

An Application for Reconsideration

- by -

Amy Yuli Chen
a Director of M.R. Fire Protection Ltd.
("Ms. Chen")

- 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.: 2016A/24

DATE OF DECISION: March 10, 2016

DECISION

SUBMISSIONS

Amy Yuli Chen on her own behalf as a Director of M.R. Fire Protection Ltd.

OVERVIEW

1. Amy Yuli Chen (“Ms. Chen”) seeks reconsideration of decision of the Tribunal, BC EST # D005/16 (the “original decision”), dated January 11, 2016.
2. The original decision considered an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on July 30, 2015, and an application under section 109(1)(b) of the *Employment Standards Act* (the “*Act*”) for an extension of the appeal period.
3. The Determination was made by the Director under section 96 of the *Act* on a complaint filed by Christopher Biech (“Mr. Biech”), who had alleged M.R. Fire Protection Ltd. (“M.R. Fire”) had contravened the *Act* by failing to pay him regular wages, vacation pay, statutory holiday pay and compensation for length of service. In a Determination issued June 10, 2015 (the “corporate determination”), the Director found Mr. Biech was owed wages in the total amount, including interest, of \$17,868.37.
4. In the Determination, the Director found Ms. Chen was a director of M.R. Fire at the time Mr. Biech’s wages were earned or should have been paid and under section 96 was personally liable to pay Mr. Biech wages in the amount of \$10,260.45.
5. An appeal of the Determination was filed by Ms. Chen relying on all of the allowable grounds of appeal under section 112(1) of the *Act*. A review of the appeal indicates the reasons for appeal were based on a rather vague denial of any knowledge relating to the claims being made by Mr. Biech, summarized by a general comment that he “was paid wages in full”, and included an assertion she had resigned as a director of M.R. Fire in March 2015. The appeal was filed more than ten weeks after the expiry of the statutory time period set out in section 112(3); a request for an extension of the statutory time period was included in the appeal.
6. The Tribunal Member making the original decision denied the requested extension and dismissed the appeal under section 114 of the *Act*.
7. In the original decision, the Tribunal Member considered the criteria used by the Tribunal when considering an extension request and found Ms. Chen had not provided a credible explanation for failing to file an appeal within the statutory time period and the appeal had no presumptive merit. In respect of the latter finding, the Tribunal Member noted that whether or not Ms. Chen had resigned as a director of M.R. Fire in March 2015 was inconsequential, as the claim by Mr. Biech related to wage entitlements from 2014 – well before Ms. Chen allegedly resigned.

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 cancel the original decision and refer the matter back to the original panel or, if more appropriate, to the Director.

9. This application has been filed outside of the statutory reconsideration period provided in section 116(2.1) of the *Act*. Ms. Chen has requested an extension of the reconsideration filing period.

ARGUMENT

10. Ms. Chen submits the delay in filing the application for reconsideration was occasioned by Wi-Fi connectivity issues that caused her application to be delivered one day after the filing deadline.
11. The arguments made by Ms. Chen in this application take two forms: a reiteration of her arguments for an extension of the appeal time period, which includes her disagreement with findings and conclusions reached by the Tribunal Member making the original decision; and a restatement of her view that the corporate determination was wrong, submitting Mr. Biech was paid in full for what he earned, in which she disputes he was entitled to compensation for length of service “as a written notice of termination was give [sic]”, to commission, or to expenses.

ANALYSIS

12. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally. As a result of amendments to the *Act* made in the *Administrative Tribunals Statutes Amendment Act, 2015*, parts of which came into effect on May 14, 2015, section 116 reads:

- 116** (1) *On an application under subsection (2) or on its own motion, the tribunal may*
- (a) *reconsider any order or decision of the tribunal, or*
 - (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 served with an order or a decision of the tribunal may make an application under this section.*
- (2.1) *The application may not be made more than 30 days after the date of the order or decision.*
 - (2.2) *The tribunal may not reconsider an order or decision on the tribunal’s own motion more than 30 days after the date of the decision or order.*
- (3) *An application may be made only once with respect to the same order or decision.*
- (4) *The director and a person served with an order or a decision of the tribunal are parties to a reconsideration of the order or decision.*

13. Except for the inclusion of statutory time limits for filing an application for reconsideration and for the Tribunal reconsidering its own orders and decisions, the amendments are unlikely to alter the Tribunal’s approach to reconsiderations.

14. In that respect, the Tribunal has said the authority of the Tribunal under section 116 of the *Act* is discretionary. A principled approach to this discretion has been developed and applied. The rationale for this approach is grounded in the language and purposes of the *Act*. One of the purposes of the *Act*, found in section 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 section 2(b) is to “promote the fair treatment of employees and employers”. The approach is fully described in *Milan Holdings Inc.*, 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 favour of persons with greater resources, who are able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

15. In deciding whether to reconsider, the Tribunal considers timeliness and such factors as the nature of the issue and its importance both to the parties and the system generally. Delay in filing for reconsideration will likely lead to a denial of an 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.
16. The Tribunal has accepted an approach to applications for reconsideration that resolves itself 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 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.
17. 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.
18. 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 in the reconsideration.
19. I find this application does not warrant reconsideration. I am satisfied there was no error made in the original decision.
20. I note first that a decision about whether or not to extend the statutory time period for an appeal involved an exercise of discretion by the Tribunal Member making the original decision. The Tribunal does not lightly interfere with that exercise of discretion unless it can be shown the exercise of discretion was not made in good faith, there was a mistake in construing the limits of authority, there was a procedural irregularity or the decision was unreasonable, in the sense that there was a failure to correctly consider the applicable principles, a failure to consider what was relevant or a failure to exclude from consideration matters that were irrelevant or extraneous to the purposes of the *Act*.
21. This application does no more than reiterate the request for an extension of the time period for an appeal and re-assert Ms. Chen’s disagreement with the corporate determination.

22. In respect of the first matter, I find the reasons given in the original decision for denying the request for an extension of the time period were reasonable and correct. Ms. Chen has not shown there is any basis for disturbing the exercise of discretion by the Tribunal Member in the original decision. The Tribunal Member applied the criteria adopted and consistently applied by panels of the Tribunal when considering requests for an extension of time.
23. There is no allegation the denial of the requested extension was not made in good faith or that the Tribunal Member exceeded the limits of his authority.
24. There was no procedural irregularity and the Tribunal Member did not fail to consider matters that were relevant or consider matters that were irrelevant.
25. Overall, I find the Tribunal Member making the original decision was completely justified, in the circumstances, in finding Ms. Chen's explanation for the delay was not credible. Her claim that she had "no knowledge of what was taking place" does not accord with the evidence. The comments in the original decision are reasonably grounded in that evidence. Attempts in this application to explain away the evidence do not assist in showing reconsideration is warranted.
26. Regardless, whether I agree with the assessment in the original decision of the credibility of her explanation for her delay, there is simply no avoiding the validity of the conclusion reached in the original decision that the appeal had no presumptive merit and was doomed to fail in any event.
27. It is well established that a person challenging a determination issued under section 96 of the *Act* is limited to arguing those issues which arise under that provision: whether the person was a director and/or officer when the wages were earned or should have been paid, whether the amount of the liability imposed is within the limits for which a director/officer may be found personally liable; and whether circumstances exist that would relieve the director/officer from personal liability under section 96(2) of the *Act*. A director/officer is precluded from arguing the corporate liability: see *Kerry Steinemann Director/Officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST # D180/96. Simply put, Ms. Chen was not allowed to challenge the corporate determination in her section 96 appeal; she could not advance her contention that Mr. Biech was paid in full for what he earned.
28. The original decision indicates Ms. Chen was a director when Mr. Biech's unpaid wage claim crystallized and she did not contend the Director had miscalculated the 2 months' entitlement set out in section 96 of the *Act*. The Determination found Ms. Chen was a director of M.R. Fire at the time Mr. Biech's wages were earned or should have been paid and calculates two months' wages. While Ms. Chen said she had resigned as a director in March 2015 and expresses disagreement with the corporate determination, nothing in the section 96 appeal disputes the section 96 findings made in the Determination.
29. Both, and in my view either, of the reasons given in the original decision were sufficient to deny the requested extension of the appeal period. Neither of those reasons has been impeached in this application. There is no broader issue raised by this application that might operate in favour of reconsideration.
30. I do not find it necessary to make any findings in respect of the delay in filing this application.
31. In sum, there is nothing in this application that would justify the Tribunal using its authority to allow reconsideration of the original decision and accordingly the application is denied.

ORDER

32. Pursuant to section 116 of the *Act*, the original decision, BC EST # D005/16, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal