

An Application for Reconsideration

- by -

Wundr Software Inc.
("Wundr")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2015A/66

DATE OF DECISION: July 3, 2015

DECISION

SUBMISSIONS

Ryan Vetter

on behalf of Wundr Software Inc.

OVERVIEW

1. This is an application by Wundr Software Inc. (“Wundr”) pursuant to section 116 of the *Employment Standards Act* (the “*Act*”) to have an appeal decision (BC EST # D038/15 issued April 22, 2015; the “Appeal Decision”) reconsidered. By way of the Appeal Decision, Tribunal Member Stevenson confirmed a Determination issued by a delegate of the Director of Employment Standards (the “delegate”) on December 24, 2014. By way of this Determination, Wundr was ordered to pay the total amount of \$20,746.32 on account of unpaid wages and section 88 interest owed to two former Wundr employees and three separate \$500 monetary penalties (see section 98).
2. Tribunal Member Stevenson summarily dismissed Wundr’s appeal on the ground that it had no reasonable prospect of succeeding (see subsection 114(1)(f) of the *Act*).
3. At this juncture, I am considering whether this is an appropriate case for the Tribunal to exercise its statutory discretion to reconsider the Appeal Decision. I have reviewed the material filed by Wundr and, in addition, the full record that was before Tribunal Member Stevenson when he issued the Appeal Decision. As will be seen, I do not conceive this application to be one that passes the first stage of the *Milan Holdings* test (see BC EST # D313/98) and, accordingly, there is no need to notify the respondent parties in order to obtain their submissions with respect to the merits of Wundr’s application.
4. The application is refused and my reasons for making this order are set out below. In the following paragraphs, I will first set out the adjudicative background to this application, then outline Wundr’s argument in support of the application and, finally, will provide my analysis of the application and final conclusion.

PRIOR PROCEEDINGS

5. Wundr is in the “e-book” publishing business. The two complainants, Blake Fisher (“Mr. Fisher”) and Andre Lopes (“Mr. Lopes”), were former Wundr employees. Mr. Fisher worked as the firm’s operations manager from November 21, 2013, to August 6, 2014, when he quit. Mr. Lopes worked as a “web UI engineer” from April 23 to September 2, 2014, when he quit to take up other employment. Both complainants alleged that they had not been paid their full wages for several months prior to each quitting.
6. The delegate investigated the two complaints but Wundr failed to participate in any meaningful fashion in that investigation. Some, but apparently not all, of the delegate’s extensive efforts to engage Wundr in the investigation during the period from October 24 through early December 2014, are summarized in the delegate’s “Reasons for the Determination” appended to the Determination (the “delegate’s reasons”) at pages R3 – R4.
7. The delegate, relying on the statements and other records submitted by the complainants (which she found to be credible), awarded Mr. Fisher the sum of \$16,045.24 on account of unpaid regular wages, vacation pay and section 88 interest. The delegate awarded Mr. Lopes the sum of \$3,201.08 on account of regular wages, payment for the 2014 Labour Day statutory holiday, vacation pay and interest. The delegate also levied three

separate \$500 monetary penalties against Wundr based on its contraventions of sections 17 (regular payment of wages) and 18 (payment of wages on termination of employment) of the *Act* and section 46 of the *Employment Standards Regulation* (failure to comply with a demand for employer records). Thus, the total amount payable under the Determination was \$20,746.32.

8. Wundr appealed the Determination on all three statutory grounds, namely, that the delegate erred in law, failed to observe the principles of natural justice in making the Determination, and on the ground that it had new evidence that was not previously available (see subsections 112(1)(a), (b) and (c) of the *Act*). As previously noted, Tribunal Member Stevenson summarily dismissed the appeal as having no reasonable prospect of succeeding.
9. Wundr's central argument on appeal was predicated on its assertion that the Determination was issued without it having been given a fair and reasonable opportunity to respond to the allegations advanced by Messrs. Fisher and Lopes – an alleged failure by the delegate to abide by the principles of natural justice. Tribunal Member Stevenson noted that while it was true that Wundr did not participate in the delegate's investigation, Wundr was given every reasonable opportunity to do so but nonetheless failed to afford itself of the opportunity provided (see, especially, Appeal Decision, paras. 21 – 31). Wundr also submitted “a substantial number of documents and facts into [the] appeal that, because of the failure to participate in the complaint process, were not given to the Director” (Appeal Decision, para. 33). Tribunal Member Stevenson concluded that none of this evidence was admissible on appeal because “I am satisfied the evidence sought to be introduced in this appeal was reasonably available and that it ought to have been provided to the Director during the complaint process” (Appeal Decision, para. 34). Tribunal Member Stevenson rejected the evidence based on the standards governing admissibility set out in *Davies et al.*, BC EST # D171/03.
10. Having disposed of both the “natural justice” and “new evidence” grounds of appeal, Tribunal Member Stevenson then turned to Wundr's alleged errors of law. He found that this ground of appeal was not meritorious (see paras. 36-39):

As a result of the “new evidence” submitted failing to satisfy the requirements for being admitted in this appeal, Wundr is simply left with an appeal that challenges findings of fact. As indicated above, an appeal that challenges findings of fact must demonstrate those findings raise an error of law.

I am not persuaded the Director made any error of law in the Determination. The Determination was grounded in findings of fact made by the Director based on the evidence and information provided by the Complainants. Wundr has not, and cannot, show any reviewable error has been made in respect of those findings of fact. As indicated above, the statutory grounds of appeal in section 112 of the *Act* do not authorize the Tribunal to consider appeals that challenge findings of fact unless those findings are shown to be an error of law and that has not been done here. The findings and the conclusions of the Director are rationally grounded in the evidence provided.

Overall, I see two insurmountable problems for Wundr with its appeal. The first is stated immediately above: that it would require the Tribunal to interfere with findings and conclusions of fact made by the Director without there being any error of law in respect of those facts being demonstrated in the appeal. As indicated above, the authority of the Tribunal in respect of appeals challenging findings of fact or seeking to have the Tribunal re-visit and alter findings of fact is limited. Accordingly, the Tribunal would defer to the findings of fact made by the Director in this case, all of which accept the claims of the complainants.

The second is that, at its core, this appeal is of a type that has been consistently rejected by the Tribunal, one where, subsequent to an unfavourable Determination, the dissatisfied party submits an appeal seeking to rely on evidence that could have, and should have, been presented to the Director during the complaint process: see *Tri-West Tractor Ltd.*, BC EST # D268/96, and *Kaiser Stables Ltd.*, BC EST # D058/97.

11. Having determined that none of the asserted grounds of appeal had any presumptive merit, Tribunal Member Stevenson summarily dismissed Wundr's appeal under subsection 114(1)(f) and confirmed the Determination.

THE APPLICATION FOR RECONSIDERATION

12. Wundr filed a 275-page application for reconsideration including a detailed 28-page memorandum appended to its Reconsideration Application Form (consisting of 113 separately numbered paragraphs) and further attachments. The documents appended to Wundr's reconsideration application include an affidavit sworn by Wundr's president and director, Mr. Ryan Vetter, various e-mails, employment agreements for Mr. Fisher and Mr. Lopes, and copies of various Tribunal, judicial and arbitration decisions. These latter attached documents have little, if any, relevance to the issues before me on this application for reconsideration.
13. Although I appreciate that Mr. Vetter, who is acting on Wundr's behalf in this application, is not a lawyer, the fact remains that the application – and in particular the lengthy memorandum that Mr. Vetter appended to the Reconsideration Application Form – is largely a muddled mishmash of random legal jargon, inaccurate factual characterizations and irrelevant arguments. I shall endeavour to sort out what is, and what is not, properly before me and then address the former in further detail.
14. Wundr's application raises several matters that are not properly before me in this reconsideration application. First, the Determination that was appealed, and confirmed by the Appeal Decision, is a *corporate determination* issued solely against Wundr. In his memorandum, Mr. Vetter stated that, by way of the Determination, he – and two other corporate directors – were “held liable for unpaid employee wages”. Although corporate directors and officers can be held liable for unpaid wages under subsection 96(1), subject to a 2-month liability ceiling and certain other statutory defences, none of Wundr's corporate directors or officers was held liable for any unpaid wages under the Determination that was confirmed by the Appeal Decision. The Determination that was the subject matter of the appeal solely concerned *Wundr's* unpaid wage liability to the two complainants and its further liability for three monetary penalties.
15. If the Director of Employment Standards does issue a section 96 determination against one or more of Wundr's directors and/or officers (or a subsection 98(2) determination with respect to the monetary penalties), any such named individual will be entitled to appeal that determination under section 112 of the *Act*. As matters now stand, there is simply no director/officer liability to address in these reconsideration proceedings. Accordingly, a large swath of the evidence and argument presented in Mr. Vetter's memorandum – relating to corporate director/officer liability – are simply not relevant.
16. Second, Wundr makes reference to certain provisions of the *Canada Business Corporations Act* (“*CBCA*”) and seeks some sort of unspecified remedy under that statute. However, the present proceeding is governed by the *Employment Standards Act* and the *CBCA* is simply not applicable to the present reconsideration application.
17. Third, Wundr seeks relief pursuant to the *Canadian Charter of Rights and Freedoms* (the “*Charter*”). However, the Tribunal has no jurisdiction to adjudicate *Charter* issues (see section 103 of the *Act* and section 45 of the *Administrative Tribunals Act*). Further, and it is not entirely clear to me whether this is a *Charter* issue or based on some other legal principle, Wundr asserts that “the entirety of this [*Employment Standards Act*]...it's overall unconstitutional”. Either way, the Tribunal has no authority to declare the *Act*, and any particular provision contained in it, “unconstitutional”. That is an issue for the courts.
18. Fourth, in its “prayer for relief”, Wundr seeks, among other things, “special damages”, “compensatory damages”, “punitive damages” and “costs”. The Tribunal does not have the statutory authority to issue a

common law damages award (including punitive damages) nor does it have the statutory authority to award costs. It should also be noted that this matter concerns a claim by the complainants against Wundr, not the other way around. I fail to see on what legal basis Wundr has any claim for any sort of damages against the complainants and certainly Wundr's materials do not identify any such claim. Finally, and in any event, a monetary claim by an employer against an employee is a matter for the courts; the *Act* contains no provision allowing an employer to, effectively, "sue" an employee for damages.

19. Having set aside the matters that I cannot lawfully adjudicate in this application, I now turn to the issues Wundr raises that do, at least potentially, fall within my statutory authority. In this regard, Wundr says that the Appeal Decision is tainted by "several errors of law, lack of procedural fairness, a failure to follow the principles of natural justice, inadequate investigation, and factual and procedural errors". Wundr asserts that the Appeal Decision is "patently unreasonable and irrational as well as incorrect and must be canceled [*sic*] or set aside".
20. More particularly, Wundr asserts that it was never properly apprised about the delegate's investigation and/or properly served with formal demands or notices. Wundr maintains that the "service" provisions contained in section 122 of the *Act* "do not apply...to this case". Finally, Wundr asserts that the two complainants were "high technology professionals" (see section 37.8 of the *Employment Standards Regulation*) and, accordingly, were not entitled to overtime pay and statutory holiday pay (see subsection 37.8(2)).

ANALYSIS

21. Applications for reconsideration invoke the Tribunal's discretionary authority to review an appeal decision. In exercising this discretion, the Tribunal will review the reconsideration application in light of the two-stage test set out in *Director of Employment Standards (Milan Holdings Inc.)*, BC EST # D313/98 ("*Milan Holdings*") which directs the Tribunal to, first, consider whether the application raises a sufficiently cogent case to justify the Tribunal exercising its discretion to reconsider the appeal decision in question. At this stage, the Tribunal will consider whether the application raises a serious and compelling issue of law, fact or procedure. If the application does not pass the first stage of the *Milan Holdings* test, it will be summarily dismissed. If, on the other hand, the application does raise an important matter justifying reconsideration, the Tribunal will receive full submissions from all affected parties and then address the merits of the application more fully.
22. The issue raised with respect to the possible application of section 37.8 of the *Employment Standards Regulation* is an issue that was not raised on appeal. Without commenting on whether or not this provision is possibly relevant to the case at hand, I find that this issue is one that should have been raised before the delegate or, at the very least, on appeal. The reconsideration process should not be used as a forum to raise issues for the very first time. Further, neither Mr. Fisher nor Mr. Lopes were awarded any "overtime pay" and, accordingly, the regulatory exclusion does not apply to either complainant's award for "regular wages". Mr. Fisher's award consisted of regular wages, vacation pay and interest and thus the regulatory exclusion is wholly irrelevant insofar as his claim is concerned. Mr. Lopes' award includes pay for one statutory holiday (\$192.31) but the balance of his award was for regular wages, vacation pay and interest and thus the regulatory exclusion, even if it applies, would only have had a very modest impact given his total \$3,201.08 award.
23. The balance of the reconsideration application essentially amounts to a rather long-winded dissertation to the effect that Tribunal Member Stevenson should not have rejected its "new evidence" and a further attack on his finding that Wundr was itself responsible for its failure to present its side of the story to the delegate prior to her issuing the Determination.

24. I see no error in fact or legal principle in the approach taken by Tribunal Member Stevenson and I adopt his reasons with respect to each of the appeal grounds that were before him. In short, the delegate made more than a reasonable effort to engage Wundr in the investigative process and it simply failed to engage. The delegate's factual findings and legal conclusions appear to be totally justifiable in light of the evidentiary record before her.
25. There is absolutely no merit to the suggestion that Wundr is somehow excluded from the operation of section 122 of the *Act* (the service provision) – Wundr says this follows from the fact it is federally incorporated. However, section 122 applies equally to both provincially and federally incorporated entities.
26. Had I adjudicated Wundr's appeal, I would have decided the matter exactly as did Tribunal Member Stevenson. As previously noted, I wholly endorse his reasons for decision. In my view, this application fails to pass the first stage of the *Milan Holdings* test and, accordingly, must be dismissed.

ORDER

27. Wundr's application to reconsider the Appeal Decision is refused. Pursuant to subsection 116(1)(b) of the *Act*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal