An Application for Reconsideration

- by -

Fraser Valley Community College Inc.
("FVCC")

- 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.: 2016A/37

DATE OF DECISION: April 14, 2016

DECISION

SUBMISSIONS

Sunanda Kikla — on behalf of Fraser Valley Community College Inc.

INTRODUCTION

1. This is an application made pursuant to section 116 of the *Employment Standards Act* (the "*Act*) for reconsideration of an appeal decision issued by Tribunal Member Bhalloo on February 10, 2016 (BC EST # D027/16; the "Appeal Decision"). By way of the Appeal Decision, Tribunal Member Bhalloo confirmed a Determination issued against the applicant, Fraser Valley Community College Inc. ("FVCC"), on October 6, 2015, in the total amount of $6,953.10 (including $3000 in monetary penalties levied against FVCC under section 98 of the *Act*).

2. On July 9, 2015, Ms. Vandana Khetarpal ("Khetarpal") filed an unpaid wage complaint under section 74 of the *Act* against the FVCC. This complaint was the subject of an oral complaint hearing before a delegate of the Director of Employment Standards (the "delegate") conducted on October 2, 2015. FVCC did not attend the complaint hearing and Member Bhalloo concluded that FVCC did not provide a reasonable explanation for its failure in that regard.

3. On October 6, 2015, the delegate issued a Determination ordering FVCC to pay Ms. Khetarpal the total sum of $3,953.10 on account of unpaid wages (over half of which was regular wages but also including overtime pay, statutory holiday pay, vacation pay and compensation for length of service) and section 88 interest. Further, and as noted above, the delegate also levied six separate $500 monetary penalties against FVCC based on its contraventions of sections 17 (failure to pay wages at least semimonthly), 18 (failure to pay earned wages on termination of employment), 40 (failure to pay overtime pay), 45 (failure to pay statutory holiday pay) and 63 (failure to pay compensation for length of service) of the *Act* and section 46 of the *Employment Standards Regulation* (failure to produce employment records as demanded). Thus, the total amount payable under the Determination is $6,953.10.

4. On October 22, 2015, the delegate issued written "Reasons for the Determination" under subsection 81(1.3) of the *Act* (the "delegate's reasons").

5. FVCC appealed the Determination and also applied for a suspension of the Determination pursuant to section 113 of the *Act*, pending the adjudication of the appeal. Member Bhalloo refused to issue a suspension order (see BC EST # D026/16). FVCC applied for reconsideration of this latter decision and I issued reasons for decision refusing this application on April 5, 2016 (see BC EST # RD064/16).

6. Member Bhalloo dismissed FVCC's appeal of the Determination as having no reasonable prospect of succeeding (see subsection 114(1)(f) of the *Act*) and this decision (BC EST # D027/16) is now before me under section 116 of the *Act*.

7. The Tribunal assesses applications for reconsideration utilizing a two-stage test (see *Director of Employment Standards (Milan Holdings Inc.)*, BC EST # D313/98). As discussed in *Milan Holdings*, "the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration" (page 7) based on whether, for example, the application is timely, raises an important question of law, policy or procedure that is not only important for the immediate parties but also in terms of the implications of the subject decision

for future cases. The Tribunal will not normally reconsider preliminary decisions nor will it reconsider decisions where the applicant is simply asking the Tribunal to "reweigh" the evidence before the member who issued the appeal decision with a view to having the reconsideration panel come to a different conclusion "as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence" (page 7). In other words, the application will only pass the first stage of the *Milan Holdings* test if it is timely, raises a serious question and is presumptively meritorious.

8. If the application does not pass the first stage of the *Milan Holdings* test, it will be summarily dismissed. If the application passes the first stage, the respondent parties will be invited to provide submissions (and the applicant will be given a right of reply) following which the Tribunal will undertake a comprehensive analysis of the application on its merits and issue written reasons for decision. Thus, at this juncture, I am considering whether FVCC's application should be summarily dismissed as failing to pass the first stage of the *Milan Holdings* test or whether the Tribunal should seek submissions from the respondent parties with respect to the merits of the application.

9. I have before me the complete record that was before Member Bhalloo as supplemented by FVCC's submissions filed in support of its section 116 reconsideration application.

10. I shall now briefly review the Determination and the Appeal Decision and then address the reconsideration application.

PRIOR PROCEEDINGS

11. Ms. Khetarpal filed her unpaid wage complaint on July 9, 2015. In her complaint, Ms. Khetarpal stated that she had been employed with FVCC from April 25, 2014, to February 5, 2015, as an "instructor" earning $25 per hour and that her employment ended when she quit. Ms. Khetarpal claimed approximately $1,000 in unpaid wages. In the "Details" section of her complaint, Ms. Khetarpal also indicated that she worked for a time doing "office work" for which she was paid a salary.

12. The subsection 112(5) record before me indicates that on August 10, 2015, the Employment Standards Branch ("ESB") sent to the parties, by e-mail, a "Notice of Mediation Session" relating to Ms. Khetarpal's complaint. The mediation was scheduled for Friday, August 14, 2015, at the ESB's Langley office at 1:30 PM. The Notice also indicated that if the matter were not resolved through mediation, a complaint hearing would be conducted on Friday, September 25, 2015, at 9:00 AM. The Notice also directed the parties to bring all relevant documents to the mediation session and attached to the Notice was an ESB "factsheet" describing the mediation process in detail.

13. On Monday, August 10, 2015, FVCC's president, Ms. Sunanda Kikla (who has acted on FVCC's behalf throughout this entire matter), sent an e-mail to the ESB requesting that the mediation be adjourned to Friday, August 28, 2015. Ms. Kikla also provided a copy of a B.C. Small Claims Court "Notice of Claim" that it filed against Ms. Khetarpal on July 29, 2015, claiming reimbursement from her for "overpayment" of wages. FVCC also asked for further information regarding Ms. Khetarpal's claim – this was provided to FVCC by e-mail dated August 10, 2015. The mediation session was rescheduled to Friday, August 28, 2015, at 1:30 PM at the ESB's Langley office and an "Amended Notice of Mediation Session" was sent to the parties, by e-mail, on August 17, 2015.

14. On August 28, 2015, Ms. Kikla sent an e-mail to the ESB advising that "due to the lack of information provided to us to understand the claim we feel the mediation will not be effective as we have no clear documents or claim presented…[so] we will not be attending today's session" [*sic*].

15. Despite FVCC's position espoused in its August 28 e-mail, the record before me shows that the ESB sent a considerable amount of information and documentation to FVCC regarding Ms. Khetarpal's claim and, of course, the mediation itself would have afforded FVCC a further opportunity to explore the details of Ms. Khetarpal's claim. I am not persuaded that FVCC was, as it repeatedly asserts, in "complete dark" about the nature of Ms. Khetarpal's unpaid wage claim; rather, the claim was, in my view, entirely adequately particularized. Although FVCC was operating in British Columbia and hiring employees, it would appear that it either did not know, or was indifferent to, its financial obligations to its employees under the *Act*.

16. In any event, FVCC seemingly indicated that it was prepared to proceed to hearing: "Once you have set the formal hearing dates, please send me the required documents so we can do the needful" [*sic*].

17. On September 1, 2015, the ESB sent the parties, by e-mail, a "Notice of Complaint Hearing" indicating that the hearing would proceed on October 2, 2015, at 9:00 AM at the ESB's Langley office. The communication also included information about the hearing process and a demand for production of all documents that the parties intended to rely on at the hearing. In addition, a formal section 85 "Demand for Employer Records" was delivered to FVCC with the requisite records to be produced by no later than September 16, 2015. FVCC failed to comply with the section 85 Demand.

18. The "Notice of Complaint Hearing" and section 85 Demand were also sent to FVCC (and to Ms. Kikla) by registered mail and Canada Post records indicate that the envelopes containing these documents were successfully delivered to the two addressees.

19. On September 17, 2015, the ESB sent a letter to FVCC enclosing 22 pages of records submitted to the ESB by Ms. Khetarpal in support of her unpaid wage claim.

20. Despite having been formally served with a section 85 Demand for Employer Records, FVCC did not produce any employment records relating to Ms. Khetarpal. Accordingly, on September 24, 2015 – with the October 2 hearing date looming – the delegate sent an e-mail to FVCC (Ms. Kikla) requesting it to provide its records in advance of the hearing. Ms. Kikla replied within an hour stating "These will be sent by Monday". Despite this assurance, FVCC never did produce any records nor did it indicate that it would not be attending the hearing.

21. On the October 2 hearing date, no one representing FVCC was in attendance and thus an ESB staff member attempted to contact FVCC leaving three separate voice mail messages at three separate telephone numbers. A fourth call was made to another number but it proved to be out of service. The hearing then proceeded in FVCC's absence. I should note that the hearing notice contained the following statement: "The Branch Adjudicator may make a Determination based on information before them, **even if you choose not to participate at the hearing**" (**boldface** in original text). The hearing notice also contained the following information regarding "Adjournments": "A request for adjournment should normally be in writing, include reasons, and be delivered to the Branch at least seven days before the scheduled hearing date. However, a request for an adjournment may be made up to and including the date of the hearing and will be granted or refused on a case-by-case basis depending on the circumstances. The Adjudicator will make reasonable efforts to accommodate the parties." FVCC never applied for an adjournment of the hearing.

22. Since FVCC did not provide any evidence or argument, the delegate decided the case based on the evidence submitted by Ms. Khetarpal. I shall now briefly summarize the delegate's findings.

The Determination

23. The Determination was issued on October 6, 2015, and on October 22, 2015, the delegate issued her written reasons following a subsection 81(1.1) request from FVCC.

24. Although Ms. Khetarpal worked for FVCC from late April 2014 to early February 2015, subsection 80(1)(a) of the *Act* limits the wage recovery period to earned wages "that became payable in the period beginning…6 months before the earlier of the date of the complaint or the termination of the employment". Accordingly, the delegate turned her mind to wages that were earned or should have been paid during the period from August 7, 2014, to February 6, 2015.

25. In the absence of any evidence or argument from FVCC, the delegate relied on Ms. Khetarpal's evidence as being the "best evidence available". Based on Ms. Khetarpal's evidence and records, the delegate determined that FVCC owed Ms. Khetarpal regular wages in the amount of $2,033.60. The delegate accepted Ms. Khetarpal's evidence as to overtime hours worked in late October and early November 2014 and awarded her $454.23 on this account. Further, the delegate, relying on Ms. Khetarpal's wage statements and testimony, also awarded her $461.44 in statutory holiday pay for the four statutory holidays that fell within the wage recovery period. While Ms. Khetarpal was paid some vacation pay, she was not paid vacation pay on all her earned wages and thus the delegate awarded her an additional $353.04 for unpaid vacation pay. Finally, the delegate applied section 66 of the *Act* and determined that Ms. Khetarpal, despite having quit, was entitled to compensation for length of service since FVCC substantially altered her working conditions by not paying all of her earned wages and by unilaterally and significantly reducing her working hours. The delegate awarded Ms. Khetarpal one week's wages on this latter account – $576.80.

26. As previously noted, the delegate also levied six separate $500 monetary penalties against FVCC based on its contraventions of sections 17 (failure to pay wages at least semimonthly), 18 (failure to pay earned wages on termination of employment), 40 (failure to pay overtime pay), 45 (failure to pay statutory holiday pay) and 63 (failure to pay compensation for length of service) of the *Act* and section 46 of the *Employment Standards Regulation* (failure to produce employment records as demanded). Although the delegate determined that "FVCC did not routinely provide wage statements" (delegate's reasons, page R3), the delegate did not levy a penalty for this clear section 27 contravention – it is not clear to me why such a penalty was not levied given the finding that there was a section 27 contravention. In any event, with section 88 interest, the Determination totalled $6,953.10.

FVCC's Appeal and the Appeal Decision

27. On November 13, 2015, FVCC appealed the Determination, alleging all three statutory grounds, namely, that the delegate erred in law, failed to observe the principles of natural justice, and that it had new and relevant evidence (see subsections 112(1)(a), (b) and (c) of the *Act*).

28. In essence, FVCC's reasons for appeal fell into a few select categories. First, it stated that it was only provided with the first two pages of the three-page complaint. Second, it says that it did not attend the complaint hearing due to an "unintentional oversight". Third, FVCC asserted that the delegate was biased and acted in bad faith. Fourth, FVCC maintained that the complaint was entirely meritless. With respect to the merits of the dispute, FVCC wished to have the Tribunal consider its submissions filed with the ESB after the Determination was issued.

29. On February 10, 2016, Member Bhalloo issued written reasons for decision summarily dismissing FVCC's appeal on the basis that it had no reasonable prospect of succeeding (see subsection 114(1)(f) of the *Act*). I have excerpted, below, the relevant portions of Member Bhalloo's decision (paras. 45 – 49; 51; 53 – 55):

> In this case, while FVCC has framed its appeal on the error of law, failure by the Director to observe the principles of natural justice in making the Determination and "new evidence" grounds of appeal, the central question in the appeal is whether FVCC was afforded a reasonable opportunity to respond to the Complaint made by Ms. Khetarpal.
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> Having said this, in this case, after the completion of the Hearing, which FVCC failed to attend, Ms. Kikla contacted a delegate of the Director with a view to providing FVCC's submissions and documents. When the delegate informed Ms. Kikla that the Hearing completed in the absence of FVCC and that a determination had been made with respect to the Complaint, Ms. Kikla insisted on presenting FVCC's submissions to the adjudicator and did so, as indicated, on October 7, 2015 by way of an email to the delegate requesting him to forward same to the adjudicator. Since those submissions were not and could not have been considered by the adjudicator to reverse the Determination already made, FVCC appealed the Determination.
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> In her appeal submissions, as previously indicated, Ms. Kikla describes the employment relationship between Ms. Khetarpal and FVCC, and goes on to dispute Ms. Khetarpal's claims for regular wages, overtime, statutory holiday pay, compensation for length of service and vacation pay. She submits that the Complaint contains claims that are "false and without merit". She attaches in excess of 400 pages of documents, some of which contain other legal proceedings that FVCC was involved in against Ms. Khetarpal and others. Other documents she presents include documents that should have been produced in context of the Demand sent by the Director to FVCC and Ms. Kikla by registered mail on September 1, 2015.
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> I find that the fact pattern of this case has many similarities to, and falls under the precedent of *Re: Tri-West Tractor Ltd.* (BC EST # D268/96). In *Tri-West Tractor*, the delegate requested information from the employer to support its allegations against a former employee to justify her termination. The adjudicator found that that the employer had produced no documented evidence to support its claim. The employer ignored verbal and written requests for information, and there was no evidence to validate its claim of cause for termination. In its appeal, the employer provided new information to support its termination. The adjudicator stated:
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> > This Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it. An appeal under Section 112 of the *Act* is not a complete re-examination of the complaint. It is an appeal of a decision already made for the purpose of determining whether that decision was correct in the context of the facts and the statutory provisions and policies. The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process.
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> In this case, the delegate meticulously summarizes in the Reasons all communications and attempted communications with FVCC, including all opportunities FVCC was provided to respond to the Complaint, prior to the Hearing and at the Hearing, all of which are summarized in paragraph 18 of this decision. Not only did FVCC not respond to the Demand and not attend at a new mediation date which was scheduled to accommodate FVCC but it also failed to attend the Hearing and failed to ask for an adjournment of the Hearing. In the circumstances, I find the delegate afforded ample opportunity to FVCC to participate and present its evidence at all stages - the pre-Hearing and the Hearing. Therefore, it is not a breach of natural justice, for the delegate to have proceeded to determine the Complaint on the basis of the evidence tendered by Ms. Khetarpal only.
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> …
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> I also find that FVCC's challenge of the Determination on the basis of "new evidence" fails on the basis of *Tri-West Tractor Ltd.* It would be inconsistent with the stated purpose of the *Act* in section 2(d); namely,

> to provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*, to consider the evidence that FVCC now presents in the appeal. It is not only unfair, but it is inefficient for a party to fail to participate at the Hearing, including the pre-Hearing stages – mediation and production of employer records – and then seek to challenge the conclusions reached by making allegations of breach of natural justice, error of law and "new evidence". While the delegate may well have arrived at a different conclusion if all parties fully participated at the Hearing, that different conclusion does not demonstrate an error on the part of the delegate.
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> …
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> If FVCC was unable to attend at the Hearing despite sufficient advance notice of it, the Notice of Complaint Hearing provided a mechanism for FVCC to apply for an adjournment of the Hearing. Ms. Kikla says that FVCC "missed" the Hearing "due to a genuine oversight as the director [Ms. Kikla] was in Supreme Court that day for filing materials" and that there was another conflicting court date in another court. If Ms. Kikla was double or triple booked for the date of the Hearing, she should have requested an adjournment on FVCC's behalf, but she did not do so, nor did she provide any of FVCC's materials in advance of the Hearing. I find FVCC's failure to ask for an adjournment is fatal to its appeal and particularly its allegation of a breach of natural justice. I also add that to accede to FVCC's request for a new hearing date in the circumstances would be inconsistent with section 2(d) of the *Act*.
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> Finally, I note that Ms. Kikla has made an allegation of bad faith and bias on the part of the adjudicator and other representatives of the Director who participated in the Complaint process at different stages; however, I do not find any or sufficient evidence in FVCC's submissions to support those allegations.
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> In the result, I am sufficiently satisfied that FVCC's appeal has no presumptive merit and has no prospect of succeeding. Therefore, I dismiss it.

30. Member Bhalloo's decision is the subject of the present reconsideration application.

FVCC's APPLICATION FOR RECONSIDERATION

31. On March 11, 2016, FVCC filed an application to have the Appeal Decision reconsidered. The original application was incomplete and FVCC filed further documents with the Tribunal on March 14 and March 23, 2016. The material filed in support of the application is voluminous (about 750 pages) and is frequently duplicative of the material filed in the original appeal. FVCC's submission contains a large number of totally irrelevant documents and is very redundant with the same, or virtually the same, assertions being repeated over and over again. FVCC's submission includes multiple copies of documents reproduced from the original subsection 112(5) record, several separate copies of each of the Determination, the delegate's reasons and the two decisions issued by Member Bhalloo, and a copy of a Notice of Claim filed by FVCC and Ms. Kikla in her personal capacity in the B.C. Supreme Court against Ms. Khetarpal and several other individuals. None of these documents should have been included in the reconsideration application.

32. FVCC's submission is riddled with unfounded accusations of misconduct against Ms. Khetarpal and the delegate (including that the latter was biased and had decided the matter in Ms. Khetarpal's favour before the hearing even commenced); allegations concerning errors in fact-finding by the delegate; assertions that the delegate's reasons are inconsistent; and that FVCC was at all times in "Complete Dark" about the nature of Ms. Khetarpal's unpaid wage claim. FVCC says that the delegate's calculations are incorrect and that "SIMPLE MATH will show that delegate intentionally DOUBLE DIPPED, USED WAGE STATEMENTS selectively to COUNT double hours for the same period and falsely calculated Stat pay, Vacation pay, Add on pay over and above Gross contract amount to incorrectly LEVY FINES against FVCC" [*sic*].

33. FVCC says that the Tribunal should impose some unspecified penalty against the delegate for her several wrongful acts and that the delegate should not have proceeded with an "'EX PARTY' judgment and hearing

of Oct 2,2015 is an eye wash to render a predetermined decision against FVCC as anticipated in August 2015 when delegate staff refused to provide the basis of the complaint and then provided incorrect documents in misleading FVCC in to believing as if the 3 pages document provided to FVCC was the 'Actual Complaint'" [*sic*]. FVCC says that it has "full merits of this matter and if the Tribunal does not refer back this matter to the delegate and reconsider this decision the same facts will be presented and argued in the court of law as the decision rendered must be factual and accurate as per the law and not fictitious and on false grounds" [*sic*]. FVCC further says that "any prudent person with Basic Math Knowledge to know that the amounts calculated as owed and Basis of owing is completely inaccurate and without merit clearly showing a poor and negligent attempt by the delegate to calculate false amounts and false bases for levying administrative penalties against FVCC" [*sic*]. Throughout its submission, FVCC constantly implies that it has been victimized by some sort of conspiracy to enrich Ms. Khetarpal at FVCC's expense – for example, "Clearly some another person in a position of power has dictated this matter to be dealt in a specific manner against FVCC"[*sic*].

34. FVCC strenuously complains about the fact that Member Bhalloo adjudicated both the suspension application and the main appeal (FVCC says that fact "makes this process MOOT and prejudicial"). I expect that a similar complaint will in due course be lodged against me since I have adjudicated the two reconsideration applications relating to each of Member Bhalloo's decisions. However, I do not find any merit whatsoever in this assertion since there is nothing improper about a member hearing both the suspension application and the appeal on its merits – this protocol is commonly followed at the Tribunal. Indeed, even a B.C. Court of Appeal justice might hear a stay of proceedings application and then be a member of the panel that adjudicates the appeal relating to the very same decision that was stayed (see, *e.g.*, *British Columbia Teachers' Federation v. British Columbia*, 2014 BCCA 75 [stay] and *British Columbia Teachers' Federation v. British Columbia*, 2015 BCCA 184 [appeal]).

35. I could continue *ad nauseam*, but I think the point has been made – FVCC believes (or at least asserts) that this entire matter has been a travesty of justice.

36. Curiously, however, FVCC's submission does not contain *any* credible and properly corroborated explanation for its failure to attend the original complaint hearing before the delegate even though one of its central arguments – repeated over and over – is that it was denied a fair hearing because the delegate proceeded "EX PARTY" [*sic*, I presume Ms. Kikla means *ex parte*). Of course, the hearing was *not* an *ex parte* hearing given that FVCC had ample notice of the fact that the complaint hearing would be proceeding on October 2, 2015. So far as I can determine, the only explanation ever advanced for FVCC's failure to attend the complaint hearing was that its non-attendance was "purely an unintentional oversight" and related to the fact that FVCC was at that time dealing with "an extremely time sensitive Legal matter before BC Supreme Court" [*sic*]. FVCC has not provided any further details about how or why this "legal matter" prevented it from either attending the hearing or, in advance of the hearing, applying for an adjournment.

37. In a 3-page memorandum dated March 11, 2016, and appended to its Reconsideration Form, FVCC's stated its grounds in support of the application as follows:

- FVCC says that it only received the first two pages of the original complaint and that this occurred "with a malicious intent to render a Predetermined decision" and that this last page was "intentionally withheld";

- FVCC says that even if it had attended the complaint hearing, it "would have essentially faced a Brand New complaint" and that the "whole process [was] very prejudicial, biased and unlawful against any 'Fair process' and is not transparent" [*sic*];

- FVCC takes issue with virtually every finding of fact made by the delegate and maintains that Ms. Khetarpal provided "false testimony" at the complaint hearing and that the delegate and other ESB officers "certainly acted in bad faith" and "attempt[ed] to mislead FVCC";

- FVCC seeks the following remedy: "This matter must be reconsidered and sent back to Director of employment standards with FULL disclosure and determined on 'Merits' and in a Transparent manner, failing which FVCC will be left with no choice but to add Director of Employment standards and the members involved in this conspiracy in their personal capacity and this will most certainly be not in favour of judicial efficiency and will be open to the 'judicial Review' application that IFVCC will bring in the Supreme Court of BC" [*sic*].

FINDINGS AND ANALYSIS

38. The Appeal Decision was issued on February 10, 2016, and FVCC's reconsideration application was not fully perfected until March 14, 2016. due, it would appear, at least in part to FVCC's difficulties in transmitting its very voluminous application (nearly 750 pages) via e-mail. Thus, this application was filed after the statutory reconsideration application period had expired, but only by a few days (see subsection 116(2.1) of the *Act*). The Tribunal has the statutory authority to extend the reconsideration application period (see subsection 109(1)(b) of the *Act*) and FVCC has applied for such an extension.

39. One of the *Milan Holdings* considerations, at the first stage, is whether the application is timely. This application is late, however, that is only one of the considerations in deciding whether the application should proceed to the second stage.

40. FVCC repeatedly asserts that there was a denial of natural justice because FVCC was only provided with the first two pages of Ms. Khetarpal's three-page complaint. The first and second pages of the complaint form require the complainant to identify their employer including business address and its principals. The complainant's personal information – including name and employment details – are set out at the bottom of the first page and continuing on the second page together with the details of the wage claim. There is a space at the bottom of the second page and it continues to the third page for the complainant to provide a narrative report concerning their complaint.

41. Even if FVCC did not receive the third page of the complaint – and I am not fully satisfied that was indeed the case, although the record before me is somewhat unclear on this point – the information set out in the "details box" was provided in other forms to FVCC. I might also note that the top right corner of the complaint identifies each page as "Page [1, 2 or 3] of 3" and thus if FVCC inadvertently only actually received the first two pages, it should have been obvious to it that there was a third page. Far from being "mislead", all FVCC had to do was simply request the ESB to provide the third page. So far as I can tell, this is precisely what occurred – on August 10, 2015, the ESB apparently provided an incomplete copy of the complaint to FVCC and Ms. Kikla immediately asked for a complete copy. The ESB's internal records appear to indicate that as of August 19, 2015, FVCC had a complete copy of the complaint. A complete copy of the complaint is contained in the subsection 112(5) record (at pages 112 – 114). However, even if FVCC *never* received the third page of the complaint (although, presumably, it would have been provided with it at the mediation session and/or at the complaint hearing had it bothered to attend either one), I do not consider that to be consequential since FVCC was provided with the essential details of Ms. Khetarpal's unpaid wage claim.

42. Further, this exact issue was argued before Member Bhalloo and I agree with his analysis of the matter (at para. 41):

> As for Ms. Kikla's argument that FVCC did not receive a complete Complaint as the delegate did not disclose that portion of the Complaint Form entitled "Details of Your Complaint" before the Hearing, I note, based on the Reasons, the delegate relied on the oral testimony of Ms. Khetarpal and the documents the latter relied upon at the Hearing when making the Determination. The documents Ms. Khetarpal relied upon at the Hearing were disclosed to FVCC well in advance of the Hearing and they are part of the Record disclosed by the Director in this appeal. While I do not agree with the Director's submission that the Director is not obliged to disclose the complete Complaint Form to the employer when scheduling a hearing in the matter, in this case, I do not find FVCC to have been prejudiced in any way by the delegate's non-disclosure of that portion of the Complaint entitled "Details of Your Complaint" to FVCC. I find, if anything, it was FVCC's failure to attend the Hearing (which I will discuss in more detail below), together with its lack of participation in the pre-Hearing stage, including failure to respond to the Demand, that potentially prejudiced FVCC in terms of the outcome in the Determination.

43. FVCC did not attend either the mediation session (and it was not obliged to do so, but had it attended it would have been provided with even more information about the nature of Ms. Khetarpal's complaint) or the complaint hearing. As noted above, FVCC has wholly failed to provide a credible explanation for its failure to attend the complaint hearing. In light of the fact that FVCC did not attend the hearing, it was entirely reasonable for the delegate to base her decision on the records and *viva voce* testimony before her. If FVCC wished to challenge Ms. Khetarpal's credibility, it should have attended the hearing where it would have been afforded an opportunity to present its own evidence and to cross-examine Ms. Khetarpal with a view to impugning her testimony. The delegate did not hear the complaint on an *ex parte* basis.

44. The evidence FVCC submitted as part of its appeal submissions should have been provided to the delegate before, or at, the complaint hearing. This evidence was not admissible on appeal in light of the twin hurdles represented by the *Tri-West Tractor* line of authorities and by *Davies et al.* (BC EST # D171/03), the latter decision being the leading authority with respect to the admissibility of "new evidence" on appeal.

45. FVCC's repeated allegation that certain individuals within the ESB and Ms. Khetarpal (and perhaps others) were all engaged in some sort of "conspiracy" to harm FVCC's economic interests is wholly unproven and, frankly, it strikes me as being completely ridiculous. There is no evidence before me of any "bad faith" on the part of the delegate or anyone else employed at the ESB.

46. I have reviewed the delegate's calculations and I am unable to find any "simple math" error – and, it should be noted, while FVCC repeatedly stated in its submissions that there were "math errors", it did not provide any particulars in this regard.

47. I am unable to find any error in law or fact in Member Bhalloo's decision. I would have rendered essentially the same decision had I been the member adjudicating the appeal.

48. In summary, this application is late and it is, on its face, wholly unmeritorious. Accordingly, FVCC's application must be refused.

ORDER

49. FVCC's application under subsection 109(1)(b) of the *Act* to extend the time period for applying for reconsideration is dismissed. Pursuant to subsection 116(1)(b) of the *Act*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal