

An application for Reconsideration

- by -

York Security Ltd.
("York Security")

- 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: Shafik Bhalloo

FILE No.: 2007A/60

DATE OF DECISION: August 20, 2007

DECISION

OVERVIEW

1. York Security Ltd. (“York Security”) seeks a reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of a Decision of the Employment Standards Tribunal BC EST #D042/07, dated May 15, 2007 (the “Original Decision”). The Original Decision confirmed the Determination made by a Delegate of the Director of Employment Standards (“the Director”) on January 24, 2007 that York Security owed Mr. Fanous \$7,513.40 for unpaid wages, overtime pay, statutory holiday pay, annual vacation pay, compensation for length of service and interest pursuant to section 88 of the *Act*. The Original Decision also confirmed all six administrative penalties of \$500.00 each in respect of York Security’s contraventions of sections 17, 18, 28, 40, 46 and 63 of the *Act* for a total of \$3,000.00.
2. In the reconsideration application, York Security attaches a short letter setting out in two very brief paragraphs its reasons for requesting a reconsideration of the Original Decision. The first reason it provides is that Mr. Fanous was paid \$5,000 for arrears of wages by a Mr. Sandhu when the latter was in the process of purchasing some shares of York Security that belonged to a Mr. Singh, one of the two principals of York Security. Therefore, York Security argues that the said payment should have been “applied against the wages” owed to Mr. Fanous. The second reason provided by York Security for its reconsideration application is in the form of an enquiry as to what liability York Security’s directors, Mr. Singh and a Mr. Narayan, have for unpaid wages (a subject that the Tribunal in the Original Decision declined to consider as no Determination had been made on that question).

ISSUES TO BE DECIDED UPON

3. In an application for reconsideration there is a preliminary or a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the Original Decision. If the Tribunal is satisfied that the case is appropriate for reconsideration, the substantive issues raised in this reconsideration application are two-fold: (1) Whether the Original Decision was wrong in concluding that there was evidence before the Delegate which could have led him to conclude that the \$5,000 payment to Mr. Fanous by Mr. Sandhu was made for the purpose of repaying a loan, and not to reimburse Mr. Fanous for unpaid wages; and (2) whether the Tribunal in the Original Decision wrongly concluded that it lacked jurisdiction to deal with the question of the liability of York Security’s directors for unpaid wages?

DISCUSSION AND ANALYSIS

4. The statutory authority for reconsideration of a Tribunal’s Decision is found in section 116 of the *Act*:

Reconsideration of orders and decisions

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.*

5. The Tribunal's authority under section 116 of the *Act* is discretionary in nature, as the Tribunal "may" reconsider its own orders or decisions. Having said that, it should be noted that the Tribunal's discretion in this regard is to be exercised with caution. As indicated by the Tribunal in *Re Eckman Land Surveying Ltd.* B.C. E.S.T. #RD413/02:

Reconsideration is not a right to which a party is automatically entitled, rather it is undertaken at the discretion of the Tribunal. The Tribunal uses its discretion with caution in order to ensure finality of its decisions; efficiency and fairness of the appeal system and fair treatment of employers and employees.

6. In *Milan Holdings Ltd.*, B.C. E.S.T. #D313/98, the Tribunal delineated a two-stage process for reconsideration applications. In the first stage, the Tribunal must decide whether the matters raised in the application warrant reconsideration. In determining this question, the Tribunal will consider a non-exhaustive list of factors that include such factors as:

- (i) whether the reconsideration application was filed in a timely fashion;
- (ii) whether the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already provided to the adjudicator;
- (iii) whether the application arises out of a preliminary ruling made in the course of an appeal;
- (iv) whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases;
- (v) whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

7. After weighing the factors in the first stage, if the Tribunal concludes that the application is not an appropriate one for reconsideration, then the Tribunal will reject the application and provide its reasons for not reconsidering. If, however, the Tribunal finds that one or more of the issues in the application are appropriate for reconsideration, the Tribunal will proceed to the second stage in the analysis. The second stage in the analysis involves a reconsideration of the merits of the application.

8. In the present case, I have reviewed the Determination; the record before the Director at the time the Determination was made; the Original Decision including the written submissions of the parties in the appeal of the Determination; and the written submissions of the parties in the reconsideration application. In my opinion, in this reconsideration application, York Security is clearly repeating the arguments it made at the hearing before the Delegate prior to the Determination and subsequently in its appeal of the Determination. In particular, York is rearguing that the \$5,000. Mr. Sandhu paid to Mr. Fanous when he was purchasing some shares of one of the Principal's of York Security should be considered as payment of wages to Mr. Fanous and not a reimbursement of the loan the latter made to York Security. The Tribunal in the Original Decision properly rejected that argument on the basis that there was evidence before the Delegate, which could have led him to conclude that the payment of \$5,000.00 by Mr. Sandhu

to Mr. Fanous was made for the purpose of repaying the loan made by Mr. Fanous to York Security and not reimbursement for unpaid wages. I agree with the Tribunal in the Original Decision that the jurisdiction of the Tribunal to review findings of fact is limited and that for an appellant to successfully challenge a Delegate's finding of fact, as in this case, the appellant must persuade the Tribunal that the error in fact amounts to an error of law. York, in this case, has failed to persuade me in this regard. In this case, there is nothing in York Security's reconsideration application that raises significant questions of law, fact, principle or procedure. I am, however, persuaded that York Security is effectively asking this Tribunal to re-weigh the evidence because it is unhappy with both the Determination and the Tribunal's decision in the Original Decision to uphold the Determination. In my view, reconsideration applications are not another opportunity for dissatisfied parties to obtain a second or third "kick at the can" as it were. In light of the direction and guidance provided in *Re Eckman Land Surveying Ltd.*, supra, and *Milan Holdings Ltd.*, supra, this Tribunal will not exercise its reconsideration power in this case.

9. Further, with respect to York Security's enquiry as to what liability its directors, Mr. Singh and Mr. Narayan, have for unpaid wages, this enquiry was made in the appeal and dealt with by the Tribunal in its Original Decision. The Tribunal correctly decided that its jurisdiction was limited to the Determination, and since no determination had been in respect of the liability, if any, of the directors for unpaid wages, the Tribunal was not in a position to consider that matter.

ORDER

10. Pursuant to Section 116 of the *Act*, the application for reconsideration is refused.

Shafik Bhalloo
Member
Employment Standards Tribunal