

An application for Reconsideration

- by -

Tyler Wilbur operating Mainline Irrigation and Landscaping  
("Wilbur")

- 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.:** 2006A/29

**DATE OF DECISION:** April 24, 2006

## DECISION

### SUBMISSIONS

|              |                   |
|--------------|-------------------|
| Tyler Wilbur | on his own behalf |
| Chris Baker  | on his own behalf |

### OVERVIEW

1. Tyler Wilbur operating Mainline Irrigation and Landscaping (“Wilbur”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “Act”) of a decision, BC EST #D196/05, made by the Tribunal on December 19, 2005 (the “original decision”). The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards on June 23, 2005.
2. The Determination found Wilbur had contravened Sections 17, 18 and 27 of the *Act* in respect of the employment of Chris Baker (“Baker”) and ordered Wilbur to pay wages to Baker in the amount of \$3,216.10 and imposed administrative penalties of \$1500.00. The original decision confirmed the Determination.
3. This application was filed with the Tribunal by Wilbur on January 26, 2006. There is no issue concerning the timeliness of the application.

### ISSUE

4. 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 is whether Wilbur had a reasonable opportunity to respond to the compliant filed by Baker.

### ANALYSIS OF THE PRELIMINARY ISSUE

5. The legislature has conferred an express reconsideration power on the Tribunal in Section 116 which provides:
  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.*

6. 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.
7. 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.
8. 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 or issues raised in the reconsideration.
9. After review of the original decision, the submissions of the parties and the material on file, I have decided this application does not warrant reconsideration.

## ANALYSIS

10. This application is grounded in the assertions by Wilbur that he has “never had the opportunity to meet with anyone on this matter” and has had “no chance to plead [his] case to any member in the employment standards branch”.
11. There are three answers to these assertions, none of which support this application.
12. First, the fact Wilbur may not have “met” with anyone concerning the complaint is irrelevant if he otherwise was provided with notice of the claim being made by Baker and was given a reasonable opportunity to respond. Second, his alleged lost opportunity to respond has been found to be a result of a conscious effort on his part to avoid dealing with the delegate who was investigating the complaint. Third, and notwithstanding this avoidance, the member deciding the original decision took the extraordinary step of providing Wilbur with an opportunity during the appeal process to submit his position on the merits of the appeal, which had raised issues concerning Wilbur's opportunity to respond, the status of Baker as an employee under the *Act* and the finding by the investigating delegate of the

number of hours worked by Baker. In fact, the opportunity to make submissions was set out in the original decision as a direction to the parties. Wilbur failed to make any submissions.

13. The original decision correctly found there was no failure on the part of the delegate or the Director to comply with principles of natural justice in making the Determination. That finding is well supported on an assessment of the evidence described in the Determination, particularly when that evidence is viewed against the failure by Wilbur to provide any contrary evidence or an explanation for the logical inference drawn from that evidence.
14. The application is denied.

### **ORDER**

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

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**