

An Application for Reconsideration

- by -

BlueCurl Technologies Inc.  
("BlueCurl")

- 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.:** 2012A/75

**DATE OF DECISION:** August 23, 2012

## DECISION

### SUBMISSIONS

Chris Slattery	on behalf of BlueCurl Technologies Inc.
Stephen Van Deventer	on his own behalf
Gagan Dhaliwal	on behalf of the Director of Employment Standards

### OVERVIEW

1. BlueCurl Technologies Inc. (“BlueCurl”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of a decision, BC EST # D064/12, made by the Tribunal on June 28, 2012, (the “original decision”).
2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on March 12, 2012.
3. The Determination was made by the Director on a complaint filed by Steven Van Deventer (“Van Deventer”), who alleged BlueCurl had contravened the *Act* by failing to pay regular wages and annual vacation pay. The Determination found that BlueCurl had contravened Part 3, section 18 and Part 7, section 58 of the *Act* and ordered BlueCurl to pay the complainant \$3,671.57, an amount which included both wages and interest.
4. The Director also imposed administrative penalties on BlueCurl under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,000.00.
5. The appeal filed by BlueCurl sought to have the Determination varied to allow the amount of wages found to be owed to Van Deventer to be “paid” in shares of BlueCurl. The appeal was filed late and BlueCurl requested an extension of the time period allowed under the *Act* for filing an appeal.
6. The Tribunal Member of the original decision refused to extend the time period for filing and dismissed the appeal.
7. BlueCurl now seeks reconsideration of the original decision.

### ISSUE

8. 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 grant the request to extend the time period for filing the appeal and consider the merits of the appeal.

### ARGUMENT

9. The application for reconsideration is structured as two parts.

10. The first part is simply an expression of dissatisfaction and disagreement with the original decision that restates – and slightly expands – the reason for the late appeal. However, it contains nothing in the way of analysis within the framework of the principles the Tribunal applies in reconsideration requests.
11. The second part revisits the substantive objective of the appeal relating to the method of paying the wages that were found in the Determination to be owing to Van Deventer.
12. The Director has filed a response, submitting the matter is not one which is appropriate for reconsideration.
13. Van Deventer has also responded, opposing the application.

### ANALYSIS OF THE PRELIMINARY ISSUE

14. Section 116 states:

- 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.*

15. As the Tribunal has stated in numerous reconsideration decisions, the authority of the Tribunal under section 116 is discretionary. A principled approach to the exercise of this discretion has been developed. The rationale for this 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 approach is fully described 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 *The Director of Employment Standards (Re Giovanni (John) and Carmen Valoroso)*, BC EST # RD046/01, the Tribunal explained the reasons for restraint:

. . . the Act creates the 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” is not 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 favor 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 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, generally, the correctness of the original decision.
17. 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.

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 by the reconsideration.

## **ANALYSIS**

20. Having reviewed the original decision, the material in the appeal file and the submissions of the parties on the reconsideration request, I am not persuaded this matter warrants reconsideration. I have two main reasons for reaching this conclusion.

21. First, the decision of the Tribunal about whether to extend the statutory time period for filing the appeal is a matter of discretion, one which is guided by well established principles.

22. One panel of the Tribunal will not lightly interfere with a discretionary decision of another panel. While I do not suggest an exercise of discretion by one panel of the Tribunal can never be reviewed and altered by a reconsideration panel, there is a burden on an applicant challenging a discretionary decision of a Tribunal Member to show the exercise of discretion by that Tribunal Member was not consistent with established legal principles, that it was not made in good faith, was arbitrary or was based on irrelevant considerations.

23. In exercising his discretion in this case, the Tribunal Member addressed those factors identified in the Tribunal's May 8, 2012, letter to the parties. Those factors are well established and have been consistently applied to applications to extend the time period for filing an appeal. The Tribunal Member of the original decision, by considering and applying those factors in making the original decision, did not deviate from established legal principles applicable to such cases. BlueCurl has not shown there was any error in this respect.

24. There is no suggestion of bad faith or arbitrariness in the original decision or that it was based on irrelevant considerations.

25. Accordingly, BlueCurl has not persuaded me there is any basis for interfering with the exercise of discretion by the Tribunal Member in the original decision.

26. Second, I have carefully reviewed the appeal material and substantially agree with the findings and conclusions in respect of the factors considered. Any concerns I have with the findings in the original decision are minor and do not assist BlueCurl in this application. They are referred to below.

27. I agree the request for an extension is not supported by a credible and reasonable explanation for the delay.
28. The suggestion by BlueCurl in this reconsideration request – that their purported communication with the Director which is said to be at the root of the delay, was “to talk to them about what I needed to do” – does not make the explanation for the delay any more reasonable.
29. Nor does the comment that “we have never done this” provide a reasonable explanation for filing an appeal late. As noted in the original decision, the Determination clearly identified the appeal deadline date and provided the Tribunal’s website address as an information resource for how to appeal a Determination. Literally thousands of parties who “have never done this” have managed to meet the statutory deadline for filing an appeal through the simple expedient of taking note of the statutory requirements and/or connecting to the Tribunal’s website. To accept “we have never done this” as a reasonable explanation for filing a late appeal would create an untenable situation not in keeping with the objectives and purpose of the appeal mechanism in the *Act*.
30. The conclusion in the original decision that BlueCurl did not appear to have formed an intention to appeal until faced with execution proceedings is one that was justified on the available facts and does not show any reviewable error.
31. As well, I accept completely the analysis and conclusion in the original decision concerning the presumptive merits of the appeal. In particular I agree with the Tribunal Member’s assessment of the merits of the appeal as “dubious” and appearing to seek a remedy that is contrary to express provisions in the *Act*.
32. In my view, however, the Tribunal Member of the original decision was being generous in describing the appeal as “something very close to frivolous”. I would have gone farther and found the appeal to be entirely frivolous and without any apparent merit.
33. It may assist BlueCurl in accepting this comment and the terminology used in the original decision that the Tribunal has accepted a “frivolous” appeal as one that presents no justiciable question and has little prospect of ever succeeding: see *Online Curbing and Concrete Ltd.*, BC EST # D589/97 and *Greg Brewer operating Smallbone Millwork & Design*, BC EST # D476/98. That accurately describes the appeal made in this case.
34. Faced with an appeal of dubious merit, it was correct and appropriate for the Tribunal Member in the original decision to take an approach to the application to extend the appeal period that included, in result, an acceptance that it is neither fair nor efficient to put parties through the delay and expense of an appeal process where the appeal has little or no prospect of ever succeeding: *Gerald Knodel a Director of 0772646 B.C. Ltd. carrying on business as Home Delivery*, BC EST # D083/11.
35. Having denied an extension of the time for filing an appeal, there was no reason to conduct a further analysis of the merits in the original decision and there is certainly no reason to do so in the context of this reconsideration application.
36. In sum, BlueCurl has not shown the original decision was wrong in any respect and the application for reconsideration is denied.

**ORDER**

37. Pursuant to section 116 of the *Act*, the original decision is confirmed.

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