

An application for Reconsideration

- by -

Inshalla Contracting Ltd.

- 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 MEMBERS: John Savage, Panel Chair
David B. Stevenson
Ian Lawson

FILE No.: 2005A/203

DATE OF DECISION: April 24, 2006

DECISION

SUBMISSIONS

Carrie Sindia, for Inshalla Contracting Ltd.

Gerard Janveaux, for the Employee

Cal Mitten, for the Director of Employment Standards

INTRODUCTION

1. This is a request for reconsideration of the dismissal of an appeal by Inshalla Contracting Ltd. (“Inshalla”) of a Determination by the Director finding liability for wages and imposing administrative penalties. In the first instance the appeal was dismissed for the reasons given in *Re Inshalla Contracting Ltd.* BC EST # D168/05.
2. The facts giving rise to the original complaint arose because of dispute between Inshalla and Gerard Janveaux (“Janveaux”) in December 2004. When the parties could not resolve the dispute themselves Inshalla through Carrie Sindia (“Sindia”) suggested Janveaux “go to the Labour Board” [sic]. Sindia was a director of the company.
3. Janveaux prepared a complaint form which was date-stamped as received by the Employment Standards Branch April 25, 2005. Between March and April 25 Janveaux sought to contact Inshalla, specifically Sindia, but he was advised that Sindia “was in no shape to deal with anything”. On May 30 the Delegate of the Director sought to contact Inshalla. He was unable to contact Inshalla or any employee of Inshalla but was able to contact Inshalla’s contract bookkeeper. He was advised by Inshalla’s contract bookkeeper, Sandy Hill that a series of unfortunate events had transpired.
4. The principal of Inshalla, Bill Moore, had been a victim of a homicide on March 6, 2005. Mr. Moore and Carrie Sindia were common law husband and wife. The place of business, which was also the family home, was destroyed by fire. By May 30, 2005 Sindia was in the advanced stages of pregnancy and she gave birth July 4, 2005.
5. The Delegate in his determination noted that Ms. Sindia was not “available to participate in this investigation” but that the bookkeeper “has filled in and offered to be the go between”. The Delegate issued his Determination July 12, 2005. Sindia, in the appeal and in this application, says that Hill was not authorized to represent Inshalla and denies receiving information from her. The relief sought is that the Delegate hold a hearing at which time Inshalla can present their case.

ISSUES

6. The issues in this application for reconsideration are:
 - Does the application meet the threshold test allowing the Tribunal to exercise its discretion under section 116 of the *Act* to reconsider the original decision?
 - If the threshold is met, does the original decision reveal a breach of the principles of natural justice?

SUBMISSIONS

7. The Applicant Inshalla filed a lengthy submission in its request for reconsideration. The main focus of that submission is that the bookkeeper interviewed by the Delegate was a contractor, not an employee of Inshalla. The bookkeeper did not contact Inshalla during the investigation process, and Inshalla had not given the contract bookkeeper authority to represent it during the investigation. It says that wages are not owed and offers evidence including statements from other employers on that issue.
8. The Respondent Janveaux did not address this issue except to suggest that part of what the bookkeeper told the Delegate suggests that the principal of Inshalla, Sindia, was in contact with the bookkeeper.
9. The Director does not take direct issue with the statements of Inshalla regarding the authority or relationship of the bookkeeper to Inshalla, but gave reasons, noted below, why it conducted the investigation in the manner he did. The Director's Delegate acknowledged that he did not believe that the bookkeeper was authorized to represent Inshalla in the investigation.

DISCUSSION AND ANALYSIS

1. Reconsideration under Section 116

10. This Tribunal has considered a two stage process in the analysis of reconsideration applications. The first stage in the analysis considers whether the matters raised in the application in fact warrant reconsideration. If the matter warrants reconsideration, the second stage in the analysis involves a reconsideration of the merits of the application: *Re Annable*, [1998], BC EST #D559/98.
11. The Tribunal has held that it applies its discretion “cautiously” to ensure the finality of its decisions, the efficiency and fairness of the appeal system, and the fair treatment of employers and employees: *Re Ekman Land Surveying Ltd.*, [2002] BC EST #RD413/02.
12. A principled approach to the exercise of this discretion has been developed. 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, which can be usefully summarized as follows:
 - Any party exercising its right to request the Tribunal to reconsider must first pass the threshold of persuading the Tribunal that it is appropriate to enter upon a reconsideration of the member's decision. The obligation to satisfy the Tribunal that it ought to embark on a reconsideration may be seen as roughly analogous to the obligation, in some statutory contexts, to obtain leave to appeal before a Tribunal decision may be appealed to the Courts.
 - In recognition of the importance of preserving the finality of member's decisions, the Tribunal will agree to reconsider those decisions only to the extent that it is first satisfied that one or more of the issues raised in the reconsideration application is important in the context of the *Act*.
 - The Tribunal tends not to be favourably disposed to entering upon a reconsideration where the reconsideration application is untimely, where it asks the panel to re-weigh evidence, and where it seeks what is in essence interlocutory relief.

- Where the Tribunal agrees to enter upon a reconsideration of a decision, the Tribunal moves, at the second stage, directly to the merits. The standard of review at this stage is the correctness of the decision.
- Unlike the process for seeking leave to appeal in the Courts, the party requesting the Tribunal to reconsider must address in one submission both the test for reconsideration and the merits of the decision.

13. Although several reasons are given supporting the Request for Reconsideration in our opinion the significant point at issue is whether there was a breach of natural justice in the conduct of the investigation, and whether section 77 of the *Employment Standards Act* was complied with.
14. In this case the Delegate at first instance accepted that his obligations under section 77 were satisfied by his communications with the contract bookkeeper. The Tribunal at first instance concluded that the bookkeeper was vested with “apparent authority”. The importance of this concept in the context of investigations and the duties imposed by section 77 of the *Act* are apparent. Apparent authority is a concept that has not been discussed or considered at any length by this Tribunal heretofore. It is an important concept, however, because it can form the foundation for concluding that the parties to an investigation have or have not been treated fairly by receiving notice.

2. Merits of Reconsideration

A. Facts

15. In this case the applicant, Inshalla, says it was not represented in the investigation and, in effect, had neither notice of the complaint nor an opportunity to respond. That arose through a series of misfortunes visited upon the remaining principal, Sindia, and a bookkeeper who seemingly sought to shield the pregnant mother from the intrusion of an investigation.
16. The Delegate noted the following:
- “Although Carrie Sindia is listed as the only director, with the Registrar of Companies, her husband, Bill Moore actually ran the operation. He is now deceased and their home, which was also the business location, was destroyed.
- Ms. Sindia has not been available to participate in this investigation, however, the bookkeeper, Sandy Hill, has filled in and offered to be the go between, to receive and exchange information, records and documents. She also agreed to deliver Ms. Sindia’s copy of this determination to her.”
17. The description of the state of Sindia is consistent with the submission of Janveaux who, in a letter dated September 22, 2005 said that:
- “I spoke to Sandy Hill the bookkeeper regarding my pay and was emphatically told that I was not to talk to Ms. Sindia as she was in no shape to deal with anything (after the death of her husband).…”
18. With respect to the Delegate’s contact with the bookkeeper, in his submission to the Tribunal the Delegate stated the following:
- “I contacted the bookkeeper, Sandy Hill on May 30, 2005, June 6, 2005, and June 14, 2005. During the first contact the bookkeeper informed me of the traumatic circumstances that the employer, Carrie Sindia, was suffering through, and added that she (Hill) was related to the

family. In addition to the traumatic events the employer has described in her appeal, the bookkeeper also stated that the employer's home and business had been destroyed and that the employer was now residing elsewhere.

With these circumstances given as the reason, when I later asked the bookkeeper, for Ms. Sindia's current phone number and address, she refused to release that information to me. She also said that she would pass on all the information needed to Ms. Sindia and receive her instructions on how to respond.

The bookkeeper said she knew where the employer was. She also said that she had the payroll records. Under these extraordinary circumstances, I decided not to place any more demands that had the potential to cause further trauma to the employer. I decided to accept the bookkeeper's word that she would be communicating with the employer. Further, I didn't know where else to search for the employer's new location."

19. In the Decision of the Tribunal which is the subject of this application, the Member accepted that the bookkeeper had "apparent authority" and "was not prepared to accept that the bookkeeper was acting without authority". Indeed, in the Determination the Delegate refers to Ms. Hill as the "employer's representative" and in the Complaint and Information Docket the name of the employer representative is given as "Sandy Hill".

20. In his submission to this Tribunal, however, the Delegate acknowledged that:

"Never at any time did I believe or claim that the bookkeeper was the employer's authorized spokesperson. The bookkeeper was the only person I had access to for employer information".

21. If the Delegate did not believe that the bookkeeper was authorized to speak on behalf of the Employer in the investigation, did this give rise to a breach of the duty under section 77, or the right of the employer to have notice of the proceeding?

B. Section 77

22. An investigation under the *Employment Standards Act*, does not necessarily give rise to the full panoply of natural justice rights arising in a purely judicial context. Indeed, the attributes of natural justice may vary according to the character of the decision and the context in which it applies: *Martineau v. Matsqui Disciplinary Board*, [1980] 1 S.C.R. 602. The appropriate procedures will in each case depend on the provisions of the statute and the context in which they are applied: *Downing v. Graydon*, (1978) 21 O.R. (2d) 292. It has been held, for example, that the Director during an investigation should not be placed in a procedural strait-jacket: *Isulpro Industries Inc.*, BC EST #D405/98.

23. In the case of investigations under the *Employment Standards Act* the duty of fairness will almost invariably require notice to the employer and employee. The general principle is that notice must be adequate in all the circumstances in order to afford those concerned a reasonable opportunity to present evidence and argument, and to respond to the position of the other party. It will also give the parties other opportunities to resolve the dispute with the assistance of the Employment Standards Branch.

24. To participate in the decision making by a public body or public official, however, individuals must possess sufficient information to enable them to make representations on their own behalf, to effectively prepare their own case and answer the case they have to meet. It is therefore a fundamental element of the duty of fairness at common law that prior notice be given to those entitled to participate in a decision.

25. Section 77 of the *Employment Standards Act* relates specifically to investigations under the Act. It provides as follows:

77. If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

26. As noted by this Tribunal, section 77 does not mandate a face-to-face hearing or meeting between the Delegate and person under investigation, but it does require that reasonable efforts be made so that the person under investigation is made aware of the allegations and be given a reasonable opportunity to respond: *Re Medallion Developments Inc.*, [2000], BC EST #D235/00.

27. In *Howard C. Chu o/a Label Express*, BC EST #RD113/04 this Tribunal observed as follows:

The purpose of the October 10th meeting was to allow Ms. Lu to put her case forward and respond to the evidence previously submitted to the Director by the Employer. The October 10th meeting took place in the course of an *investigation*, the meeting was not intended to be a full *evidentiary hearing* at which both parties would present their respective cases to a delegate who, in turn, would consider the parties' evidence and then issue a final and binding decision. While, in the latter case, it would be inappropriate for a delegate to conduct a hearing if only one party was notified and permitted to appear at the hearing, where the delegate is conducting an *investigation* no such procedural rule applies (see *Medallion Developments Inc.*, B.C.E.S.T. Decision No. D235/00).

When conducting an investigation, a Director's delegate is entitled to speak to the parties separately (and this is often the only practical way to proceed). However, and this was the nub of Tribunal Member Love's initial decision to order the matter referred back to the Director, both parties are entitled to know about, and make submissions regarding, material evidence submitted by the adverse party (see section 77 of the *Act*).

28. In *Island Scallops Ltd.*, BC EST #D198/02 the Tribunal noted:

The Employer submitted that the failure by the Delegate to interview the Employer was a breach of s. 77 of the *Act*. It is apparent that s. 77 does not mandate an oral interview of the parties: *Medallion Developments Inc. BCEST D# 235/00*. It is unclear to me in this case, why the Delegate interviewed the complainant, and chose not to interview the Employer. Apparently by agreement of the parties, the whole communication between counsel for the Employer and the Delegate was not filed with me by either party. Perhaps such an explanation would be apparent in the exchange of information between the Delegate and counsel for the Employer. In my view, the nature of the duty of the Delegate under s. 77 of the *Act* must depend on the matter which is in issue between the parties. At minimum, the Delegate must provide an opportunity to the parties to provide information, and to consider and respond to important allegations, on a critical matter in issue, before the Delegate issues a Determination. Each case will turn on its own facts. While a Delegate has considerable discretion over the investigation process, in this case given that one of the issues was the existence or non-existence of an oral contract for a fixed term, I would have thought it essential, in order to assess credibility of the parties, to interview both parties. In my view, in the circumstances of this case, the failure to interview Mr. Saunders was a breach of s. 77 of the *Act*.

29. In this case the Delegate submitted that a phone call was made to a cell phone number but the voice mail message said that the mailbox was full. A second telephone number was out of service. We infer that this was a phone number for the employer's home and business that had been destroyed. No registered mail was sent.

30. The only other efforts made to provide notice were three contacts with the contract bookkeeper as described above. As the Delegate noted, “Never at any time did I believe or claim that the bookkeeper was the employer’s authorized spokesperson”. In these circumstances the contacts with the bookkeeper cannot constitute notice to Inshalla, unless the bookkeeper had apparent or implied authority to receive such notice.

C. Implied and Apparent Authority

31. There is nothing in the evidence or findings of the Delegate that indicates that the contract bookkeeper had actual or express authority. Inshalla through Sindia denies there was such authority. The notes the Delegate kept during the three contacts with the bookkeeper do not record any representations made by the bookkeeper about her authority. Implied authority is a species of actual or express authority. We have concluded that there was no implied authority. Did the contract bookkeeper nevertheless have the apparent authority to act for Inshalla? We have concluded that, in the circumstances here, there was no apparent authority.

32. With respect to apparent authority, the Decision appealed from said this:

Section 77 of the Act applies if the Director conducts, as was the situation here, an investigation. In such circumstances the “person under investigation” (i.e., Inshalla, in this case) must be afforded a reasonable opportunity to respond to the allegations made against it. The delegate made several attempts to contact Inshalla and, ultimately, spoke with the firm’s bookkeeper who, if not formally authorized, nonetheless, had the apparent authority to speak on behalf of the firm.

33. G.H.L. Fridman, in *The Law of Agency*, 7th ed. (London: Butterworths, 1996), at p. 315, describes the conditions under which a principal is to be held liable for the conduct of its agent. A principal is liable for the acts of its agent acting within the scope of his authority and the authority of the agent may be either actual or apparent, i.e., it may be express, implied, usual or ostensible.

34. There is a distinction between implied authority and apparent authority. In some circumstances an agent may have implied authority. The implied authority may be a necessary inference from the authority that an agent expressly has, may be implied by the conduct of the principal or may arise from what is usual in a trade, profession or business. Implied authority is an example of actual authority. There is nothing in the evidence here to suggest that a contract bookkeeper, as opposed to an ‘in-house’ or employed bookkeeper, has the implied authority to represent an employer in an investigation under the *Employment Standards Act*.

35. In contrast to actual authority is apparent authority. Apparent authority is an authority that an agent has not been given by a principal but which the law regards as the agent possessing, notwithstanding the principals lack of consent. The agent’s authority is said to arise from the principal’s conduct, it is an authority which “apparently” exists having regard to the conduct of the parties.

36. Apparent authority requires conduct on the part of the principal that gives rise to the authority. Absent the requisite conduct of the principal there can be no finding of apparent authority: *John LeRuyet v. Paul Stenner, The Manufacturers Life Insurance Company, The Great-West Life Assurance Company et al.*, 2001 BCSC 1129.

37. In *Keddie v. Horne* (1999), 70 B.C.L.R. (3d) 270 (C.A.) Madam Justice Rowles, for the Court, opined as follows:

[28] A finding of apparent authority depends on some representation through words or conduct on the part of the principal that leads a third party to believe that the agent has the authority in question. Apparent authority is a product of the principal's outward conduct with respect to third parties, not of the principal's internal agreements or arrangements with its agent.

[29] *Bowstead on Agency, supra*, at p. 284, defines the nature of apparent authority as follows:

Where a person, by words or conduct, represents or permits it to be represented that another person has authority to act on his behalf, he is bound by the acts of such other person with respect to anyone dealing with him as an agent on the faith of any such representation, to the same extent as if such other person had the authority that he was represented to have, even though he had no actual authority.

[30] *Fridman, supra*, at p. 122, distinguishes apparent authority from the various types of actual authority this way:

Unlike the kinds of authority which have been discussed in the preceding chapter [types of actual authority], the agent's authority in agency by estoppel is not an actual or real authority at all. That is to say it does not result from consent on the part of the principal, whether express, or implied, according to the rules already discussed, that the agent should have any authority at all, or the kind of authority which he has purported to exercise. The agent's authority here is the product of the principal's conduct, his representation that the agent is authorised to act on his behalf. It is an authority which 'apparently' exists, having regard to the conduct of the parties. In fact it does not exist. But as a matter of law, arising out of the factual position, the agent is said to have authority.

[31] What appears to be absent in the case at bar, which the authorities indicate is necessary if the appellant is to make out her case against Canada Life on the basis of apparent authority, is some conduct or representation emanating from Canada Life which would suggest to persons in the position of the appellant that Mr. Horne was acting as Canada Life's agent. It was the absence of this element which ultimately led the trial judge to rule as he did in dismissing the appellant's vicarious liability claim.

38. In *LeRuyet v. Stenner*, Mr. Justice Joyce found there to be no apparent authority. He described the principle as follows:

[40] Apparent authority does not depend on the contractual arrangement between the principal and agent. It depends on the relationship between the principal and the third party. A finding of apparent authority depends on some representation through words or conduct

39. The difficulty in ascribing apparent authority to the contract bookkeeper in this case is that there is simply no conduct by the principal, Inshalla through Sindia, from which an inference can be drawn that the bookkeeper had authority to act in the investigation. Indeed, the Delegate seems to have been of this view when making his submission that he did not at any time believe that the bookkeeper was the authorized spokesperson for Inshalla.

40. In these circumstances, in our opinion, the contract bookkeeper cannot be said to have apparent authority to act on behalf of the employer, Inshalla.

41. It follows that reasonable notice of the investigation was not given Inshalla. In these circumstances, while we sympathize with the predicament the Delegate was in, in our view the Delegate's efforts fell short of what is required by section 77. That is not to say, however, that in every case compliance with section 77 requires actual notice. There may be circumstances where, for example, a person leaves the jurisdiction or seeks to avoid notice either deliberately or through a course of conduct that they know or ought to know will prevent them from meeting their legal obligations. In such exceptional cases, and there may well be others, actual notice may not be reasonably be required, nor would delay to provide actual notice serve the purposes of the *Act*.
42. In this case, the first contact with the contract bookkeeper merely resulted in the bookkeeper advising the Delegate of the events affecting Sindia's ability to deal with the complaint. The second contact with the bookkeeper arises only four weeks before Sindia gave birth. Her husband was recently deceased and her home and place of business had been recently destroyed. The third contact with the bookkeeper was only two and half weeks before Sindia gave birth. Here there is no evidence of conduct by Sindia that would lead the delegate to conclude the bookkeeper had apparent authority to represent Inshalla. Based on the authority of our Court of Appeal in *Keddie v. Horne* that is fatal to a finding of apparent authority.

SUMMARY AND CONCLUSION

43. Since the bookkeeper did not have actual, implied or apparent authority, there was a breach of natural justice, and the statutory requirements of section 77 were not met. The complaint is referred back to the Director for reconsideration after receiving representations from both of the parties. While there are submissions from Inshalla regarding the manner of conducting the investigation or whether there should be a hearing, in our view that is a matter that is in the discretion of the Delegate. While the Decision of the Tribunal for which reconsideration has been sought considered the merits of the actual complaint, we expressly refrain from giving our opinion on that matter, which the Delegate must reconsider after giving both parties an opportunity to be heard.

ORDER

44. The application for reconsideration is allowed. Pursuant to s. 116 of the *Act* it is ordered that the Determination dated July 12, 2005 and the Tribunal's decision dated November 1, 2005 are set aside, and the complaint is referred back to the Director for reconsideration after receiving representations from the parties.

John Savage
Panel Chair
Employment Standards Tribunal

David B. Stevenson
Member
Employment Standards Tribunal

Ian Lawson
Member
Employment Standards Tribunal