Employment Standards TRIBUNAL

An application for Reconsideration

- by -

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

("Mr. 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/19

DATE OF DECISION: May 7, 2012

DECISION

SUBMISSIONS

Ralph Hanneke	on his 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 Ralph Hanneke ("Mr. Hanneke") for a reconsideration of decision # D010/12 (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, including Intan Hanneke ("Ms. Hanneke") and Mr. Hanneke. 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 in a director's determination 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*. In a separate director's determination dated October 19, 2011, the delegate, applying the functional test, determined that Mr. Hanneke was a *de facto* Director or Officer of the Company and therefore also liable for the full amount found owing to Mr. Osborne in the Corporate Determination (the "Section 96 Determination"). In arriving at this conclusion, the delegate reasoned:

> Ralph Hanneke has not refuted any of the evidence regarding his involvement in the affairs and business of 0888231 B.C. Ltd. carrying on business as RDH Construction. He has not refuted he held himself out to be the owner of the business to Anthony Osborne or the business' clients. He has not refuted he hired Anthony Osborne, negotiated the terms of employment or paid him by both cash and bank draft. In fact, Ralph Hanneke's statement that his wife, who is listed as the sole director of the corporation, had nothing

> to do with the business is supportive of a finding that Ralph Hanneke was the controlling mind of the affairs and business of the corporation. He indicated he would be appealing the corporate determination and had retained counsel on behalf of the corporation, which is further indicative of the fact he holds the decision making authority to influence the affairs and interest of the corporation.
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> Given the preponderance of evidence regarding Ralph Hanneke's involvement in the governance of 0888231 B.C. Ltd. carrying on business as RDH Construction, on applying the functional test, I find Ralph Hanneke to be a *de facto* director/officer of 0888231 B.C. Ltd. carrying on business as RDH Construction.

5. With respect to the administrative penalty levied against the Company in the Corporate Determination, the delegate, in concluding that Mr. Hanneke was also personally liable for the penalty, stated:

> … the undisputed facts are that Ralph Hanneke hired Anthony Osborne, controlled the terms of his employment including setting his hours of work and paid wages to Anthony Osborne. Accordingly, I find that there is sufficient evidence to support the conclusion Ralph Hanneke authorized, permitted or acquiesced in the contraventions and is therefore personally liable for the administrative penalties.

6. Mr. Hanneke appealed the Section 96 Determination, alleging that the delegate erred in law and breached the principles of natural justice in making the said determination and sought its cancellation.

7. The Tribunal Member, in dismissing Ms. Hanneke's appeal in the Original Decision, 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 personally liable; and whether 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.
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> Specifically, Mr. Hanneke may not question the validity of the findings by the Director that 0888231 was Mr. Osborne's employer, what Mr. Osborne's wage rate was, what his hours were and whether he was owed wages by 0888231. The conclusions reached by the Director on all of these matters were based on findings of fact made in the corporate Determination that were never appealed and may not be challenged now.
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> The only argument made by Mr. Hanneke on the issues that arise under section 96 or section 98(2) is that he was not a director of 0888231, but even on that matter he has not framed his argument in the context of those facts and factors on which the Director based the finding that he was a *de facto* director of the company. A person may be found to be a director of a corporation even though not formally listed in the corporate registry if that person exercises functions, task and duties that are typical of a corporate director: see, for example, *Erwin Penner and Beverly Hauff*, BC EST # D371/96, and *Jim Kovacs*, BC EST # D076/97. The facts relied on by the Director in finding Mr. Hanneke was a director are supported in the material found in the section 112(5) Record, in the reasonable and logical conclusions that flow from that material and point strongly to Mr. Hanneke being the controlling mind of the company and a *de facto* director. Mr. Hanneke has not demonstrated there was any error made by the Director in this regard.
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> The material in the section 112(5) Record shows the Director made reasonable efforts to provide 0888231 and Mr. 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 Mr. Hanneke, in the face of the material in the section 112(5) Record, that he was not served 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. In this context, I note the *Act* does not require personal service; delivery by registered mail to the person's last known address constitutes service for the purposes of the *Act*: see section 122 of the *Act*.
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> As a result of the above considerations, I find that Mr. Hanneke has failed to demonstrate any reviewable error in the Determination or provided any basis for cancelling it. The appeal is dismissed.

8. Mr. Hanneke, as indicated, is seeking a Reconsideration of the Original Decision issued on January 26, 2012. Pursuant to Rule 22(3) of the Tribunal's *Rules of Practice and Procedure*, Mr. Hanneke had thirty (30) days after the date of the Tribunal's decision to deliver his application for Reconsideration. However, Mr. Hanneke filed an incomplete application for Reconsideration on February 28, 2012, and the Tribunal, on February 29, 2012, requested that he provide his written reasons for both his Reconsideration Application and for filing his application past the time limit by 4:00 p.m. on March 7, 2012. On March 5, 2012, Mr. Hanneke, by email to the Tribunal, advised he would be out of town until March 10, 2012. On March 12, 2012, he again contacted the Tribunal by email and asked the Tribunal to contact him by telephone. He also advised that he would be able to hand deliver the requested documents to the Tribunal no later than 4:00 p.m. on March 13, 2012. However, he failed to do this and on March 14, 2012, the Tribunal, by way of a letter of same date (emailed to Mr. Hanneke and mailed to the Registered and Records Office of the Company), advised Mr. Hanneke that it would be unable to proceed with his application for Reconsideration.

9. Subsequently, on March 15, 2012, Mr. Hanneke filed the Reconsideration Application form with submissions in support of his Reconsideration but without any submissions explaining his late application. He filed his submissions explaining his late application the next day, on March 16, 2012. In the latter submissions, he explains that he was out of town until March 14, 2012, and did not have an opportunity to call or email the Tribunal. He further explains that his files were at home and he was unable to send his documents to the Tribunal until March 15, after he got home. He states he was in the North and did not have access to a computer or phone (although, according to the Tribunal, he did send the Tribunal an email on March 5, 2012, advising he was out of town until March 10, 2012, and followed up with another email on March 12, 2012, asking the Tribunal to phone him and advising he would hand deliver his documents to the Tribunal the next day).

10. As for his submissions on the merits of his Reconsideration Application, Mr. Hanneke repeats his Appeal submissions made earlier stating that it was he and not the Company that hired Mr. Osborne for personal use. He states he never used the offices at 2300 - 1066 West Hastings Street, Vancouver "to act on behalf" of the Company, although I note Mr. Hanneke is using that same address for his Reconsideration Application and his earlier Appeal Application. The delegate also used the same address when corresponding with the Company and the Company's Directors and Officers during the investigation of the Complaint, including after the Corporate Determination.

11. I also note, as with his Appeal submissions, Mr. Hanneke reiterates in his submissions in the Reconsideration Application that he paid Mr. Osborne in full and encloses the cheques he gave to Mr. Osborne, which he previously submitted in the Appeal of the Section 96 Determination.

12. He submits the administrative penalty of $2,000 "is not fair" in the circumstances and concludes his submissions by referring to a letter from WorkSafe BC, dated February 28, 2012, and two (2) emails, one from himself, dated March 13, 2012, to an accountant, Ms. Lani Booth ("Ms. Booth"), and the latter's email in response dated March 14, 2012. With respect to the first, that is, the letter from WorkSafe BC, dated February 28, 2012, I note that this letter confirms Ms. Hanneke's request to WorkSafe BC to cancel coverage

relating to the Company's account with WorkSafe BC. I also note that this letter 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 Mr. Hanneke used in both the Appeal of the Section 96 Determination and again in his Reconsideration Application. It is also the same address the delegate used previously when corresponding with the Company and Mr. and Ms. Hanneke in context of the investigation of the Complaint leading to and after the issuance of the Corporate Determination.

13. With respect to the two emails, one from Mr. Hanneke to Ms. Booth and her email in response, I note that in his email to Ms. Booth, Mr. Hanneke is asking 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.

14. In response to Mr. Hanneke's Reconsideration Application, the Director states that Mr. Hanneke is simply rearguing the submissions made in the initial investigation of the Complaint and in his subsequent Appeal of the Section 96 Determination.

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

ISSUES

16. 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 Mr. Hanneke, on appeal, could not question the validity of the Director's finding that the Company was Mr. Osborne's employer; ii) that nothing in the evidence adduced by Mr. Hanneke gives rise to circumstances that might exempt him from personal liability under section 96 of the *Act*; and (iii) that there was no denial of natural justice on the part of the Director in making the Section 96 Determination.

ANALYSIS

17. 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
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> (a) reconsider any order or decision of the tribunal, and
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> (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.
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> (2) The director or a person named in a decision or order of the tribunal may make an application under this section.
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> (3) An application may be made only once with respect to the same order or decision.

18. 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.

19. 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.

20. 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.

21. 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.

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

- Failure to comply with the principles of natural justice;
- Mistake of law or fact;
- 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

23. Having reviewed Mr. Hanneke's reconsideration submissions, I am not persuaded that reconsideration is warranted in this case. While I have grave doubts that Mr. Hanneke's application was filed in a timely fashion and I find his explanation for filing his application late suspect[1], I need not rely on the late filing to dismiss his Reconsideration Application. Instead, I find that Mr. Hanneke's application for Reconsideration is nothing short of a transparent attempt to reargue the submissions he made previously in the Appeal of the Section 96 Determination. This is evident when one compares the submissions in both the Appeal and the Reconsideration Applications.

24. Having said this, I also find that the Tribunal Member's Original Decision is very well reasoned and there is no reviewable error in the decision. I agree with the Tribunal Member 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, as the Company did not appeal the Corporate Determination, it is not appropriate in the Section 96 Determination for Mr. Hanneke to argue the matter of Mr. Osborne's employment status vis-à-vis the Company. Nor is it appropriate for Mr. Hanneke to challenge the amount of the Corporate Determination in the Section 96 Determination or in the Reconsideration Application.

25. I also note that Mr. Hanneke has not made any submissions that would persuade me to reconsider the Tribunal Member's conclusion that Mr. Hanneke failed to discharge the burden of proof to show that the Director denied him natural justice in making the Section 96 Determination. I note that Mr. Hanneke continues to use the same mailing address for his Reconsideration Application as he did for his Appeal Application. This address is also the address of the Registered and Records Office of the Company, and the one that the delegate used in sending all correspondence to the Company and to Mr. Hanneke and Ms. Hanneke. 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 Mr. Hanneke with particulars of the Complaint and an opportunity to present an argument and evidence in response to that Complaint.

26. 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 Mr. 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 cancelled the Company's coverage at the Company's request. However, I do not find that this letter is of any assistance to Mr. 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.

27. 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 Mr. Hanneke's Reconsideration Application. I note that the request of Mr. Hanneke to the accountant, Ms. Booth, "to get a letter stating that the company never has an income and never had any employees [*sic*]" was not carried out by Ms. Booth who responded in no uncertain terms that she could not

[1] At all material times Mr. Hanneke was aware of the ongoing proceedings he was involved in before the Tribunal and, contrary to his submissions, he did have access to email as he sent the Tribunal an email on March 5, 2012, advising he was out of town until March 10, 2012, and followed up with another email on March 12, 2012, asking the Tribunal to phone him and advised he would hand deliver his documents to the Tribunal the next day, but failed to do so.

"vouch or make any reference to this type of transaction" as she did not prepare any business financials for the Company.

28. 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. As with the associated Reconsideration Application of Ms. Hanneke, Mr. Hanneke's Reconsideration Application is an attempt at 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.

29. In the circumstances, Mr. 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

30. Pursuant to section 116 of the *Act*, I order the Original Decision dated January 26, 2012 (BC EST # D010/12) confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal