

An Application for Reconsideration

- by -

Wen Hsing Huang, a Director of Kingdom Treasure Group Corp.
(“Mr. Huang”)

- 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.: 2016A/56

DATE OF DECISION: May 13, 2016

DECISION

SUBMISSIONS

Shen Shun Huang

on behalf of Wen Hsing Huang, a Director of Kingdom
Treasure Group Corp.

OVERVIEW

1. Wen Hsing Huang (“Mr. Huang”) seeks reconsideration of a decision of the Tribunal, BC EST # D059/16 (the “original decision”), dated March 23, 2016.
2. The original decision considered an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on November 27, 2015, and an application under section 109(1)(b) of the *Employment Standards Act* (the “*Act*”) for an extension of the appeal period.
3. The Determination was made by the Director under section 96 of the *Act* on a complaint filed by Peiyuan Jin (“Mr. Jin”), who had alleged Kingdom Treasure Group Corp. (“KTG”) had contravened the *Act* by failing to pay him regular and overtime wages. In a Determination issued October 8, 2015 (the “corporate determination”), the Director found Mr. Jin was owed wages by KTG in the total amount, including interest, of \$667.25.
4. The corporate determination was not appealed. Canada Post records provided to the Tribunal by the Director showed Mr. Huang received the corporate determination on October 15, 2015.
5. In the Determination that resulted in the original decision, the Director found Mr. Huang was a director of KTG at the time Mr. Jin’s wages were earned or should have been paid and under section 96 of the *Act* was personally liable to pay Mr. Jin wages in the amount of \$679.72.
6. An appeal of the Determination was filed by Mr. Huang alleging the Director failed to observe principles of natural justice in making the Determination and that evidence had become available that was not available when the Determination was being made.
7. A review of the appeal indicates the reasons for appeal were based on a denial by Mr. Huang that he was a director of KTG, an alleged misunderstanding that resulted in KTG failing to attend a hearing on September 8, 2015, convened by the Director on Mr. Jin’s complaint and an assertion that Mr. Jin had been paid the wages he claimed were owed to him by KTG.
8. The appeal was dismissed.
9. In the original decision, the Tribunal Member considered whether the Director had failed to observe principles of natural justice and found the Director had provided Mr. Huang with the procedural rights required in the circumstances: he had received notice of the complaint hearing on Mr. Jin’s wage claim and the notice provided to the directors of KTG concerning their potential personal liability for wages found to be owed to Mr. Jin. The Determination also notes Mr. Huang admitted to knowing of the complaint hearing and choosing not to attend.

10. The Tribunal Member making the original decision noted there was no basis for allowing Mr. Huang to argue KTG's wage liability, found the evidence before the Director when the Determination was made showed Mr. Huang was listed as a corporate director of KTG when the wages of Mr. Jin were earned or should have been paid and, based on those facts and the clear language of section 96 of the *Act*, was personally liable for wages found owing to Mr. Jin.

ISSUE

11. In any application for reconsideration, there is a threshold, or preliminary, issue of whether the Tribunal will exercise its discretion under section 116 of the *Act* to reconsider the original decision. If satisfied the case warrants reconsideration, the issue raised in this application is whether the Tribunal should cancel the original decision and refer the matter back to the original panel or, if more appropriate, to the Director.

ARGUMENT

12. Mr. Huang submits Mr. Jin was paid his full wages and that no further wages should have been found owing to him. He submits the decision of the Director was an "Error of Judgement".

ANALYSIS

13. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally. As a result of amendments to the *Act* made in the *Administrative Tribunals Statutes Amendment Act, 2015*, parts of which came into effect on May 14, 2015, section 116 reads:

- 116** (1) *On an 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 served with an order or a decision of the tribunal may make an application under this section.*
- (2.1) *The application may not be made more than 30 days after the date of the order or decision.*
 - (2.2) *The tribunal may not reconsider an order or decision on the tribunal's own motion more than 30 days after the date of the decision or order.*
- (3) *An application may be made only once with respect to the same order or decision.*
- (4) *The director and a person served with an order or a decision of the tribunal are parties to a reconsideration of the order or decision.*

14. Except for the inclusion of statutory time limits for filing an application for reconsideration and for the Tribunal reconsidering its own orders and decisions, the amendments are unlikely to alter the Tribunal's approach to reconsiderations.

15. In that respect, the Tribunal has said the authority of the Tribunal under section 116 of the *Act* is discretionary. A principled approach to this discretion has been developed and applied. The rationale for this approach is grounded in the language and purposes of the *Act*. One of the purposes of the *Act*, found in section 2(d), is "to provide fair and efficient procedures for resolving disputes over the application and interpretation" of its provisions. Another stated purpose, found in section 2(b) is to "promote the fair treatment of employees and employers". The approach is fully

described in *Milan Holdings Inc.*, BC EST # D313/98 (Reconsideration of BC EST # D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In *The Director of Employment Standards (Re Giovanni (John) and Carmen Valoroso)*, BC EST # RD046/01, the Tribunal explained the reasons for restraint at page 4:

... the *Act* creates a legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute...

There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the “winner” not be deprived of the benefit of an adjudicator’s decision without good reason. A third is to avoid the spectre of a Tribunal process skewed in favour of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

16. In deciding whether to reconsider, the Tribunal considers timeliness and such factors as the nature of the issue and its importance both to the parties and the system generally. Delay in filing for reconsideration will likely lead to a denial of an application. An assessment is also made of the merits of the original decision. The focus of a reconsideration application is, generally, the correctness of the original decision.
17. The Tribunal has accepted an approach to applications for reconsideration that resolves itself 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 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.
18. 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.
19. 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 in the reconsideration.
20. I find this application does not warrant reconsideration. I am satisfied there was no error made in the original decision. This application does nothing more than resubmit elements of the appeal that were not accepted in the original decision. The focus of this application remains substantially on the corporate determination.
21. The evidence that Mr. Huang was a director of KTG when the wages of Mr. Jin were earned or should have been paid is incontrovertible. There is no basis for seeking reconsideration of this factual conclusion.
22. As well, the Tribunal Member making the original decision made no error in rejecting Mr. Huang’s attempt to argue the merits of the corporate determination. As stated in the original decision, the time and place to

argue the wage liability of KTG was at the complaint hearing convened by the Director on September 8, 2015. No representative of KTG appeared at that hearing to contest Mr. Jin's claim. No appeal of the corporate determination was made by Mr. Huang or any person from KTG.

23. The original decision is entirely consistent with the facts and the principle established by the Tribunal in *Kerry Steinemann, a Director/Officer of Pacific Western Vinyl Windows & Doors Ltd.*, BC EST # D180/96, and consistently applied to appeals and application such as this.
24. There is nothing in this application that would justify the Tribunal using its authority to allow reconsideration of the original decision and accordingly the application is denied.

ORDER

25. Pursuant to section 116 of the *Act*, the original decision, BC EST # D059/16, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal