Employment Standards TRIBUNAL

An application for Reconsideration

- by -

Intan Hanneke, a Director or Officer of 0888231 B.C. Ltd. carrying on business as RDH Construction

("Ms. Hanneke")

- 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.: 2012A/18

DATE OF DECISION: May 7, 2012

DECISION

SUBMISSIONS

Intan Hanneke	on her own behalf, a Director or Officer of 0888231 B.C. Ltd. carrying on business as RDH Construction
Anthony Osborne	on his own behalf
Theresa Robertson	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an application by Intan Hanneke ("Ms. Hanneke") for a reconsideration of decision # D009/12 (the "Original Decision"), issued by the Tribunal on January 26, 2012.

2. On December 2, 2010, Anthony Osborne ("Mr. Osborne") filed a complaint under section 74 of the *Employment Standards Act* (the "*Act*") alleging that 0888231 B.C. Ltd. carrying on business as RDH Construction (the "Company") contravened the *Act* by failing to pay him wages for hours worked and making unauthorized deductions from his wages (the "Complaint"). The delegate investigated the Complaint and on April 29, 2011, issued a determination (the "Corporate Determination") against the Company finding that the Company was Mr. Osborne's employer for the purposes of the *Act* and owed him wages and interest totalling $1,034.34. The delegate, additionally, levied $2,000.00 in administrative penalties against the Company in the Corporate Determination.

3. The Corporate Determination, which included a notice to the Directors and Officers explaining their personal liability under the *Act*, was sent to the Company, with copies to the Registered and Records Office and to the Directors and Officers. However, the Corporate Determination was not appealed and the deadline for appealing the Corporate Determination expired on June 6, 2011.

4. As the Company failed to settle or pay the amounts ordered in the Corporate Determination, the delegate conducted a company search and found that the Company was incorporated on August 16, 2010, with Ms. Hanneke listed as its Director from the time of its incorporation. The corporate records also indicate that she was a Director between September 19, 2010, and October 11, 2010, when Mr. Osborne's wages were earned or should have been paid. Pursuant to section 96 of the *Act*, Ms. Hanneke, as a Director, is liable for up to two (2) months' unpaid wages for each employee of the Company and therefore, the delegate ordered that Ms. Hanneke is personally liable for the entire amount of wages owed to Mr. Osborne for the period September 19, 2010, to October 11, 2010, namely, $1,050.59 inclusive of accrued interest pursuant to section 88 of the *Act* (the "Section 96 Determination").

5. With respect to the administrative penalty levied against the Company in the Corporate Determination, the delegate noted that there is insufficient evidence that Ms. Hanneke authorized, permitted or acquiesced in the contravention of the Company and, therefore, she was not personally liable for the administrative penalty.

6. Ms. Hanneke appealed the Section 96 Determination, alleging that the delegate breached the principles of natural justice in making the said Determination.

7. In the Original Decision, the Tribunal Member correctly noted that while Ms. Hanneke's appeal was based on the "natural justice" ground of appeal, the submissions in the appeal question the correctness of the Director's finding in the Corporate Determination that the Company was Mr. Osborne's employer. The Tribunal Member also accurately noted that while Ms. Hanneke did not specifically invoke the error of law ground of appeal, in her submissions, she raised an argument that the Director erred in law in finding Mr. Ralph Hanneke ("Mr. Hanneke"), her spouse, was a Director of the Company or had any authority relating to the business of the Company. More specifically, Ms. Hanneke's initial appeal submissions consisted of three (3) short paragraphs alleging that Mr. Hanneke was not a Director or Officer of the Company and that he did not have any authority to hire Mr. Osborne for the Company and, lastly, that she never received any mail from the Employment Standards Branch (the "Branch").

8. The Tribunal Member, in dismissing Ms. Hanneke's appeal, stated:

> It is well established that a person challenging a director/officer Determination is limited to arguing those issues which arise under section 96: whether the person was a director/officer when the wages were earned or should have been paid; whether the amount of the liability imposed is within the limit for which a director/officer may be found to be personally liable; and whether the circumstances exist that would relieve the director/officer from personal liability under subsection 96(2). The director/officer is precluded from arguing the corporate liability: see *Kerry Steineman, Director/Officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST # D180/96. Accordingly, the arguments that question the correctness of the corporate Determinations may not be raised in this appeal.
>
> Specifically, Mrs. Hanneke may not question the validity of the Director finding 0888231 was Mr. Osborne's employer. That matter was a finding of fact made in the corporate Determination and was never appealed.
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> As well, Mrs. Hanneke may not argue the correctness of the Director's conclusion about the status of Mr. Hanneke with 0888231. She is confined to addressing her own liability under section 96. Mr. Hanneke has filed his own appeal on the matter of his personal liability under the *Act*.
>
> Mrs. Hanneke has not made any argument on those issues that arise under section 96. There can be no question that she was listed as a director of 0888231 at the time the wages of Mr. Osborne were earned and should have been paid. The Determination clearly indicates the amount of the liability imposed on Mrs. Hanneke under section 96 was within the limit of personal liability and there is nothing in the Determination or the material in the file that would indicated circumstances that might exempt Mrs. Hanneke from personal liability.
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> The material in the section 112(5) Record shows the Director made reasonable efforts to provide 0888231 and Mrs. Hanneke with the particulars of the complaint, with an opportunity to present argument and evidence in response to the complaint and with the corporate Determination. A party 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. The bald assertion made by Mrs. Hanneke, in the face of the material in the section 112(5) Record, is not sufficient to satisfy the burden of persuading the Tribunal there has been a failure to comply with principles of natural justice in making the Determination.
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> As a result, Mrs. Hanneke has failed to demonstrate any reviewable error in the Determination or provided any basis for cancelling it. The appeal is dismissed.

9. Ms. Hanneke, as indicated, is seeking a reconsideration of the Original Decision and it would appear she wants it cancelled although she is not clear about it in her submissions. Having said this, I note that the address to which the Director sent all correspondence relating to and including the Corporate Determination is the same address Ms. Hanneke used on the Appeal Form when she appealed the Section 96 Determination, and it is also the same address she now uses to file her Reconsideration Application.

10. In her submissions in support of her Reconsideration Application, Ms. Hanneke is now submitting a letter from WorkSafe BC, dated February 28, 2012, which confirms her request to WorkSafe BC to cancel coverage related to the Company's account with WorkSafe BC. The letter from WorkSafe BC is addressed to the Company and refers to the Company as "0888231 B.C. LTD RDH CONSTRUCTION" and sent to the registered and records office address of the Company which Ms. Hanekke used in the Appeal and Reconsideration applications and which the delegate used to correspond with the Company and Mr. and Ms. Hanneke in context of the Complaint and the Corporate Determination.

11. Ms. Hanneke indicates that she created the Company to operate a coin laundry in Vancouver and asked Mr. Hanneke to help her set up the Company and assist her with obtaining a business licence, which she obtained in 2010 in the name of L & H Coin Laundry. Mr. Hanneke's involvement thereafter ended. He was never a Director or employee of the Company, nor was he compensated for his services as a Director or employee according to Ms. Hanneke.

12. Ms. Hanneke states that she is from Indonesia and has been in Canada for only four (4) years and, therefore, her English is "not very good to handle this task". I presume she is speaking about setting up the Company and why she used Mr. Hanneke's services.

13. In her further reply in the Reconsideration application, Ms. Hanneke states she never hired Mr. Osborne for any services, or as an employee. She repeats that Mr. Hanneke was never an Officer or Director of the Company, nor authorized to hire any person for the Company.

14. Ms. Hanneke submits that Mr. Osborne helped Mr. Hanneke and not the Company or her. She states that her only contact with Mr. Osborne was when he picked up Mr. Hanneke from their home. Mr. Hanneke was using Mr. Osborne as a driver to drive him around to the doctor or to other places he needed to go, and Ms. Hanneke says she never talked to him about employment with the Company. She reiterates that she never hired Mr. Osborne and concludes by asking that all "conclusion[s] and findings" regarding this matter should be sent to her to the "above address" so she could forward it to her legal representative. The address she provides is the same address as one used by the delegate to correspond with the Company, as well as Mr. and Ms. Hanneke, which address, as indicated, is also provided by Ms. Hanneke in her Appeal, as well as her Reconsideration Application. I make note of this only because Ms. Hanneke has repeatedly stated that she never received any mail from the Branch, which is apparently the basis for the denial of natural justice argument she advanced in her Appeal previously.

15. Ms. Hanneke has also produced in her Reconsideration application a similarly dated correspondence in the same writing style and font as her own letter purporting to be a statement from Mr. Gerard Brewer ("Mr. Brewer"). She claims Mr. Brewer was in attendance at the meeting between Mr. Hanneke and Mr. Osborne, at which meeting the latter two discussed how Mr. Osborne was to assist Mr. Hanneke and drive him to the doctor and to other places he needs to go. In the purported letter of Mr. Brewer, the latter indicates that Ms. Hanneke, herself, was not present at the meeting attended by him between Mr. Hanneke and Mr. Osborne. He does not indicate when the meeting happened, but he indicates that Mr. Hanneke made it clear to Mr. Osborne that he was working for Mr. Hanneke and not for any company, and that Mr. Osborne was "on call" to drive Mr. Hanneke around on an as-needed basis. Mr. Brewer further indicates that Mr. Osborne was hired by Mr. Hanneke for $12 per hour to be paid in cash. Mr. Brewer also indicates that Mr. Hanneke helped Mr. Osborne "with an apartment and paid lunches". Mr. Osborne was subsequently replaced with another person on the same terms. Mr. Brewer concludes by stating that Ms. Hanneke never attended any of the meetings involving Mr. Osborne and suggests that Mr. Osborne's WorkSafe BC claim is "fabricated" as he never saw Mr. Osborne injure himself.

16. Ms. Hanneke also submits two (2) emails; one from Mr. Hanneke, dated March 13, 2012, and one from Ms. Lani Booth ("Ms. Booth"), dated March 14, 2012, responding to Mr. Hanneke's email. Mr. Hanneke's email is directing Ms. Booth to provide him with "a letter stating that the company never has an income and never had any employees" [*sic*]. Ms. Booth, in response, states that she cannot "vouch or make any reference to this type of transaction" as she did not prepare financial records for the Company.

17. The Director, in response to Ms. Hanneke's Reconsideration application, states that Ms. Hanneke is simply rearguing the submissions made in the initial investigation of the Complaint and in her subsequent Appeal of the Section 96 Determination.

18. Mr. Osborne, in his submissions in response to the Reconsideration application, is opposed to the relief sought by Ms. Hanneke in her Reconsideration Application. I have read Mr. Osborne's submissions carefully and do not propose to set them out here, as I do not find them helpful or relevant in my decision in this application as they are in large measure in the nature of a diatribe against Mr. and Ms. Hanneke.

ISSUES

19. In an application for reconsideration, there is a threshold issue under section 116 of the *Act* of whether the Tribunal will exercise its discretion to reconsider the Original Decision. If the Tribunal is satisfied that the case is appropriate for reconsideration, the substantive issues raised in the Reconsideration Application will be considered. In this case, the substantive issues are whether the Director erred in concluding: i) that Ms. Hanneke, on appeal, could not question the validity of the Director's finding that the Company was Mr. Osborne's employer; ii) that Ms. Hanneke may not argue the correctness of the Director's conclusion about the status of Mr. Hanneke with the Company; iii) that nothing in the evidence adduced by Ms. Hanneke gives rise to circumstances that might exempt Ms. Hanneke from personal liability under section 96 of the *Act*; and (iv) that there was no denial of natural justice on the part of the Director in making the Section 96 Determination.

ANALYSIS

20. Section 116 of the *Act* gives the Tribunal the authority to reconsider and confirm, cancel or vary its own orders or decisions:

> **Reconsideration of orders and decisions**
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> 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.

21. The Tribunal's authority in section 116 is discretionary in nature as the Tribunal "may" reconsider its own orders or decisions. Further, the Tribunal's discretion is to be exercised 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 the employers and employees.

22. In an earlier decision of the Tribunal in *Voloroso*, BC EST # RD046/01, it is important to note that the Tribunal called for a restraint in the exercise of the reconsideration power in section 116 of the *Act:*

> … 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 favour of persons with greater resources, or best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

23. Having said this, it should be noted that in *Re: British Columbia (Director of Employment Standards)(sub nom. Milan Holdings Inc.)*, BC EST # D313/98, the Tribunal set out a two-stage process for determining whether or not to exercise its reconsideration power. In the first stage, 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 Member; (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.

24. After weighing the above factors in the first stage, if the Tribunal concludes that the application is inappropriate for reconsideration, then the Tribunal will reject the application and provide its reasons for not reconsidering same. 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 involves consideration of the substantive issues raised by the reconsideration.

25. The circumstances where the Tribunal favours exercising its discretion to reconsider include but are not limited to:

a. Failure to comply with the principles of natural justice;

b. Mistake of law or fact;

c. Significant new evidence that was not reasonably available to the original panel;

d. Inconsistency between decisions of the Tribunal that are indistinguishable on the critical facts;

e. Misunderstanding or failure to deal with a serious issue; and

f. Clerical error

26. Having reviewed Ms. Hanneke's reconsideration submissions, I am not persuaded that a reconsideration is warranted in this case. I agree with the Director that Ms. Hanneke, for the most part, is re-arguing her appeal. This is abundantly evident when one compares the appeal submissions with the reconsideration submissions. As with her appeal submissions, in her reconsideration submissions, Ms. Hanneke reiterates

that Mr. Hanneke was not a Director or Officer of the Company, nor was he in a position to act like one. He only helped her set up "the project" which she describes as the coin laundry operation. Thereafter his involvement stopped. In both the appeal and reconsideration submissions, Ms. Hanneke also indicates that she did not receive a T4 form in relation to Mr. Osborne, and that Mr. Osborne did not indicate to her that he was working for the Company.

27. I do not find that the Tribunal Member in the Original Decision erred in any respect. I find that the issue with respect to the status of Mr. Osborne vis-à-vis the Company should have been dealt with in the appeal of the Corporate Determination, if the Company was disputing the Director's finding that Mr. Osborne was an employee of the Company. However, the Company did not appeal the Corporate Determination, and it is not appropriate in the Section 96 Determination for Ms. Hanneke to argue the matter of Mr. Osborne's employment status vis-à-vis the Company. Nor is it appropriate for Ms. Hanneke to challenge the amount of the Corporate Determination in the Section 96 Determination or in the Reconsideration application.

28. I also note that Ms. Hanneke has not made any submissions that would persuade me to reconsider the Tribunal Member's conclusion that she failed to satisfy the burden of persuading the Tribunal that the Director failed to comply with the principles of natural justice in making the Section 96 Determination. I note that Ms. Hanneke continues to use the same mailing address for her Reconsideration Application as she did for her appeal application. This address is also the address of the Registered and Records Office of the Company, and the one to which the delegate sent all correspondence to the Company and to Mr. Hanneke and Ms. Hanneke. It is the same address that Ms. Hanneke asked in her Appeal submissions for all "conclusion(s) and findings" to be sent to. In the circumstances, I find there is no evidence that the Tribunal Member erred in concluding that the Director made reasonable efforts to provide the Company and Ms. Hanneke with particulars of the Complaint and an opportunity to present an argument and evidence in response to that Complaint.

29. With respect to the WorkSafe BC letter of February 28, 2012, I note that this letter is addressed to the Company doing business as RDH Construction and not L &H Coin Laundry. It is also sent to the same address as the one used by Ms. Hanneke in the Appeal and Reconsideration applications, and which the delegate used in corresponding with the Company and with both Mr. Hanneke and Ms. Hanneke. The letter confirms that WorkSafe BC has cancelled the Company's coverage at the Company's request. However, I do not find that this letter is of any assistance to Ms. Hanneke in the Reconsideration Application notwithstanding the question of its admissibility. However, it does support the notion that the Company was conducting business as RDH Construction and *not* L&H Coin Laundry for which Ms. Hanneke suggests she had the company incorporated and received a business permit in 2010.

30. Finally, with respect to the email of Ms. Lani Booth, dated March 14, 2012, in response to Mr. Hanneke's email of March 13, 2012, notwithstanding that neither of these emails would be admissible in the Reconsideration Application as they would not qualify as new evidence, I find the emails irrelevant and unhelpful to Ms. Hanneke's Reconsideration Application. I note that the direction Mr. Hanneke provides to the accountant, Ms. Booth, "to get a letter stating that the company never has an income and never had any employees [*sic*]" was unfulfilled by Ms. Booth who indicates in no uncertain terms that she could not "vouch or make any reference to this type of transaction" as she did not prepare any business financials for the Company.

31. With respect to Mr. Brewer's purported statement, as with Ms. Booth's and Mr. Hanneke's emails above, I find them both inadmissible in this Reconsideration Application. The letter largely deals largely with the matter of Mr. Osborne's status vis-à-vis the Company and it should have been raised in the investigation of the Complaint in the first instance and before the Corporate Determination was made. It is inappropriate for

Ms. Hanneke, in the Reconsideration application of the Original Decision pertaining to the Section 96 Determination, to adduce any evidence that she could have properly produced in the investigation of the Complaint against the Company leading to the Corporate Determination. Therefore, I find the purported statement of Mr. Brewer inadmissible. As an aside, I also question whether Mr. Brewer truly prepared the letter or statement purported to be his. It is written with similar grammatical and language deficiencies I noticed in Ms. Hanneke's letter of same date. Curiously, the font in both Ms. Hanneke's submissions and the purported statement of Mr. Brewer are the same and there is an identical typographical error in both letters with respect to the date. More specifically, there is a missing space between the month and date. It is as if the same template letter were used to create both Ms. Hanneke's and Mr. Brewer's letters or statements of April 23, 2012.

32. Having said this, I find that none of the factors the Tribunal considers in exercising its discretion to reconsider under Section 116 of the *Act* exist in this Reconsideration Application. This is a case of an unsuccessful applicant at appeal, Ms. Hanneke, taking the proverbial "second kick at the can" before a different panel with a view to having a favourable outcome. This is neither an appropriate purpose of reconsideration, nor does it advance the stated objective of the *Act* in section 2(d), namely, the fair and efficient procedure for resolving disputes.

33. In the circumstances, Ms. Hanneke's application for reconsideration fails at the first stage of the two-stage process in reconsideration applications and, therefore, I need not pursue the second-stage analysis in *Re: Milan Holdings Inc., supra*.

ORDER

34. Pursuant to section 116 of the *Act*, I order the Original Decision dated January 26, 2012 (BC EST # D009/12) confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal