

An Application for Reconsideration

- by -

Goodwin Gibson, a Director or Officer of VidWRX Inc.
("Gibson")

- 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.: 2017A/75

DATE OF DECISION: June 23, 2017

DECISION

SUBMISSIONS

Roselle P. Wu

counsel for Goodwin Gibson, a Director or Officer of
VidWRX Inc.

OVERVIEW

1. This is an application for reconsideration filed pursuant to section 116 of the *Employment Standards Act* (the “*Act*”) by Goodwin Gibson, a Director or Officer of VidWRX Inc. (“Gibson”). Mr. Gibson’s application concerns BC EST # D044/17, issued by Tribunal Member Stevenson on April 24, 2017 (the “Appeal Decision”).
2. In adjudicating this application, I have reviewed the entire section 112(5) record that was before the Tribunal in the appeal, as well as the further submissions filed by legal counsel on Mr. Gibson’s behalf. Having reviewed this material, I am of the view that this application does not pass the first stage of the two-stage *Milan Holdings* test (see BC EST # D313/98) and, as such, must be summarily dismissed.

PRIOR PROCEEDINGS

3. Darren Bockman, Hongting Chen and Trevor McManus (the “complainants”), each being a former employee of VidWRX Inc. (“VidWRX”), filed unpaid wage complaints under section 74 of the *Act*. VidWRX is a federally incorporated business corporation and it was extraprovincially registered to carry on business in British Columbia on November 9, 2007. On December 16, 2016, and following an investigation into the three unpaid wage complaints, a determination was issued against VidWRX in the amount of \$30,728.23 on account of unpaid wages and section 88 interest and a further \$3,500 on account of monetary penalties levied under section 98 of the *Act* (the “Corporate Determination”).
4. The Corporate Determination was never appealed and thus now stands as a final order. I understand that VidWRX is no longer actively carrying on business.
5. The present applicant, Mr. Gibson, was at all material times a VidWRX director and, as such, is personally liable for VidWRX employees’ unpaid wages under subsection 96(1) of the *Act*: “A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months’ unpaid wages for each employee.” On January 20, 2017, a delegate of the Director of Employment Standards (the “delegate”) issued a determination against Mr. Gibson under this latter provision in the total amount of \$25,099.31 on account of unpaid wages and section 88 interest owed to the complainants (the “Section 96 Determination”). In fixing the amount payable, the delegate applied the 2-month liability ceiling and, in addition, did not find Mr. Gibson to be liable for any monetary penalties under section 98(2) of the *Act*.
6. At this juncture, I should also note that two other determinations were issued against VidWRX on June 30, 2016, and July 22, 2016, in the amounts of, respectively, \$32,488.39 (one former employee) and \$133,284.87 (ten former employees). Neither determination was ever appealed. Determinations were also concurrently issued against Mr. Gibson under subsection 96(1) with respect to these former employees’ unpaid wages in the amounts, respectively, of \$30,988.39 and \$110,999.33. Mr. Gibson unsuccessfully appealed these two subsection 96(1) determinations (see BC EST # D005/17 and BC EST # D006/17) and I

refused Mr. Gibson's subsequent section 116 application to have the latter two appeal decisions reconsidered (see BC EST # RD032/17).

7. These latter two appeals were essentially identical, both being predicated on the assertion that Mr. Gibson, as a director of a federally incorporated business corporation, could not be held liable under subsection 96(1) of the *Act*. This argument was rejected both on appeal and on reconsideration.
8. Mr. Gibson's appeal of the January 20, 2017, Section 96 Determination now before me in this application echoes the arguments he advanced in the two earlier appeals. Briefly, Mr. Gibson's appeal – based on all three statutory grounds set out in subsection 112(1) – raised the following matters:

- Subsection 96(1) is inapplicable to a director of a federally incorporated business corporation; and
- the delegate incorrectly calculated Mr. Gibson's unpaid wage liability.

9. As noted above, the appeal was based on all three statutory grounds but no argument whatsoever was advanced under the “new evidence” ground (subsection 112(1)(c) of the *Act*). Mr. Gibson advanced essentially the identical constitutional arguments that were advanced (and rejected) in the earlier appeal/reconsideration proceedings. With respect to the alleged calculation error(s) his position was as follows:

The appellant is unable at this time to comment on the correctness of the calculation of “wages”. The appellant requires supporting documentation regarding the wages of the various employees and hereby requests the same if they have been received by the Director. The appellant has resigned as a director of the Corporation. The appellant reserves the right to provide further arguments regarding the calculation of “wages” after he has been provided with copy [sic] of the complete Record that was before the Director at the time the Determination was made.

10. On appeal, Member Stevenson rejected the constitutional arguments for the reasons given in the earlier appeal/reconsideration proceedings (see Appeal Decision, paras. 19 – 22). With respect to the alleged calculation “errors” – and, of course, Mr. Gibson did not provide *any* evidence to show that there were, in fact, calculation errors – Member Stevenson noted that the amount of the wages owed by VidWRX had been finally determined via the Corporate Determination and that there was no evidence or argument that Mr. Gibson was not a VidWRX director when the complainants' wage claims crystallized (see Appeal Decision, paras. 23 – 31). Member Stevenson summarily dismissed the appeal on the basis that it had no reasonable prospect of succeeding (see subsection 114(1)(f) of the *Act*).

THE RECONSIDERATION APPLICATION

11. In this application, Mr. Gibson does not advance any argument regarding whether there was a “calculation error” in determining his subsection 96(1) liability to the complainants.
12. However, and once again, Mr. Gibson raises the identical constitutional arguments that were previously (and affirmatively) rejected by the Tribunal regarding whether subsection 96(1) applies to him in his capacity as a director of a federally incorporated business corporation. Presumably, this seemingly quixotic application has been filed in order to preserve his judicial review rights regarding his declared liability to the complainants under the Section 96 Determination.

13. However, while I understand that Mr. Gibson may feel compelled to file this application in order to forestall any argument on judicial review that he failed to “exhaust his internal remedies”, that is not a proper foundation for finding that the application passes the first stage of the *Milan Holdings* test. Although the Tribunal is not, strictly speaking, bound by its prior decisions, there is obvious merit in having jurisprudential consistency and, more importantly, I see no reason to depart from the views expressed in the earlier proceedings regarding the constitutional issue raised in this case because, in my view, the previous decisions are legally correct.
14. I consider Mr. Gibson’s constitutional arguments to be misconceived, and for the reasons I gave in BC EST # RD032/17, I am of the view that these arguments must be rejected.

ORDER

15. Mr. Gibson’s application to have the Appeal Decision reconsidered is dismissed. Pursuant to subsection 116(1)(b) of the *Act*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal