

An Application for Reconsideration

- by -

IVIS Partners Ltd., IVIS Lumber Sales Ltd., and 0734131 B.C. Ltd.
(the “Employer”)

- 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.: 2010A/112

DATE OF DECISION: October 5, 2010

DECISION

SUBMISSIONS

Drew Demerse

Counsel for IVIS Partners Ltd., IVIS Lumber Sales Ltd.
and 0734131 B.C. Ltd.

Reena Grewal

on behalf of the Director of Employment Standards

OVERVIEW

1. IVIS Partners Ltd., IVIS Lumber Sales Ltd., and 0734131 B.C. Ltd. (collectively, “the Employer”) seek reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of a decision, BC EST # D069/10, made by the Tribunal on June 29, 2010 (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 March 18, 2010. The Determination considered complaints filed by several employees of the Employer alleging the Employer had contravened requirements of the *Act* in respect of their employment by failing to pay regular wages, overtime wages, annual vacation pay and statutory holiday pay.
2. The Determination found the Employer had contravened sections 18, 40, 45, 58 and 126 of the *Act* by failing to pay regular wages, overtime wages, annual vacation pay, statutory holiday pay and for issuing NSF cheques and ordered the payment of unpaid wages and interest under section 88 of the *Act* in the amount of \$25,917.53 and imposed administrative penalties on the Employer for contraventions of the *Act* in the amount of \$3,500.00.
3. The Employer appealed the Determination on the ground the Director failed to observe principles of natural justice in making the Determination. The Employer also sought to introduce new evidence on the appeal.
4. The Tribunal Member of the original decision found the Employer did not show the Director failed to observe principles of natural justice in making the Determination and did not establish a basis for the Tribunal to allow new evidence on the appeal. The original decision dismissed the appeal and confirmed the Determination.
5. In this application for reconsideration, the Employer seeks to revisit the alleged failure by the Director to observe principles of natural justice in making the Determination by asserting the original decision “does not adequately address the issues of natural justice raised in this matter”.

ISSUE

6. 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 warrants reconsideration, the substantive issue raised in this application is whether the Tribunal should have found the Director had failed to observe principles of natural justice in making the Determination.

ANALYSIS OF THE PRELIMINARY ISSUE

7. 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.*

8. 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.

9. 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.
10. 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.

ANALYSIS

13. Having reviewed the original decision, the material in the appeal file, the submission of counsel for the Employer in this application, including the statutory declaration of Mr. Gurpreet Singh Sangha, and the submission of the Director, I am not persuaded this matter warrants reconsideration.
14. Counsel for the Employer accepts the focus of an application for reconsideration is the original decision. He says the original decision does not adequately address the natural justice issue because it failed to grasp the actual nature of the Employer's appeal, confusing the allegation of bias made in the appeal with what the Employer really meant to say, which is that they were not afforded an opportunity to argue their case.
15. There is no basis for this submission. Even a cursory examination of both the response of the Director to the Employer's appeal and the original decision clearly indicates the question of whether the Employer had an opportunity to respond was argued, considered and decided. The original decision states the following:
- A review of the record shows that throughout the investigation, the parties were given full opportunity to present their respective cases and that the Appellant [the Employer] did not respond in a timely manner to several notifications of the allegations and requests for records.
16. Counsel also submits the Tribunal ought to have allowed the 2009 T4 information on the basis such information is generally not produced until February or March of the year following the 2009 calendar year. In my view, this argument does no more than seek to have the reconsideration panel second guess the conclusions reached in the original decision, with no additional reasons or argument provided for doing so and without showing any demonstrable error in the original decision.
17. The question of whether to accept new evidence on an appeal is a matter of discretion for the Tribunal Member considering the appeal. The exercise of that discretion has been guided by the considerations set out in *Davies and others (Merilus Technologies Inc.)*, BC EST # D171/03. The Tribunal Member making the original decision addressed those considerations in exercising her discretion not to allow the new evidence. Nothing in this application for reconsideration shows her assessment of any of the factors was wrong. Her view that the T4 information could have been provided during the investigation was not the only basis upon which the new evidence was not accepted. There were also concerns expressed about the credibility and probative value of the new evidence submitted.
18. On reconsideration, one panel of the Tribunal will not lightly interfere with a discretionary decision of another panel. The burden on an applicant challenging a discretionary decision of a Tribunal Member is to show the exercise of discretion by 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. None of that is shown in application, nor, I would add, is it alleged.
19. The application is denied.

ORDER

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

David B. Stevenson
Member
Employment Standards Tribunal