An Application for Reconsideration

- by -

Asian Drywall Ltd.
("Asian Drywall")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2017A/94

DATE OF DECISION: August 28, 2017

DECISION

SUBMISSIONS

Amrinder Randhawa — counsel for Asian Drywall Ltd.

OVERVIEW

1. This is an application, filed under section 116 of the *Employment Standards Act* (the "*Act*"), for reconsideration of BC EST # D029/17, an appeal decision issued by Tribunal Member Bhalloo on March 21, 2017 (the "Appeal Decision"). The application was filed by legal counsel on behalf of Asian Drywall Ltd. ("Asian Drywall").

2. Subsection 116(2.1) of the *Act* states that an application for reconsideration "may not be made more than 30 days after the date of the order or decision" that is the subject of the application. This application was filed on July 11, 2017, and, accordingly, was filed nearly three months after the statutory application time period expired. That being the case, Asian Drywall has applied for an extension of the reconsideration application period under subsection 109(1)(b) of the *Act*: "In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following: …(b) extend the time period for requesting an appeal or applying for reconsideration even though the period has expired".

3. In my view, the application to extend the reconsideration application must be refused. My reasons for so concluding now follow.

PRIOR PROCEEDINGS

4. On December 9, 2016, and following an oral complaint hearing held on March 10, 2016, a delegate of the Director of Employment Standards (the "delegate") issued a Determination, and accompanying "Reasons for the Determination" (the "delegate's reasons"), ordering Asian Drywall to pay its former employee, Harwinder Sangha ("Sangha"), the total sum of $12,811.42 on account of unpaid wages ($12,000), concomitant 4% vacation pay ($480.00) and section 88 interest ($331.42). Further, and also by way of the Determination, the delegate levied three separate $500 monetary penalties (see section 98) based on Asian Drywall's contraventions of sections 17 (failure to pay wages at least semimonthly) and 18 (payment of wages on termination) of the *Act* and section 46 of the *Employment Standards Regulation* (the "*Regulation*") (failure to produce employment records on demand). Thus, the total amount payable under the Determination is $14,311.42.

5. Asian Drywall did not appear at the complaint hearing. On January 29, 2016, Asian Drywall acknowledged receipt of the hearing notice (delivered by registered mail) – the notice stated that the complaint hearing would be held at the Employment Standards Branch's Richmond office on March 10, 2016, commencing at 9:00 AM. As recounted in the delegate's reasons (page R3), Mr. Neeraj Walia (Asian Drywall's sole director and officer) "requested an adjournment of the…hearing as a result of a scheduled house inspection, the timing of which conflicted with the hearing". The adjournment application was refused because "the Employer failed to provide any supporting documentation". In an affidavit filed in support of the reconsideration application, Mr. Walia stated that he asked for the adjournment "in emergency circumstances…before March 04, 2016 in writing" and that the emergency in question was as follows: "I am a tradesman and a sub-contractor and I had a meeting to set up with the Engineer for building inspection on March 10, 2016" and that "the Engineer has a tight schedule and the Company Asian Drywall Ltd. could

have been liable for back charges or economic loss or could loose [sic] contract for the delayed work because of missed meeting with engineer" [*sic*].

6. With respect to this latter explanation, I note that Asian Drywall did not produce its original e-mail request for an adjournment and there is nothing in the subsection 112(5) record regarding the adjournment request. Mr. Walia did not, in his affidavit, provide any particulars regarding what efforts, if any, he made to have the engineer's inspection moved to a different day or time, nor is there anything in the material before me confirming that, in fact, this inspection was fixed for a day and time that conflicted with the scheduled complaint hearing. Mr. Walia says that all arrangements regarding the inspection were "arranged…on the telephone".

7. On the day set for the hearing (shortly after 9:00 AM), a member of the Richmond Branch office staff attempted to contact Mr. Walia both by telephone and e-mail, inquiring about his whereabouts and advising that the hearing would proceed at 9:25 AM "if the Employer did not contact the Branch" (delegate's reasons, page R3). "The Employer did not contact the Branch by 9:25 a.m. and the adjudicator proceeded with the hearing with only the Complainant in attendance" (page R3). Notwithstanding Asian Drywall's failure to attend the hearing, the delegate did review its written 22-page submission that had previously been submitted to the delegate (on February 19, 2016), and he discussed Asian Drywall's arguments in his reasons.

8. The delegate determined, *inter alia*, firstly, that Mr. Sangha was an employee rather than an independent contractor; and secondly, relying on section 126(1) of the *Act*, that Mr. Sangha was entitled to unpaid wages in the amount of $12,000. This latter amount comprised three separate $4,000 cheques, two of which were returned for insufficient funds and a third that was the subject of a "stop payment" order. With respect to these three cheques, Asian Drywall has never provided any evidence that these payments were eventually made to Mr. Sangha.

9. Asian Drywall, through its legal counsel (but not the same counsel who is now representing the firm) filed a late appeal seeking to have the original complaint referred back to the Director of Employment Standards for rehearing. The appeal was predicated on all three statutory grounds, namely, that the delegate erred in law and failed to observe the principles of natural justice, and that Asian Drywall had new evidence (see subsection 112(1)(a), (b) and (c) of the *Act*). The deadline for appealing the Determination, as noted in a text box at the bottom of the second page of the Determination, was "by 4:30 pm on January 16, 2017". In a memorandum filed with the Tribunal on January 17, 2017, Asian Drywall's counsel stated that the appeal "was filed [on January 16, 2017] at 5:44 p.m. instead of 4:30 p.m." and that counsel was unable to file a timely appeal because he "was retained on 16th January 2017 in the morning to prepare and file the Appeal" and that "due to the time constrains [*sic*] believed the Appellant that the Appeal should be filed on 16th January 2017" but that "by the time the lawyer received the determination letter, there was actually no time left to meet the deadline of 4:30 p.m." [*sic*].

10. Regarding the merits of the appeal, counsel made two fundamental assertions. First, he submitted the delegate erred in law in determining that there was an employment relationship between the parties. Second, he asserted that the delegate should not have refused the hearing adjournment request.

11. Although Member Bhalloo was alive to the late appeal issue (see Appeal Decision, para. 1), he did not specifically adjudicate Asian Drywall's subsection 109(1)(b) application to extend the appeal period. Rather, he dismissed the appeal on the basis that it had no reasonable prospect of succeeding (see subsection 114(1)(f) of the *Act*). Member Bhalloo held that the delegate correctly applied the relevant provisions of the *Act* in determining that there was an employment relationship (see Appeal Decision, paras. 42 – 45).

12. As for the delegate's refusal to adjourn the complaint hearing, Member Bhalloo noted that the original adjournment request was not supported by any sort of corroborating documentation or other evidence, and that Asian Drywall was well aware of the consequences that would flow from its failure to attend the complaint hearing (see paras. 52 – 53).

13. Finally, Member Bhalloo held that none of the so-called "new evidence" submitted on appeal met the test for admissibility set out in *Davies et al.*, BC EST # D171/03.

14. The record before me indicates that on March 21, 2017(the date the Appeal Decision was issued), the Appeal Decision was sent to Asian Drywall's former legal counsel, by regular mail and e-mail, and to Mr. Sangha (by mail) and the delegate (by regular mail and e-mail). I should also note that Asian Drywall's legal counsel identified himself in the appeal documents as the lawyer and "agent" for Asian Drywall.

THE APPLICATION TO EXTEND THE RECONSIDERATION APPLICATION PERIOD

15. The reconsideration application is premised on three assertions. First, Asian Drywall once again says that there was no employment relationship between the parties. Second, Asian Drywall says that the delegate erred in awarding vacation pay (in this regard, I should note that once the delegate held that Mr. Sangha was entitled to unpaid wages in the amount of $12,000, section 58 mandated an additional 4% vacation pay). Third, Asian Drywall says that the delegate should not have refused the original application to adjourn the complaint hearing. Surprisingly, counsel has not made any submissions regarding the two-stage *Milan Holdings* test (see BC EST # D313/98) that governs section 116 applications (indeed, he does not mention the *Milan Holdings* decision at all).

16. As noted at the outset of these reasons, this application was filed nearly three months after the application period expired. Despite the fact that counsel concedes the application is untimely, he failed to provide a rationale, at any point in his 6-page submission appended to the Reconsideration Application Form, regarding why the reconsideration application period should be extended in this case. However, Asian Drywall also submitted an affidavit from Mr. Walia, sworn July 10, 2017, which provides some information regarding its failure to file a timely reconsideration application.

17. In his affidavit, Mr. Walia says that he was unaware of the Appeal Decision until June 12, 2017, when he first learned that a Writ of Seizure and Sale relating to the Determination (see section 92 of the *Act*) had been issued. Mr. Walia says that he then contacted his former legal counsel and was told "that the appeal decision was made against me". Mr. Walia does not explain why he did not immediately take steps to file a reconsideration application – I note that the present application was filed about one month after Mr. Walia says he first learned about the Appeal Decision. There is nothing in the material before me to indicate when Asian Drywall first retained its current legal counsel.

18. Mr. Walia says that he was away in India from April 14 to May 9, 2017, and regularly checked his e-mail account. Mr. Walia says that his counsel never informed him about the Appeal Decision, but there is nothing in the material before me from Asian Drywall's original legal counsel to corroborate that assertion. I think it improbable that Asian Drywall's former legal counsel would not have advised Asian Drywall that the Appeal Decision had been issued and delivered to his office. However, I need not make any affirmative finding in that regard since the Appeal Decision was, in accordance with the *Act* and the Tribunal's *Rules of Practice and Procedure*, properly delivered to Asian Drywall when it was delivered to its legal counsel.

19. In my view, delivering the Appeal Decision to Asian Drywall's former legal counsel (its "agent" for the appeal) was sufficient service on Asian Drywall (as principal) especially since Asian Drywall identified, on its Appeal Form, its legal counsel's office as its address for delivery for purposes of the appeal proceedings. If Asian Drywall believes it has not been properly represented by its former legal counsel that is a matter for the Law Society of British Columbia, rather than this Tribunal, to consider.

20. In light of the above circumstances, I am not satisfied that Asian Drywall has provided a reasonable and credible explanation for its failure to file a timely reconsideration application. Further, even if I were inclined to grant an extension, this application merely reiterates arguments previously raised on appeal and, in my view, Member Bhalloo correctly disposed of the appeal. I wholly endorse his reasons for decision. In other words, this application does not pass the first stage of the *Milan Holdings* test.

ORDER

21. Asian Drywall's subsection 109(1)(b) application to extend the time for filing an application for reconsideration of the Appeal Decision is refused. Pursuant to subsection 116(1)(b) of the *Act*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal