Image House Inc.*, BC EST #D075/98 Reconsideration of BC SET #D418/97); *Alexander Perequine Consulting*, BC EST #D095/98 (Reconsideration of BC EST #D574/97); *32353 BC Ltd., (d.o.b. Saltair Neighbourhood Pub)*, BC EST #D478/97 (Reconsideration of BC EST #D186/97).

c) where the application arises out of a preliminary ruling made in the course of an appeal. "The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid a multiplicity of proceedings, confusion or delay": *World Project Management Inc.,* BC EST #D134/97 (Reconsideration of BC EST #D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator."

The Delegate says that the circumstances in which the Tribunal will exercise its discretion to reconsider a decision are limited and have been identified as follows:

- failure to comply with the principles of natural justice;
- mistake of fact or law;
- 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.

The Delegate says that where the Tribunal is satisfied that the Decision appears to warrant reconsideration, the Tribunal will proceed with an analysis of the substantive issues. The Delegate submits that the Employer's application has not addressed any of the substantive issues described above so as to warrant reconsideration.

I have reviewed the submissions of the parties and the documentation supplied in support and have decided to deny the Employer's application for reconsideration. As indicated above, the Member dismissed the Employer's appeal of the Determination dated November 15, 2004 because the Employer's application for appeal was untimely and because the circumstances in which the tardy application to appeal was made did not justify an extension of the time to file the appeal. In its application for reconsideration of the Tribunal's Decision, the Employer has not challenged the basis on which the Member dismissed the Employer's appeal, which was that it was untimely and an extension of time was not warranted. Rather, the Employer effectively seeks to re-argue its application for reconsideration, on the merits, by arguing that the Delegate erred by incorrectly calculating the unpaid vacation amounts. Additionally, it argues that the administrative penalty imposed by the Delegate is too onerous for it to bear.

An application for reconsideration of a Tribunal's decision is not an opportunity for an applicant to re-argue its case as though it was a fresh appeal, that is, a re-hearing of the appeal as though no appeal had been previously decided. An applicant for reconsideration of a Tribunal's decision on appeal bears the onus of demonstrating that the Tribunal erred in its decision. In the instant case, the applicant fails to allege that the Tribunal erred in deciding that the appeal was untimely and declining to extend the time to appeal. Instead, the applicant has taken its application for reconsideration as an opportunity to re-argue its case on the merits, despite the fact that the case was dismissed on the timeliness issue. Since the Employer does not challenge the Tribunal's Decision that the Employer's appeal was untimely and that an extension of time was not warranted, there is no basis on which to set aside the Tribunal's Decision.

In any event, I find that the Member did not err in dismissing the appeal on the basis of timeliness. Although I am sympathetic to the Employer's situation, since the appeal was only three days late, I am not satisfied that the circumstances support an extension. For instance, I agree with the Member that although the Employer was aware of the timeframe for filing its appeal, it failed to demonstrate a genuine, *bona fide* intention to appeal the Determination and it failed to notify the respondent employee and the Delegate of this intention.

Additionally, I am not satisfied that there is a strong *prima facie* case in favour of the Employer. The Employer contends that the Delegate erred by calculating the employee's unpaid vacation pay on the basis of the employee's gross earnings for 2002 and 2003, because those earnings included vacation pay. The Employer says vacation pay ought to have been excluded from the calculation of unpaid vacation pay.

According to section 58 of the *Act*, the calculation of an employee's vacation pay is to be based on the employee's "total wages during the year of employment entitling the employee to the vacation pay". The term "wages" is broadly and non-exhaustively defined in s. (1) of the *Act* to include, among other things, "salaries, commissions or money, paid or payable by an employer to an employee for work". Vacation pay is earned and payable for work. The statutory definition of "wages" does not expressly exclude vacation pay that has already been paid. Accordingly, vacation pay forms part of "wages" within the meaning of the *Act* (*United Used Auto and Truck Parts Ltd.*, BCEST #D334101, *Xinex Networks Inc.*, BCEST #D068/99). The Tribunal has held that the term "total wages" in s. 58 included vacation pay (*National Leasing Group Inc.*, BCEST #D552/99, at paras. 32-33; *Markin*, BCEST #228/98, at para. 12; *Primco (PWL) Ltd.*, BCEST #D144/97, at para. 15; *Pay Less Gas Co. (1972) v. British Columbia (Director of Employment Standards)* (1991), 38 CCEL at 117 (BCSC)).

Additionally, the Employer makes two new arguments it did not include as alleged grounds of error in its appeal, below. First, the Employer says the employee's vacation pay was wrongly treated as being 6% of gross salary per year rather than the minimum of 4% of gross salary which it says was all the employee was entitled to under the *Act* given his approximately 18 months of service with the Employer. Second, the Employer says the $500 penalty is too onerous, given its limited resources and its "earnest efforts" to co-operate with the Delegate.

With respect to the allegation that the employee is entitled only to the statutory minimum vacation pay of 4% of his wages, I note that s. 58 is not drafted in such limiting terms. Additionally, I note that the employee was contractually entitled to 3 weeks paid vacation per year which is approximately equivalent to 6% of gross salary.

Section 58 states, in part, that an employer must pay an employee having more than 5 calendar days of employment and up to 5 consecutive years of employment vacation pay of "at least" 4% of the employee's total wages during the year of employment entitling the employee to the vacation pay. The Tribunal has said that the Director is not limited by such terminology to collecting the statutory minimum; rather, the Director has the authority to enforce a contractual entitlement to vacation pay that exceeds the statutory minimum (*QI Systems Inc.*, BCEST #D340/02, at para. 3; *Evinger*, BCEST #D331/97, reconsideration of BCEST #D027/97).

Finally, with respect to the matter of the $500 administrative penalty, payment of that administrative penalty is required by section 29(1) of the *Employment Standards Regulation*, B.C. Reg. 396/95, which imposes a fine of $500 on a person who contravenes a provision of the *Act* for the first time or for the first

time in the preceding three years. The Director (or a Delegate) has no discretion; once a contravention is found, the s. 29(1) penalty automatically applies. No exception is provided in the event the offender lacks resources or the offender co-operated with the Delegate. In any event, the Employer puts forth no evidence of its financial circumstances. Moreover, the Employer's assertion that it made "earnest efforts" to co-operate with the Delegate, contradicts the Delegate's unchallenged submissions that the Employer failed to supply relevant information when asked to do so or, indeed, until collection efforts commenced.

In the result, I am unable to conclude that there is a strong *prime facie* case that would support the Employer's appeal if an extension of time was granted to permit the appeal to proceed. Nor can I conclude that the Member erred in finding there was no strong *prima facie* case and in dismissing the appeal as untimely.

Therefore, the application for reconsideration is dismissed and the Tribunal's Decision confirmed.

Alison H. Narod
Member
Employment Standards Tribunal