

An Application for Reconsideration

- by -

The Director of Employment Standards
(the “Director”)

- 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.: 2011A/101

DATE OF DECISION: October 5, 2011

DECISION

SUBMISSIONS

Michelle J. Alman	counsel for the Director of Employment Standards
Jaspreet S. Malik	counsel for Satnam Education Society of British Columbia

OVERVIEW

1. The Director of Employment Standards (the “Director”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of a decision, BC EST # D052/11, made by the Tribunal on June 10, 2011 (the “original decision”).
2. The original decision considered an appeal of a Determination issued by a delegate of the Director on February 8, 2011. The Determination considered a complaint filed by Baldeep Singh Hehar (“Mr. Hehar”) alleging his former employer, Satnam Education Society carrying on business as Khalsa School (“Satnam”) had contravened requirements of the *Act* in respect of his employment by failing to pay all wages owing.
3. The Determination found Satnam had contravened sections 17 and 58 of the *Act* by failing to pay wages and vacation pay. The Director ordered the payment of wages and interest under section 88 of the *Act* in the amount of \$6,793.50 and imposed an administrative penalty on Satnam for contraventions of the *Act* in the amount of \$500.00.
4. Satnam applied under section 113 of the *Act* on February 8, 2011, for a suspension of the effect of the Determination and provided the Director with a cheque in the amount of \$6,330.25. The original decision notes, at para. 2, that on March 22, 2011, the effect of the Determination was suspended until the Tribunal decided the merits of the appeal of the Determination.
5. Satnam appealed the Determination on March 17, 2011, on all three of the statutory grounds set out in section 112 of the *Act*.
6. The Tribunal Member of the original decision found the Director had erred in law in interpreting the employment contract between Satnam and Mr. Hehar, had misinterpreted and misapplied the effect of section 27 of the *Act* and had taken an unreasonable view of the evidentiary record. In result, the Tribunal Member allowed the appeal and cancelled the Determination.
7. In the last paragraph of the original decision, the Tribunal member referred to the \$6,330.25 being held by the Director in trust and ordered those funds to be released 30 days after the date of the original decision unless either Mr. Hehar or the Director applied for reconsideration, in which case, the funds were to be held until further order of the Tribunal.
8. Mr. Hehar filed a timely application for reconsideration.
9. The application for reconsideration by Mr. Hehar has been dismissed and the money held by the Director has been ordered to be released to Satnam.

10. In this application for reconsideration, the Director says the Tribunal breached principles of natural justice by making an order under section 113 without regard to the requirements of procedural fairness and that the Tribunal, in suspending the effect of the Determination on March 22, 2011, and the Tribunal Member, in continuing the suspension order in the original decision, erred in law.
11. The application for reconsideration by the Director was filed outside of the time limits prescribed by the Tribunal in its *Rules of Practice and Procedure* (the “Rules”).

ISSUE

12. 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 once again scrutinize the evidentiary record.

ARGUMENT

13. The submission by counsel for the Director acknowledges the delay in filing the application for reconsideration.
14. She says the fault for the delay lies with the delegate whose Determination was cancelled, who failed to forward the original decision to the Director’s program director as required by Employment Standards Branch policy. As a result, the program director did not become aware of the original decision until she reviewed it on the Tribunal’s website on July 19, 2011. The program director forwarded the original decision to counsel who then submitted this application as quickly as possible.
15. Counsel says the delay in filing the application has created no prejudice to any party and says this application raises “significant legal points concerning the Tribunal’s jurisdiction to make certain orders”.
16. Counsel says the Tribunal’s powers are those provided to it under the *Act*. Section 113 allows the Tribunal a discretion to suspend of the effect of a Determination under appeal for the period if certain conditions are satisfied.
17. Counsel argues the Tribunal has acted in excess of its powers under section 113 by extending a suspension of the effect of the Determination after having cancelled the Determination “in its entirety”. Counsel also says that extending the suspension order contradicts those provisions of the *Act* governing the Director’s ability to collect and deal with monies.
18. Counsel also submits that by extending the suspension order in the original decision without providing any party with a meaningful opportunity to address that matter, the Tribunal Member failed to meet even the basic requirements of procedural fairness.
19. Lastly, counsel for the Director argues the initial suspension order was made without jurisdiction.
20. Counsel for Satnam takes no position on the application for reconsideration.

ANALYSIS OF THE PRELIMINARY ISSUE

21. 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.*

22. 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.

23. 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. Although the *Act* does not set out a time limit for the bringing of an application, the *Rules* provide that reconsideration applications should be brought within 30 days. This application was made approximately two and one-half months after the original decision was issued – forty-five days out of time. 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.

24. 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.

25. 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.
26. 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

27. I am not persuaded this matter warrants reconsideration.
28. The primary considerations for my conclusion is that the application is not timely and does not raise an issue of importance to the parties or to the system generally.
29. In my view the question of law raised by counsel for the Director in this application has been answered in *The City of Surrey*, BC EST # D049/99 (Reconsideration of BC EST # D488/98). I refer to the following excerpt from page 5:

While only a person who appeals a determination can take advantage of s. 113, the language of s. 113 does not bifurcate the different appeal proceedings in which the challenged determination is at issue before the Tribunal. To the contrary, s. 113 gives the Tribunal broad authority to suspend a determination that has been appealed for the period and subject to the conditions it thinks appropriate. The broad language of s. 113 is supported by its purpose which is to ensure that justice is done within the appeal process.

30. The Director, who argued a very narrow view of section 113 in the above *City of Surrey* decision, is plowing old ground in this application, seeking a conclusion that bifurcates appeal and reconsideration proceedings into separate proceedings. This view has been rejected and will not be revisited here.
31. The arguments relating to the jurisdiction to issue a suspension order in March 2011 and procedural fairness are well out of time. Both of those matters should have been raised in March, when the suspension order was initially issued. It is inappropriate to raise them as part of this application. The focus of an application for reconsideration is the original decision.
32. The decision of the Tribunal Member in the original decision to clarify and delineate “the period” and the conditions of the suspension order was a matter of discretion, not jurisdiction. In the circumstances, the Tribunal Member was not required to seek submissions from the parties on how to exercise his discretion.
33. The application for reconsideration is denied.

ORDER

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

David B. Stevenson
Member
Employment Standards Tribunal