An application for Reconsideration

- by -

660 Management Services Ltd., Ideal Welders Ltd. and Caldew Services Ltd.
Associated Employers under Section 95 of the Employment Standards Act
(the "Associated Corporations")

- 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.: 2005A/216

DATE OF DECISION: April 3, 2006

DECISION

SUBMISSIONS

Michael W. Hunter, Q.C.:	on behalf of the Associated Corporations
Jim Ross	on behalf of the Director of Employment Standards

OVERVIEW

1. This is an application by 660 Management Services Ltd., Ideal Welders Ltd. and Caldew Services Ltd., Associated Employers under Section 95 of the Employment Standards Act (the "Associated Corporations") for a reconsideration of Tribunal Decision #D147/05 (the "Original Decision"), issued by the Tribunal on September 26, 2005.

2. 660 Management Services Ltd. ("660") operates a management services business, and provides Ideal Welders Ltd. ("Ideal") and Caldew Services Ltd. ("Caldew") with bookkeeping and accounting services. All three corporations operate out of the same location. Robert (Jim) Longo is the President and Secretary of Ideal, Mollie M. Longo is the President and Secretary of Caldew, and Christine Longo is the President and Secretary of 660.

3. Keema Baysinger worked for Ideal as a payroll/benefits administrator. 660 issued her paycheques and ROE. Ms. Baysinger became pregnant. Shortly before she went off work for medical reasons related to the pregnancy, she was advised that her hours of work would be reduced from five days per week to three days per week, and her remuneration would change to an hourly, rather than an annual, rate of pay. While she was on pregnancy leave, Mr. Baysinger was told that her hours of work would be reduced again from three days per week to two days per week.

4. Ms. Baysinger said she would be unable to continue to work for Ideal, and completed a self help kit seeking compensation for length of service. Ideal responded to Ms. Baysinger on October 14, 2004, advising her that she was not entitled to "severance pay". Ms. Baysinger filed her complaint with the Employment Standards Branch on October 21, 2004, seeking compensation for length of service. On October 29, 2004, the delegate sought information from each party. Ideal advised him that ithad evidence that Ms. Baysinger quit her employment, and the matter should be ended. The delegate conducted a fact finding conference on November 9, 2004. On December 22, 2004, Ideal paid Ms. Baysinger an amount representing "full and final" payment of "severance pay" claimed in the self help kit. The delegate advised the employer that because Ms. Baysinger's "offer" in the self help kit had been rejected, Ms. Baysinger had withdrawn her offer and proceeded with a complaint.

5. Following an investigation, the delegate determined that 660, Ideal and Caldew were associated companies under Section 95 of the *Employment Standards Act* (the "*Act*"). The delegate also determined that Ideal had changed Ms. Baysinger's hours of work without her written consent, had not established that the reduction would not have occurred if Ms. Baysinger was not pregnant, had further reduced her hours of work without her written consent, and had not established that the further reduction in her hours of work would not have occurred if she had not taken pregnancy leave. The delegate found that no compensation for length of service was owed. The delegate awarded Ms. Baysinger an amount that

represented the difference between the amount deposited with the Director and the wages owed to her. The delegate found that the companies were related for the purposes of section 95, and issued a Determination in that amount. He also imposed an administrative penalty in the amount of $500 under section 29(1) of the *Regulation* for the Associated Corporations' contravention of the *Act*.

6. The Associated Corporations appealed the decision on the grounds that the delegate had erred in law. Those errors included associating the corporations for no reason, for not ceasing to investigate the complaint once the amount claimed by Ms. Baysinger in her self help kit had been deposited with the Director, and for failing to consider whether Ms. Baysinger had failed to mitigate her losses. Although the Associated Corporations advanced other arguments which were not grounds for appeal under the *Act*, the Tribunal also addressed those grounds.

7. The Tribunal Member reviewed the submissions, the facts and the law, and concluded that the delegate had not erred in associating the corporations. In addressing the Associated Corporation' argument that the delegate erred in finding a statutory purpose in treating the companies as one employer, the Member said as follows:

> I do not agree with counsel for the Associated Corporations that there is "no reason" for the decision to associate or that the Director erred in law in making the association. I accept, as counsel argues, that a business might operate through several corporations for reasons unrelated to the administration of minimum standards legislation. However, where the interconnection of those several corporations obfuscates questions of responsibility for the correct application of minimum standards and potential liability for any contraventions of those standards, it is not an error, for reasons relating to both the proper administration of the *Act* and the fairness and efficiency in resolving disputed under the *Act*, to associate those corporations. The facts of this case, which show, among other things, the Associated Corporations sharing Baysinger's employment, provide a sufficient reason for associating the corporations that this aspect of the appeal is dismissed.

8. In addressing the Associated Corporations' argument that the delegate erred in investigating the complaint once the amount claimed in the self-help kit was deposited with the Branch, the Member said:

> As a matter of law, once the investigation of a complaint has been commenced, the Director may only stop or postpone the investigation in those circumstances which are listed in that subsection. None of those circumstances would have applied in this case. The Determination specifically addresses whether the voluntary payment by the Associated Corporation of $1426.93 "resolved" the dispute and concluded that it did not. There is no error in that conclusion.
>
> Even if the complaint could be considered "resolved" by the voluntary payment, there is nothing in the *Act* what would compel the Director, as a mater of law, to stop the investigation. Under subsection 76(3), a decision to stop an investigation in such circumstances is a matter of discretion for the Director and not mandatory. It would be an absurd reading of the *Act* to find the Director is compelled, as a matter of law, to stop an investigation in circumstances where a discretion is given about whether to stop investigating.

9. Although the Associated Corporations did not argue that the Director's discretion had been improperly exercised, the Member noted the Tribunal's decisions in that respect.

10. Finally, the Member also decided that the issue of mitigation did not arise in the circumstances given that the wage award flowed from a contravention of statutory rights, not damages for breach of contract. The

Member upheld the delegate's decision to impose an administrative penalty based on the Tribunal's decisions on that issue and dismissed all aspects of the appeal.

ARGUMENT

11. Counsel for the Associated Corporations seeks a reconsideration of the Decision on the member's decision to uphold the delegate's decision to associate the companies. He repeats his argument that there is no statutory purpose for treating the entities as one employer for the purposes of the *Act*. He also argues that the "unnecessary" section 95 finding renders all three companies liable for increased administrative penalties if one should commit a future infraction.

12. Counsel for the Associated Corporations relies on the following statement contained in the self-help kit: "receipt of this amount will be considered full payment of this claim under the Employment Standards Act" in his argument for a reconsideration of the Member's decision to uphold the delegate's decision to proceed with the investigation after the companies had paid the Director the full amount claimed in the self help kit. He repeats his argument, made before the original Member, that the 2002 amendments were "intended to be a complaints driven system whereby an employee would deal directly with her employer and the employer would be encouraged to voluntarily pay the amount claimed". He submits that, if I accept his argument about the "policy change" behind the amendments, the Member erred in law in his analysis of section 74 and 76.

13. Counsel further says that the Member erred in finding that Ms. Baysinger was not required to accept a position with the employer that was not the same as or comparable to her pre-leave position. Counsel says that Ms. Baysinger was offered her exact job, but for two days per week rather than three.

14. Finally, counsel for the Associated Corporations says that the administrative penalty should not have been upheld because the complaint was resolved, but if it is upheld, it should not be on the record for all three companies for the purposes of further infractions.

15. The Director seeks to have the reconsideration application dismissed on the basis that "there is no error of law in the Determination". The delegate also responded to several comments made by counsel, largely with respect to the facts.

16. In reply, counsel for the Associated Corporations argues that the delegate's letter of March 1, 2006 addressed matters not previously raised by counsel or in the proceedings to date, and is not in accordance with tribunal procedures. Counsel nevertheless addresses comments made by the delegate. Given that the matters commented upon by the delegate are factual, and have no bearing on the reconsideration application, I do not find it necessary to summarize the Associated Corporations' response.

ISSUES

17. 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?

ANALYSIS

18. The *Employment Standards Act*, R.S.B.C. 1996 c. 113 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

19. 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."

20. 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.

21. The Tribunal may agree to reconsider a Decision for a number of reasons, including:

- The adjudicator 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 Adjudicator 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*)*

22. 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.

23. 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.

24. 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…
>
> 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 favor of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

25. Having reviewed the material, I am not persuaded that a reconsideration of the matter is warranted.

26. The basis for the reconsideration application is, in all essential respects, identical to that advanced before the Tribunal at the first instance. The member fully analyzed those arguments in light of the *Act* and Tribunal jurisprudence. While it is evident that the Associated Corporations continue to disagree with the Determination, they have advanced no clear and compelling basis for reconsideration.

27. Counsel's arguments, particularly with respect to the issue of stopping the investigation, essentially seek to have the Tribunal "re-weigh" the arguments already made. Counsel says that the Member's analysis is in error based on the "intent" of the *Act* but provides no authority for his arguments. Although counsel relies upon the wording of the Self-Help kit and the Complaint Information Form in support of his argument, the wording of those documents, neither of which are prescribed by the *Act* or *regulation*, have no bearing on the Member's analysis.

28. The Associated Corporations have not raised significant questions of law, fact, principle or procedure that should be reviewed because of their importance to the parties and/or their implications for future cases.

ORDER

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

Carol L. Roberts
Member
Employment Standards Tribunal