

An application for Reconsideration

- by -

Colorperfect Painting Ltd.
("CPL")

- 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/75

DATE OF DECISION: August 16, 2006

DECISION

SUBMISSIONS

Wiley Woods and Natalie Charanek on behalf of Colorperfect Painting Ltd.
Sharn Kaila on behalf of the Director

OVERVIEW

1. Colorperfect Painting Ltd. (“CPL”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “Act”) of a decision, BC EST #D060/06, made by the Tribunal on May 23, 2006 (the “original decision”). The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards on February 14, 2006. The Determination had found CPL had contravened Sections 17, 18, 40, 45 and 58 of the *Act* in respect of the employment of several employees and ordered CPL to pay the employees wages in the amount of \$25,442.89 and imposed administrative penalties of \$1500.00. The original decision confirmed the Determination.
2. The original decision also considered appeals against Determinations issued by the Director against Wiley J. Woods and Natalie Charanek as Directors and Officers of CPL in the amount of \$21,010.56 and confirmed those Determinations.
3. This application was filed with the Tribunal by CPL on June 12, 2006. There is no issue concerning the timeliness of the application.
4. The application asks the Tribunal to reconsider the original decision. The application raises the following points:
 - (i) CPL had provided evidence of dates worked and wages paid to the former employees, which was not considered in the appeal;
 - (ii) CPL had provided a clear explanation of why wages were withheld from dishonest employees, which was not recognized in the appeal; and
 - (iii) The appeal should have gone ahead because the Director had failed to contact the principals of CPL before issuing the Determinations.

ISSUE

5. 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 the Director failed to comply with principles of natural justice in making the Determination and whether the Tribunal erred by not accepting the new evidence provided by PCL with their appeal and by not allowing the appeal.

ANALYSIS OF THE PRELIMINARY ISSUE

6. 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.*
7. 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.
8. 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.
9. 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.
10. 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.

11. After review of the original decision, the submissions of the parties and the material on file, I have decided this application does not warrant reconsideration. This application does no more than re-state all of the grounds of appeal, seeking to have another panel of the Tribunal re-visit the appeal and reach a different conclusion. That is apparent from the reconsideration submission, which states, in part:

“We are requesting reconsideration with another Member who will consider our side.”

12. The above comment misconstrues the reconsideration process, which, put in very simple terms, requires the applicant to show there are circumstances arising in the original decision that justify the Tribunal exercising its discretion under Section 116 of the *Act*.
13. CPL has not shown such circumstances and, accordingly, the application is denied.

ORDER

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

David B. Stevenson
Member
Employment Standards Tribunal