

An application for Reconsideration

- by -

Tony Lau Insurance Agencies Ltd.  
("Lau Insurance")

- 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/52

**DATE OF DECISION:** June 23, 2006

## DECISION

### SUBMISSIONS

Tony T.K. Lau	on behalf of Tony Lau Insurance Agencies Ltd.
J.R. Dunne	on behalf of the Director
Anita Gomes	on her own behalf

### OVERVIEW

1. Tony Lau Insurance Agencies Ltd. (“Lau Insurance”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of a decision, BC EST #D036/06, made by the Tribunal on March 20, 2006 (the “original decision”). The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards on December 21, 2005. The Determination had found Lau Insurance had contravened Part 3, Section 21, and Part 8, Section 63, of the *Act* in respect of the employment of Anita Gomes (“Gomes”). Lau Insurance was ordered to pay wages and interest to Gomes in the amount of \$3,700.97 and to pay administrative penalties for the contraventions in the amount of \$1000.00.
2. Lau Insurance appealed the Determination, contending the Director had made an error of law in the Determination, had failed to observe principles of natural justice in making the Determination and that evidence had come available which was not available at the time the Determination was made. The Tribunal Member deciding the original decision found no error of law and no failure to observe principles of natural justice by the Director in making the Determination. The Tribunal Member found the additional evidence sought to be introduced with the appeal was not shown to be unavailable to Lau Insurance at the time the Determination was made and that the test for its acceptance on appeal had not been met.
3. In this application Lau Insurance has raised the same issues and arguments that were canvassed in the original decision.

### ISSUE

4. 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 Lau Insurance should have been discharged from its liability to reimburse Gomes for improper deductions from wages or to pay Gomes length of service compensation.

## ANALYSIS OF THE PRELIMINARY ISSUE

5. 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.
6. 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.
7. 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.
8. 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.
9. 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.
10. 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.

11. At the root of this application is a failure, or refusal, by Lau Insurance to recognize an appeal to the Tribunal is neither a reinvestigation of the complaint nor an opportunity to seek a review of the factual conclusions and analysis done by the Director' delegate. It is an error correction process. The grounds upon which an appellant may file an appeal are limited to those found in Section 112(1) of the *Act*. This point was made in the original decision.
12. This application effectively re-visits all aspects of the appeal, doing no more than attributing to the Tribunal Member the same errors which were alleged against the Director in the appeal. The objective of Lau Insurance in this application for reconsideration is the same as it was in the appeal - to change the conclusion of the Director on the question of whether Lau Insurance had just cause to terminate Gomes' employment. That is an inappropriate use of the reconsideration provisions. The focus of a reconsideration application is the original decision of the Tribunal and I can find no error in that decision.
13. It is unnecessary to review the reasons provided in the original decision for dismissing the appeal. They clearly and accurately set out the principles applicable to an appeal based, as this appeal was, primarily on findings of fact.

## **ORDER**

14. Pursuant to Section 116 of the *Act*, I order the original decision be confirmed.

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