

An Application for Reconsideration

- by -

Global Safe Technologies Inc.
("Global Safe")

- 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: David B. Stevenson

FILE No.: 2009A/021

DATE OF DECISION: May 13, 2009

DECISION

SUBMISSIONS

1. Don Dafoe on behalf of Global Safe Technologies Inc.
2. Stanley Schaefer on his own behalf
3. Tyler Siegmann on behalf of the Director of Employment Standards

OVERVIEW

4. Global Safe Technologies Inc. (“Global Safe”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of a decision, BC EST #D005/09, made by the Tribunal on January 12, 2009 (the “original decision”). The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on October 7, 2008. The Determination considered a complaint filed by Stanley Schaefer (“Schaefer”) alleging Global Safe had contravened requirements of the *Act* in respect of his employment by failing to pay him regular wages, annual vacation pay and length of service compensation.
5. The Determination found that Schaefer was owed regular wages and annual vacation pay under the *Act*, but denied his claim to length of service compensation. The Determination ordered Global Safe to pay wages, annual vacation pay, and interest under section 88 of the *Act* in the amount of \$17,689.41 and imposed administrative penalties on Global Safe for contraventions of the *Act* in the amount of \$1,500.00.
6. Global Safe appealed the Determination on the ground the Director had failed to observe principles of natural justice in making the Determination. Global Safe also sought to introduce new evidence on the appeal.
7. The original decision dismissed the appeal, finding no failure to observe principles of natural justice and expressing the view that the appeal was actually grounded in a disagreement by Global Safe with findings of fact made in the Determination which, in the circumstances, were unassailable. The new evidence which Global Safe sought to introduce with the appeal comprised Schaefer’s T-4 statements for the years 2006 and 2007. This new evidence was not accepted. The Tribunal Member of the original decision found the documents were available at the time the Determination was made and, in any event, were not determinative on the issue of whether Schaefer was an employee of Global Safe, as the Director found, or a partner in the business, as Global Safe had asserted in the complaint process and re-argued in the appeal.
8. In this application for reconsideration, Global Safe has revisited its disagreement with the conclusion in the Determination that Schaefer was an employee of Global Safe rather than a partner in the business. The T-4’s have been resubmitted, and additional material has been provided, in the form of written statements from Jon Hack and Randy Siteman, who are unidentified in the reconsideration application but who, from the tenor and content of their statements, appear to be directors and/or officers of Global Safe and potentially personally liable under section 96 of the *Act* for wages owed by Global Safe to Schaefer.

ISSUE

9. In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case is appropriate for reconsideration, the substantive issue raised in this application, as it was in the appeal, is whether the Director failed to observe principles of natural justice in finding Schaefer was an employee of Global Safe.

ANALYSIS OF THE PRELIMINARY ISSUE

10. The legislature has conferred a reconsideration power on the Tribunal under Section 116 of the *Act*, which reads as follows:

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.*

11. Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is "*to provide fair and efficient procedures for resolving disputes over the interpretation and application*" of its provisions. Another stated purpose, found in subsection 2(b), is to "*promote the fair treatment of employees and employers*". The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. An assessment is also made of the merits of the original decision. The focus of a reconsideration application is the original decision.

12. Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the tribunal as including:

- 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.

13. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively re-visit the original decision and come to a different conclusion.

14. If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration.

ARGUMENT

15. It is unnecessary to set out the arguments of Global Safe in detail. It suffices to say the arguments advanced in this application are substantially a restatement of the submissions made in the appeal. Even the statements provided by Mr. Hack and Mr. Siteman simply reassert what Global Safe has asserted in both the complaint process and the appeal: that Schaefer was a partner in Global Safe under an oral agreement between he and Mr. Hack, Mr. Siteman and Don Dafoe.
16. Essentially, the submission of Global Safe is that I should receive and review the new material submitted with this application, ignore the findings of fact made by the Director, and reach a different conclusion than the Director about the status of Schaefer under the *Act*.
17. No natural justice argument has been made in this application, and more particularly, no argument has been made that there was an error in the original decision in deciding that ground of appeal.
18. The Director says this application continues Global Safe's disagreement with the conclusions reached in the Determination and is simply an attempt by Global Safe to have the Tribunal admit evidence which was not allowed into the appeal, consider statements that were not provided in either the complaint process or the appeal process and, using that additional material, review and re-weigh the finding on Schaefer's status under the *Act*.
19. Schaefer has made a brief submission that provides a personal perspective, but does not add to the submission of the Director on the merits of the application.

ANALYSIS

20. After review of the Determination, the original decision, and the submissions of the parties on this application, I have decided this application does not warrant reconsideration.
21. As indicated above, the focus of a reconsideration application is the original decision. In this application, Global Safe has not addressed the original decision at all, but has refocused on the Determination, submitting additional evidence, including evidence which was not accepted into the appeal process without providing any analysis on why the original decision was wrong and should be changed on that point, and the statements of Mr. Hack or Mr. Siteman, without giving any explanation why those statements were not provided to the Director or submitted with the appeal, without providing any other reason to accept them and without establishing any factual basis for them.
22. If required, I can find no error with the decision not to accept the "new" evidence presented by Global Safe with the appeal. The original decision on this point was both discretionary and rationally grounded in an assessment of the factors set out by the Tribunal in *Davies and others (Merilus Technologies Inc.)*, BC EST #D171/03. There is no argument that the application of those factors to the evidence sought to be introduced was an error of law and no basis shown in this application for interfering with that exercise of discretion.

23. This application does not address natural justice, which was the ground chosen in the appeal, and it weighs heavily against allowing reconsideration that its sole focus is to re-visit the Determination and the original decision and come to a different conclusion about Schaefer's status under the *Act*.
24. For the above reasons, I can find no circumstances arising from the original decision which warrant the Tribunal exercising its discretion under Section 116 of the *Act*. The application is accordingly dismissed.

ORDER

25. Pursuant to Section 116 of the *Act*, I order the original decision be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal