

An Application for Reconsideration

- by -

Corinex Communications Corp.
("Corinex")

- 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.: 2009A/090

DATE OF DECISION: September 18, 2009

DECISION

SUBMISSIONS

Peter Sobotka	on behalf of Corinex Communications Corp.
Steven Chen	on his own behalf
Andres Barker	on behalf of the Director of Employment Standards

OVERVIEW

1. Corinex Communications Corp. (“Corinex”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of a decision, BC EST # D043/09, made by the Tribunal on May 8, 2009 (the “original decision”). The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on January 26, 2009. The Determination considered a complaint filed by Steven Chen (“Chen”) alleging Corinex had contravened requirements of the *Act* in respect of his employment by failing to pay him regular and commission wages.
2. The Determination found that Corinex had contravened section 17 the *Act* and ordered the payment of regular wages, annual vacation pay and interest under section 88 of the *Act* in the amount of \$9,743.94 and imposed an administrative penalty on Corinex for a contravention of the *Act* in the amount of \$500.00.
3. Corinex appealed the Determination on the ground the Director erred in law in interpreting the contract of employment between Chen and Corinex. Corinex also sought to introduce new evidence on the appeal.
4. Most of the new evidence which Corinex sought to introduce with the appeal was not accepted. The Tribunal Member of the original decision found this evidence did not satisfy the test articulated by the Tribunal in *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03 as it was available at the time the Determination was made. One of the documents provided by Corinex with the appeal – its consolidated financial statement for the year 2007 – was accepted and considered in the original decision.
5. The original decision dismissed the appeal, finding no error in law was made.
6. In this application for reconsideration, Corinex has revisited its disagreement with the interpretation of the employment agreement made by the Director and accepted by the Tribunal in the appeal.

ISSUE

7. 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 erred in law in interpreting the contract of employment between Chen and Corinex.

ANALYSIS OF THE PRELIMINARY ISSUE

8. The legislature has conferred a reconsideration power on the Tribunal under Section 116 of the *Act*, which reads as follows:

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.*

9. 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.
10. 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.
11. 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.

12. 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.

ARGUMENT

13. In this application, Corinex has refocused its disagreement with the Determination and reiterated most of its arguments against the interpretation of the employment contract made in the Determination.
14. Corinex says the finding of the Director, that Chen's monthly salary would increase when certain revenue milestones were reached, is wrong and fails to appreciate the wording in the employment contract relating to increases in Chen's salary is stated in terms of monthly revenue, not annual revenue as used in the Determination. Corinex says the interpretation given to the contract by the Director is illogical for two reasons: first, such an interpretation would have required Corinex to give Chen a salary increase at a time

when the revenue on which the increase was based was unknown; and second, it would have meant that Chen was entitled to an increase in salary immediately on his hiring because the “annual revenue” in the year previous to his hiring exceeded the level set for the first “bump” in compensation.

15. Corinex also argues the Director ignored the opinions given by the lawyer and auditor for Corinex on the interpretation of the employment contract.
16. Finally, Corinex argues that Chen’s claim for regular wages was filed out of time. This appears to be an argument that has been raised for the first time in this application. This argument requires a review of a factual finding made by the Director concerning the date on which Chen filed his complaint, a matter in respect of which the Tribunal has limited authority: see *Britco Structures Ltd.*, BC EST # D260/03. It is not appropriate for the Tribunal to consider this argument at this stage in the process – even if it is within the authority of the Tribunal to review this particular finding of fact at all. In any event, the material in the file does confirm the statement made in the Determination, at page R2, that Chen filed his complaint within the time period allowed under the *Act*.¹ Initially, the complaint sought commission wages, but was later amended to seek payment of regular wages as well.
17. Both Chen and the Director have filed a response to this application.
18. Chen says Corinex is simply trying to confuse the issue by ignoring some of the language in the employment contract and making unreasonable arguments on facts that logically do not have any bearing on when the salary increases would occur under his employment contract. He says Corinex has added nothing to oppose the original decision.
19. The Director says Corinex is only repeating arguments that have been made to the Tribunal in the appeal, seeking to have the reconsideration panel review those arguments and come to a different conclusion.

ANALYSIS

20. After review of the Determination, the original decision and the submissions of the parties on this application, I have decided this application does not warrant reconsideration.
21. As indicated above, the focus of a reconsideration application is the original decision. The original decision found the interpretation of the employment contract made in the Determination was plausible and reasonable. In this application, Corinex has not addressed potential errors in the original decision, but has refocused on the Determination, rearguing submissions made in the appeal, which were not accepted in the original decision, and raising an additional argument concerning the timeliness of the filing of the complaint that is not appropriately raised at this stage of the process. The objective of this application is the same as the objective of the appeal: to have the Tribunal accept the interpretation of the employment contract put forward by Corinex and, consequently, to change the result of the Determination.
22. It weighs against this application that I view it as an attempt to have another panel of the Tribunal review the Determination and come to a different conclusion than the Director and the Tribunal Member in the original decision.

¹ There does appear to be a typographical error on page R7 of the Determination referring to the date of filing of the complaint as **January** 30, 2008, when the material and an earlier reference in the Determination, at page R2, set the date of filing as **July** 30, 2008.

23. Corinex may disagree with the Determination and the appeal, but has not demonstrated there is any error in the conclusion reached in the original decision that the interpretation given by the Director to the employment contract was plausible, reasonable and not shown by Corinex to be wrong.
24. As a result, there are no circumstances arising from the original decision which would justify the Tribunal exercising its discretion under Section 116 of the *Act*. The application is accordingly dismissed.

ORDER

25. Pursuan to Section 116 of the *Act*, I order the original decision be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal