

An Application for Reconsideration

- by -

William Jia, an Officer of Panagin Pharmaceuticals Inc.  
("Mr. Jia")

- 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.:** 2014A/68

**DATE OF DECISION:** June 24, 2014

## DECISION

### SUBMISSIONS

Patrick J. Sullivan

counsel for William Jia, an Officer of Panagin  
Pharmaceuticals Inc.

### OVERVIEW

1. William Jia (“Mr. Jia”) seeks reconsideration of a decision of the Tribunal, BC EST # D039/14 (the “original decision”), dated May 13, 2014.
2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 13, 2014.
3. The Determination was made by the Director on a complaint filed by 18 former employees of Pegasus Pharmaceuticals Group Inc., Panagin Pharmaceuticals Inc., Pegasus Lifecare Inc., Pepmetric Technologies Inc., Tatech Bioscience Inc., and Pegasus Biopharmaceuticals Inc. (collectively “the employer”) alleging the employer had contravened the *Employment Standards Act* (the “*Act*”) by failing to pay wages for work performed. In a Determination dated May 31, 2013 (the “corporate determination”), the Director found wages were owed to the complainants in the total amount of \$216,716.19.
4. No appeal of the corporate determination was filed and the statutory time period for filing an appeal has long since expired. The employer has not paid any amount on the corporate determination.
5. The Director issued a Determination against Mr. Jia under section 96 of the *Act*, finding Mr. Jia was an officer of Panagin Pharmaceuticals Inc. (“Panagin”), one of the entities determined to be the employer in the corporate determination. The amount of the Determination was \$148,341.07.
6. An appeal was filed by Mr. Jia alleging the Director erred in law in the Determination. The appeal sought to have the Tribunal cancel the Determination. The appeal was also grounded in new evidence coming available that was not available at the time the Determination was issued.
7. The Tribunal Member of the original decision dismissed the appeal under section 114(1)(f) of the *Act* and confirmed the Determination.
8. In the original decision, the Tribunal Member found Mr. Jia had not demonstrated the Director erred in law in making the Determination.
9. In answering the error of law ground of appeal, the original decision contains the following summary of the principles operating in the context of the arguments made by Mr. Jia on this ground of appeal: first, the Director may rely on corporate records filed in the corporate registry to find a person is a corporate director/officer; second, the corporate records raise a rebuttable presumption that may be overcome by showing, on “credible and cogent evidence”, the corporate records are inaccurate; and third, it would be a “rare and exceptional circumstance” where a person recorded as a director/officer in the corporate records would not be found to be such for the purpose of section 96 of the *Act*.

10. The Tribunal Member making the original decision did not accept that the document advanced in the appeal by Mr. Jia as a “resignation” from his appointment as an officer of Panagin was sufficiently “clear and cogent” to overcome the presumption arising from his inclusion in the corporate records. In addition to being ambiguous, the Tribunal Member observed Mr. Jia did not say to whom the document was delivered or what he did to ensure it had been received and acted upon in accordance with its instructions.
11. In assessing the “new evidence” ground, the Tribunal Member did not accept the evidence presented met the criteria for admission on appeal.
12. The Tribunal Member of the original decision also noted that, while Mr. Jia had been served with the corporate determination as an officer of the employer in June 2013, there was no effort on his part between the time of his being served and the filing of an appeal of the Determination – April 10, 2014 – to communicate with the Director to clarify his status with the employer.

### ISSUE

13. 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, hold an oral hearing on his appeal and/or refer the matter back to the Director.

### ARGUMENT

14. In this application for reconsideration, counsel for Mr. Jia says the Director erred in law and failed to observe principles of natural justice in the Determination by deciding Mr. Jia was liable for the wages owed by the employer, collectively, when the finding was limited to his role as an officer of Panagin.
15. Counsel submits there was a “fundamental flaw”, and a breach of natural justice in the reference and reliance in the original decision to Mr. Jia not having provided evidence to the Director when he was unaware the Director was considering imposing liability on him for unpaid wages.
16. Counsel says there was a breach of natural justice, as well as a non-compliance with section 77 of the *Act*, in the failure to provide Mr. Jia with the opportunity to personally respond to the complaints of the eighteen former employees.
17. Counsel also submits the Tribunal Member of the original decision failed to consider the “uncontroverted evidence” provided by Mr. Cao and Mr. Huang addressing Mr. Jia’s position with the employer and his involvement in the “business management” of the employer. In this respect, counsel for Mr. Jia adds the Tribunal Member of the original decision should not have allowed the absence of any “detail” concerning Mr. Jia’s resignation to have affected the decision when no effort was ever made to either obtain the details or give Mr. Jia an opportunity to provide them.
18. Finally, counsel submits the liability of Mr. Jia should be considered in the context of his inability to control the payment of the wages and that the non-payment of wages was not his fault.
19. Counsel says those matters that are alleged to be errors can be corrected by cancelling the original decision and conducting an oral hearing on whether Mr. Jia was an officer of the employer.

## ANALYSIS

20. 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* 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.

21. 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 *The Director of Employment Standards (Re 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 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” 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 best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

22. 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.
23. 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.

24. 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.
25. 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.
26. I am not persuaded the matters involved in this application warrant reconsideration.
27. The first argument raised by counsel for Mr. Jia is focused on the Determination, adding a substantive argument, which invokes another ground of appeal, that was not raised in the initial appeal. A complete answer to this aspect of the application is that an attempt to expand grounds of appeal and arguments to include grounds and arguments that ought to have been included in the appeal is both inappropriate, being inconsistent with the purposes of efficient dispute resolution described in section 2, and outside of the statutory time period for delivering an appeal. It is trite and well established that an appellant is required to comply with the *Act*, both in terms of form and timeliness, and with the Tribunal's *Rules of Practice and Procedure* (the "Rules") in filing an appeal. More particularly, when an appeal is delivered to the Tribunal, it must indicate the grounds upon which it is based and contain all arguments and evidence supporting it. Appeals whose grounds do not conform with the *Act* and the *Rules* are unlikely to be accepted or allowed to proceed: see *D. Hall & Associates Ltd.*, BC EST # D354/99.
28. Notwithstanding, in light of subsection (4) of section 96, this argument has no merit.
29. The second argument does not justify reconsideration of the original decision. Mr. Jia received the Determination, which clearly indicated a director or officer of the corporation could be held liable for unpaid wages, and the Determination was delivered to him as an "officer" of the corporation. That was sufficient to alert him to his potential liability. In any event, Mr. Jia did provide some new evidence with the appeal: the "resignation" letter and the letters from Mr. Cao and Mr. Huang. It is apparent the Tribunal Member making the original decision considered those documents, specifically finding the "resignation" was not persuasive evidence and did not meet the criteria for inclusion as "new evidence" in the appeal. The other letters, in light of the inclusion of Mr. Jia in the corporate records as an officer of the employer and the principles applied in such circumstances, are largely irrelevant as neither speak to that fact or affect the application of the operative principles and plainly did not satisfy the criteria for admitting new evidence.
30. The third argument is similar to the first: it should have been raised in the appeal of the Determination and supported with evidence that gave it credibility as a demonstrated error of law. It is clear the employer was given an opportunity to respond to the merits of the claims brought by the former employees. Mr. Jia was an officer of one of the corporations comprising the employer. A copy of the corporate determination was delivered to him. He did not seek to appeal it. The logical inference is that he had no dispute with it. This argument is without merit, even I allowed it to be advanced at this stage of the proceedings.
31. The next argument is answered in paragraph 30: the letters from Mr. Cao and Mr. Huang were, on the facts, largely irrelevant as they were insufficient to overcome the presumption raised by the inclusion of Mr. Jia in the corporate records as an officer of the employer. In respect of the suggestion the Tribunal ought to have alerted Mr. Jia to the deficiency in his appeal and invited him to provide "details" that were not included in the appeal, it is not the function of the Tribunal to assist a party with their appeal. Such involvement could, quite rightly, be perceived as acting as advocate for that party and would seriously compromise the impartiality of the Tribunal. The *Act* and the *Rules* require an appellant to present its best case at the filing stage. If it is deficient, that is neither the fault nor the responsibility of the Tribunal. A policy approach that would allow an appellant to

continually patch perceived gaps in its appeal is inconsistent with the statutory objective of efficiency and expedience in the dispute process.

32. The other matters argued in this application are not matters that have ever determined the outcome of a question of liability for wages under section 96 of the *Act*. The matter of fault for the contravention is addressed in the *Act* in the context of administrative penalties. In this case, the Director found Mr. Jia could not be held personally liable for the administrative penalty imposed on the employer: see section 98(2) of the *Act*. The possibility the contravention is not the fault of the director/officer does not affect that person's personal liability potential under section 96.
33. In sum, the application for reconsideration is denied.
34. Based on that conclusion, it is not necessary to consider the request for an oral hearing had the reconsideration been successful.

### **ORDER**

35. Pursuant to section 116 of the *Act*, the original decision, BC EST # D039/14, is confirmed.

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