

An application for Reconsideration

- by -

Advantage Plumbing and Drainage Inc.  
(“Advantage”)

- 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/47

**DATE OF DECISION:** May 25, 2006

## DECISION

### SUBMISSIONS

Fred van Hunenstijn	on behalf of Advantage Plumbing and Drainage Inc.
David Abrams	on his own behalf
Ted Mitchell	on behalf of the Director

### OVERVIEW

1. Advantage Plumbing and Drainage Inc. (“Advantage”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of a decision, BC EST #D070/05, made by the Tribunal on May 27, 2005 (the “original decision”), as varied by BC EST #D039/06, dated March 23, 2006. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards on January 7, 2005. The Determination had found Advantage had contravened Sections 18, 44, 58 and 63 of the *Act* in respect of the employment of David Abrams (“Abrams”) and ordered Advantage to pay wages to Abrams in the amount of \$4,529.46.
2. Advantage appealed all aspects of the Determination. The original decision dismissed those parts of the appeal challenging the decision by the delegate that Abrams was owed regular wages and length of service compensation. The findings of the delegate on the annual and statutory holiday pay calculations were found to be in error and the wage calculations relating to those findings were referred back to the delegate under paragraph 115(1)(b) of the *Act*.
3. The delegate reviewed the findings on the annual and statutory holiday pay and resubmitted them to the Tribunal, which issued a decision on March 23, 2006 varying the Determination to show there was no contravention of Sections 44 and 58 of the *Act* and, correspondingly, no wages owing for annual or statutory holiday pay. That decision also confirmed the Determination in all other respects, resulting in Determination ordering Advantage to pay Abrams for wages and length of service compensation in the amount of \$2,495.67 as of December 22, 2005.
4. This application for reconsideration was filed with the Tribunal by Advantage on June 20, 2005 and was held in abeyance pending the result of the referral back. There is no issue concerning the timeliness of the application.
5. The substance of this application had actually been delivered to the Tribunal on June 10, 2005 and had requested the Tribunal to “re-address” the issue of length of service compensation because of “serious errors at law and fact”.

### ISSUE

6. 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, as it was in the appeal, is

whether Advantage should have been discharged from its liability to pay Abrams length of service compensation, or putting it in other words, whether Abrams was entitled to length of service compensation.

## ANALYSIS OF THE PRELIMINARY ISSUE

7. 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.*

8. 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. The focus of a reconsideration application is the original decision.

9. 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.

10. 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.

11. 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.

12. After review of the original decision, the variance, the submissions of the parties and the material on file, I have decided this application does not warrant reconsideration.
13. The question of whether there was just cause to terminate Abrams has been adequately canvassed. During the complaint process, Advantage alleged breach of trust, insubordination, conspiracy and collusion and two post-termination matters, an alleged failure or refusal to remove company decals from his truck and making false employment references. The delegate considered those allegations and found the evidence submitted by Advantage to be insufficient to support just cause for dismissal. The delegate noted that some of the concerns about Abrams' behaviour were speculative and not clearly supported by the evidence.
14. The Tribunal member of the original decision noted that while essentially Advantage was repeating the same allegations of fact and making the same arguments in the appeal that were made to the delegate during the complaint process, there appeared to be new arguments and additional evidence that the Tribunal member was not prepared to allow on appeal.
15. In this application, Advantage says the material submitted with the appeal had all been provided during the complaint process. In the submission on this application, Mr. van Hunenstijn, representing Advantage, says:
- “It cannot be open to decline consideration of “new” evidence when this evidence is not new and was clearly forwarded to the Kelowna Delegate, Jerry Gonclaves, on February 24, 2003, and appears to have been misplaced by ESB in transferring the file to the Burnaby Delegate, Ted Mitchell. . . .
- Evidence we have submitted . . . appears to have been missed, ignored and not considered . . .”
16. The submission goes on to identify three matters, and the evidence supporting those matters, which Advantage says provides, “proof for at least three uncontradicted reasons for summary dismissal without compensation”. All of the evidence relating to each of these matters is found in documents provided during the complaint investigation.
17. In his reply, the delegate says the documents referred to in the reconsideration application were in the file, were considered by him in making the Determination and were included in the Record supplied under Section 112(5) of the *Act* when the appeal was made.
18. For his part, Abrams says those matters did not go “uncontradicted” as suggested by Advantage.
19. It is not entirely clear from the reconsideration application submission made by Advantage whether the disagreement with the original decision is with the refusal to accept and consider the “new” evidence submitted with the appeal, or the refusal by the Tribunal member to re-examine all of the evidence, including that which had already been provided during the complaint process and that which had been submitted with the appeal, and arrive at a different conclusion.
20. In the result, it makes no difference to this application.
21. If it is the former, there was no error in the original decision for the Tribunal Member to refuse to accept and consider evidence that was available and could have been provided to the delegate (see *Tri-West*

*Tractors Ltd.*, BC EST #D268/96; *Kaiser Stables Ltd.*, BC EST #D058.97 and *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D171/03).

22. If it is the latter, I agree completely with the comments made by the Tribunal member in the original decision for dismissing the appeal on the length of service compensation:

By simply repeating the arguments made before the delegate, Advantage fails to point out any error of law or breach of the principles of natural justice in the making of the Determination. Although the delegate's reasons are brief, he seems to have applied the correct principles in deciding whether Advantage had just cause to dismiss Abrams. I suspect Advantage offers these same arguments in the hope I might find them more persuasive than did the delegate. Advantage, however, bears the burden of demonstrating some error or unfairness in the Determination that might persuade me to vary it, cancel or refer it back to the Director under section 115 of the *Act*. . . In the absence of any reason why I should find the delegate erred or committed some unfairness, therefore, I must dismiss this aspect of Advantage's appeal.

23. Similarly, in this application, no error of law in the original decision has been identified or demonstrated. In my view, this application is simply another attempt by Advantage to have the delegate's decision on just cause reviewed and reversed. Advantage says as much in the opening words of its application submission. This type of application does not represent an appropriate use of the reconsideration provisions in the *Act* and, accordingly, the application is denied.

## **ORDER**

24. Pursuant to Section 116 of the *Act*, I order the original decision, as varied by the Tribunal decision BC EST #039/06, be confirmed.

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