

An Application for Reconsideration

- by -

Dana Harrison
a Director or Officer of DNT Enterprises Ltd.
("Harrison")

- 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: Robert E. Groves

FILE No.: 2016A/28

DATE OF DECISION: March 23, 2016

DECISION

SUBMISSIONS

Dana Harrison on his own behalf

OVERVIEW

1. Dana Harrison (“Harrison”) seeks reconsideration of Tribunal Decision Number BC EST # D016/16, dated January 20, 2016 (the “Appeal Decision”). The application is brought pursuant to section 116 of the *Employment Standards Act* (the “Act”).
2. The Appeal Decision resulted from Harrison’s appeal of a determination of a delegate (the “Delegate”) of the Director of Employment Standards (the “Director”) issued on September 22, 2015 (the “Determination”).
3. The Determination ordered Harrison to pay \$4,657.01, for wages, overtime, statutory holiday pay, deductions, annual vacation pay and interest in respect of a complaint made by John S. Harris (“Harris”) against DNT Enterprises Ltd. (“DNT”), a corporate body, for which Harris had worked as an employee, and of which Harrison had been a director at the times relevant to the determination of the complaint. Harrison’s liability was based on an application of section 96 of the *Act*.
4. The Appeal Decision dismissed Harrison’s appeal, and confirmed the Determination.
5. I have before me the Determination, the Delegate’s Reasons for the Determination, Harrison’s Appeal Form and supporting material, the record delivered to the Tribunal pursuant to section 112(5) of the *Act*, the Appeal Decision, and Harrison’s application for reconsideration.
6. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal’s *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings on applications for reconsideration. Having reviewed the materials before me, I find I can decide this application based on the written materials filed, without an oral or electronic hearing.

FACTS

7. I adopt the facts as set out in paragraphs 2 – 8 of the Appeal Decision.
8. Briefly put, the relevant facts are these:
 - On September 4, 2014, the Director issued a determination (the “Corporate Determination”) ordering DNT to pay wages owing to its employee, the complainant Harris, as well as administrative penalties.
 - DNT did not appeal the Corporate Determination, and it did not pay the sums set out in it, as it was ordered to do.
 - On April 15, 2015, the Director issued a second determination (the “Dustin Harrison Determination”) ordering Dustin Harrison, the applicant’s son, to pay wages and interest found to be owed as a result of the Corporate Determination. Dustin Harrison’s liability was based on

section 96 of the *Act*, as the Director made a finding that he was a director of DNT at the time wages should have been paid to Harris.

- On appeal, the Tribunal cancelled the Dustin Harrison Determination based on new evidence which revealed that it was Harrison who was a director of DNT at the relevant times, and not Dustin Harrison.
 - The Director then issued the Determination, ordering Harrison to pay the wages and interest found owing as a result of the issuance of the Corporate Determination. Again, Harrison's liability was based on a finding that he was a director of DNT at the relevant times, and so section 96 of the *Act* was engaged.
 - In his appeal of the Determination, Harrison did not contest his status as a director of DNT, or that section 96 required him to pay sums properly owed to Harris. Rather, Harrison argued that the sums found to be owed to Harris in the Corporate Determination were incorrect.
9. In the Appeal Decision, the Tribunal noted that it was only the Determination that was under appeal, not the Corporate Determination that had decided the wages owed by DNT to Harris. The Tribunal decided, correctly, that it had no authority to disturb the findings of the Director in the Corporate Determination.
10. The Tribunal observed that the only question to be considered in the appeal was whether the sum found to be owed by Harrison in the Determination was greater than the maximum of two months' unpaid wages for Harris that Harrison was liable to pay pursuant to section 96 of the *Act*. The Tribunal concluded that a calculation of two months' wages for Harris during the relevant period was greater than the sum the Determination found that Harrison owed to Harris. Accordingly, there was no basis on which the appeal could succeed.
11. Harrison produced, for the appeal, accounting statements on the basis of which he sought to contend that the Director's calculation of the amount of wages DNT owed to Harris, which had appeared in the Corporate Determination, was in error. For the reasons I have described, the Tribunal stated that the Corporate Determination was, at that juncture, unassailable.

ISSUES

12. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:
1. Does the request meet the threshold established by the Tribunal for reconsidering a decision?
 2. If so, should the decision be confirmed, cancelled, varied or referred back to the original panel, or another panel of the Tribunal?

DISCUSSION

13. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116 of the *Act*, the relevant portion of which reads as follows:
- 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.

14. The reconsideration power is discretionary, and must be exercised with restraint. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal.
15. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *Act*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is also derived from a desire to preserve the integrity of the appeal process mandated in section 112 of the *Act*.
16. With these principles in mind, the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party seeking to have the Tribunal's appeal decision overturned.
17. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal considers the applicant's submissions, the record that was before the Tribunal in the appeal proceedings, and the decision the applicant seeks to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. In order for the answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the appeal decision which are so important that they warrant reconsideration.
18. In general, the Tribunal will be disinclined to reconsider if the primary focus of the application is to have the reconsideration panel re-weigh arguments that failed in the appeal. It has been said that reconsideration is not an opportunity to get a "second opinion" when a party simply does not agree with an original decision (see *Re Middleton*, BC EST # RD126/06).
19. If the applicant satisfies the requirements in the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.
20. In my opinion, Harrison has shown no basis on which the Appeal Decision should be reconsidered, and so the application fails at the first stage of the inquiry.
21. Harrison's submissions in support of his application refer to several matters, none of which in my view is germane to the issues to be decided when section 116 of the *Act* is engaged.
22. Harrison first alleges as a ground for reconsideration that Harris "did in fact steal" from DNT. This was an assertion made earlier in the history of the complaint. No further evidence or argument, apart from the bare assertion of theft, is made by Harrison in support of this allegation for the purposes of his application for reconsideration. Again, such an assertion attacks the validity of the Corporate Determination, and it is therefore a matter entirely irrelevant to the question of Harrison's section 96 liability as a director of the company that was the subject of concern for the Delegate when she issued the Determination.
23. Harrison also states that he filed a "consumer proposal", presumably in bankruptcy, in December of 2014. No other documents or evidence regarding this action on his part are offered. No notice to creditors or other evidence as to steps taken by a trustee is presented. It is entirely unclear from the submission what the status of these proceedings might be, or the effect their existence might have on Harrison's application. No submission is made that this initiative on Harrison's part would offer a basis on which the Appeal Decision might be found to have been rendered in error. It is not obvious to me that this must be so. Therefore, I see

no reason to conclude that the Appeal Decision should be reconsidered because Harrison may have made a “consumer proposal”.

24. Harrison’s final submission consists of an offer to make periodic payments should the application result in a confirmation of the Appeal Decision. This is a matter for the Director. It is not a basis for concluding that the Appeal Decision should be reconsidered.

ORDER

25. Pursuant to section 116 of the *Act*, I order that the Appeal Decision BC EST # D016/16 be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal