

An Application for Reconsideration

- by -

Irwin Lupovici, a Director and Officer of Bong Wear Company Ltd.
("Mr. Lupovici")

- 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.: 2015A/57

DATE OF DECISION: May 26, 2015

DECISION

SUBMISSIONS

Irwin Lupovici on his own behalf as a Director and Officer of Bong Wear Company Ltd.

OVERVIEW

1. Irwin Lupovici, a Director and Officer of Bong Wear Company Ltd., (“Mr. Lupovici”) seeks reconsideration of a decision of the Tribunal, BC EST # D031/15 (the “original decision”), dated March 26, 2015.
2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on December 12, 2014.
3. The Determination was made by the Director under section 96 of the *Employment Standards Act* (the “*Act*”), on complaints filed by Kan Tai (Albert) Chui and Pauline Wong (“the complainants”), who alleged Bong Wear Company Ltd. (“BWCL”) had contravened the *Act* by failing to pay all wages earned. In a Determination issued August 21, 2014 (the “corporate determination”), the Director found wages were owed to the complainants in the total amount of amount of \$20,817.46.
4. The amount of the Determination made against Mr. Lupovici under section 96 of the *Act* is \$9,948.80 (the “section 96 Determination”).
5. An appeal of the section 96 Determination was filed by Mr. Lupovici on the basis of new evidence coming available that was not available when the Determination was being made.
6. The Tribunal Member making the original decision dismissed the appeal under section 114 of the *Act* and confirmed the Determination.
7. In the original decision, the Tribunal Member found Mr. Lupovici’s appeal did not address any of the issues that may be raised in an appeal of a section 96 Determination, but for the most part was challenging the corporate determination and, such a challenge, was both significantly out of time and misconceived.

ISSUE

8. In any application for reconsideration there is a threshold, or preliminary, issue of whether the Tribunal will exercise its discretion under section 116 of the *Act* to reconsider the original decision. If satisfied the case warrants reconsideration, the issue raised in this application is whether the Tribunal should grant the request to reconsider and cancel the original decision and refer the matter back to the Director.

ARGUMENT

9. Mr. Lupovici has raised the same arguments in this application as were made in the appeal, which is to say, he disagrees with the administrative penalties imposed on BWCL in the corporate determination, explains the difficult financial picture encountered by BWCL and expresses a desire to make arrangements with the complainants directly to pay the amounts owed.

ANALYSIS

10. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally. Section 116 of the *Act*, as it read at the time this application was made, states:

- 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. As the Tribunal has stated in numerous reconsideration decisions, the authority of the Tribunal under section 116 is discretionary. A principled approach to the exercise of this discretion has been developed. The rationale for this 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 application and interpretation” of its provisions. Another stated purpose, found in subsection 2(b), is to “promote the fair treatment of employees and employers”. The approach is fully described 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 *The Director of Employment Standards (Re Giovanni (John) and Carmen Valoroso)*, BC EST # RD046/01, the Tribunal explained the reasons for restraint:

. . . the Act creates a 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” not be 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.

12. 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. Undue delay in filing for reconsideration will mitigate against the application. An assessment is also made of the merits of the original decision. The focus of a reconsideration application is, generally, the correctness of the original decision.

13. 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.
14. It will weigh against the 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.
15. 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.
16. I am not persuaded this application warrants reconsideration.
17. As I have suggested above, this application does no more than re-assert challenges made in the appeal that were not accepted in the original decision. The focus of this application is not the original decision but the Determination.
18. I will reiterate, briefly, the reasons provided in the original decision for denying the appeal. First, the Tribunal Member found Mr. Lupovici had not raised any issue under section 96 of the *Act*, that he was precluded from arguing the merits of the corporate determination, that he was, in any event, too late to appeal the corporate determination and he had not met the criteria for introducing new evidence on appeal.
19. Raising the same challenges to the Determination in an application for reconsideration that were raised and dismissed in an appeal is not an appropriate use of the reconsideration process. As indicated above, it weighs against an application for reconsideration if its objective is to have the Tribunal effectively re-examine the appeal and come to a different conclusion than was made in the original decision. That is the case here.
20. This application is denied.

ORDER

21. Pursuant to section 116 of the *Act*, the original decision, BC EST # D031/15, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal