An Application for Reconsideration

\- by -

Serendipity Winery Ltd.
("Serendipity Winery")

\- 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.: 2015A/103

DATE OF DECISION: October 22, 2015

DECISION

SUBMISSIONS

Robert Smithson counsel for Serendipity Winery Ltd.

OVERVIEW

1. Serendipity Winery Ltd. ("Serendipity Winery") seeks an extension of the time for filing an application for reconsideration of a decision of the Tribunal, BC EST # D073/15 (the "original decision"), dated July 16, 2015.

2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on May 4, 2015.

3. The Determination was made by the Director on a complaint filed by Richard Kanazawa ("Mr. Kanazawa"), who alleged Serendipity Winery had contravened the *Employment Standards Act* (the "*Act*") by failing to pay him all wages earned.

4. The Determination found Serendipity Winery had contravened provisions of the *Act* and owed Mr. Kanazawa wages and interest in the amount of $27,627.82. The Director also imposed administrative penalties against Serendipity Winery in the amount of $2,500.00.

5. An appeal was filed by Serendipity Winery alleging the Director erred in law and failed to observe principles of natural justice in making the Determination. Serendipity Winery also sought to introduce additional evidence with the appeal on the ground it was evidence that was not available when the Determination was being made.

6. The Tribunal Member making the original decision found no merit in any of the grounds of appeal and dismissed it under section 114(1)(f) of the *Act*, confirming the Determination.

7. Serendipity Winery wishes to file an application for reconsideration of the original decision. The time limit for filing an application for reconsideration expired August 17, 2015: see section 116(2.1) of the *Act*.

8. On July 16, 2015, Serendipity Winery requested an extension of the filing period. On July 30, 2015, the Tribunal acknowledged the request and instructed Serendipity Winery to provide a "completed Reconsideration Application Form as well as submissions on the reconsideration in sufficient detail to allow the Tribunal to determine whether the reconsideration request, on its face, is meritorious."

9. On August 4, 2015, Serendipity Winery delivered a Reconsideration Application Form and an accompanying submission summarizing the reasons for the requested extension of the time period and a general outline of the grounds upon which Serendipity Winery intends to base the reconsideration application.

10. The Tribunal has invited the Director and Mr. Kanazawa to respond to Serendipity Winery's request for an extension of time, but neither has filed a submission on the request.

ISSUE

11. The issue being addressed in this application is whether the Tribunal should extend the statutory time period for filing the application for reconsideration.

THE FACTS

12. The facts are set out in the Determination and summarized in the original decision.

13. The material provided in the request for an extension raises no argument in respect of the facts found in the Determination and the original decision, although Serendipity Winery intends to argue in a reconsideration application that the Tribunal Member making the original decision incorrectly characterized what is described in the original decision as "the chartered accountant's June 9, 2015, report regarding 'taxable benefits' and other evidence relating to the actual amount of the required remittance to the Canada Revenue Agency" as "new evidence". In their outline of the grounds for reconsideration, Serendipity Winery says it will argue the information provided by the chartered accountant was not evidence of any "new" facts, but was "legal argument" in support of Serendipity Winery's position that the money withheld from Mr. Kanazawa was "permitted or required" by taxation authorities.

ARGUMENT

14. Serendipity Winery has provided a submission supporting its requested extension that provides the reasons for requesting the extension and an outline of the grounds upon which the application will be based.

15. Serendipity Winery has provided two reasons for an extension. First, it indicates material has been provided to the Director that may make any further action on the matter by Serendipity Winery unnecessary. Second, legal counsel for Serendipity Winery is scheduled to have surgery and will not be in his office for a period of approximately three weeks commencing July 31, 2015.

16. Serendipity Winery has provided nine grounds upon which it intends to seek reconsideration. I shall address these within the analysis of their request.

ANALYSIS

17. Following recent amendments to the *Act*, 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 served with an order or a decision of the tribunal may make an application under this section.*
>
> *(2.1) The application may not be made more than 30 days after the date of the order or decision.*
>
> *(2.2) The tribunal may not reconsider an order or decision on the tribunal's own motion more than 30 days after the date of the decision or order.*
>
> *(3) An application may be made only once with respect to the same order or decision.*

> *(4) The director and a person served with an order or decision of the tribunal are parties to a reconsideration of the order or decision.*

18. The Tribunal has not previously addressed the basis upon which it will grant an extension of the statutory time period for filing an application for reconsideration, but in my view the appropriate starting point is to review the criteria that have governed requests to the Tribunal to extend the filing period in appeals and assess whether it is appropriate to apply those criteria to applications to extend the time period for reconsideration applications. In *Metty M. Tang*, BC EST # D211/96, the Tribunal noted the following considerations apply to applications to extend the time period for filing appeals:

> Section 109(1)(b) of the *Act* provides the Tribunal with the discretion to extend the time limits for an appeal. In my view, such extensions should not be granted as a matter of course. Extensions should be granted only where there are compelling reasons to do so. The burden is on the appellant to show that the time period for an appeal should be extended.

19. Section 109(1)(b) of the *Act* now operates to provide the Tribunal with a discretion to extend the time period for an application for reconsideration.

20. In *Re Niemisto*, BC EST # D099/96, the Tribunal set out following criteria that should be satisfied to grant an extension of time in an appeal:

> 1. there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
> 2. there has been a genuine and on-going *bona fide* intention to appeal the Determination;
> 3. the respondent party (*i.e.*, the employer or employee), as well the Director, must have been made aware of this intention;
> 4. the respondent party will not be unduly prejudiced by the granting of an extension; and
> 5. there is a strong *prima facie* case in favour of the appellant.

21. I see no reason to deviate from the criteria listed above when considering requests for an extension of the time period for filing reconsideration applications. However, the question of whether there is a strong *prima facie* case must take into account that the Tribunal's discretionary authority to reconsider under section 116 of the *Act* is exercised with restraint – see *The Director of Employment Standards (Re Giovanni (John) and Carment Valaroso)*, BC EST # RD046/01 – and must remain consistent with the approach taken by the Tribunal in deciding whether reconsideration is warranted.

22. As the reconsideration decisions issued by the Tribunal have indicated, 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 application and interpretation"* 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 Giovanno (John) and Carmen Valoroso)*, BC EST #RD046/01, the Tribunal explained the reasons for restraint:

> . . . the Act creates a 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" not be 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 has considered factors such as the nature of the issue and its importance, both to the parties and the system generally. The inclusion of a period of time within which an application for reconsideration must be made does not otherwise affect the Tribunal's approach to such an application, which will continue to involve an assessment of the application based on those factors and the merits of the original decision.

24. Applying the above, I find it is not appropriate to grant an extension of the statutory time period for filing an application for reconsideration.

25. I accept the first three criteria considered in a request for an extension, and listed above, have been satisfied. The matter of undue prejudice weighs neither for nor against the request. The governing criteria, however, is that the request for an extension, which is sufficiently detailed to allow an assessment of its merits, does not show a strong *prima facie* case in favour of Serendipity Winery. I agree with the Tribunal Member in the original decision, who found no merit in the position of Serendipity Winery, and do not find any of the arguments outlined in the extension request demonstrate an error in the original decision.

26. In making the above finding, I provide the following comments on the outline of the grounds upon which Serendipity Winery wishes to seek reconsideration.

27. In respect of the first two grounds, I accept the characterization in the original decision of the chartered account's report and the associated information as an attempt by Serendipity Winery to introduce "new evidence" in the appeal that could have been provided during the complaint process. I do not accept the suggestion from counsel for Serendipity Winery that this report was nothing more than "legal argument". While the report may have been in support of legal argument, it was clearly intended to be evidence – expert evidence in fact – seeking to establish or, at least confirm, both the existence of a "taxable benefit" and the amount of tax required to be paid on that benefit. Next, and regardless of whether the Director, in result, found there was no jurisdiction to consider whether the withholdings were authorized under section 21(1) of the *Act*, that finding did not prevent Serendipity Winery from providing a considerable amount of other evidence relating to the question of "taxable benefits" during the complaint process. It was, as noted in the original decision, a "central issue before the delegate". I agree with the original decision that Serendipity Winery could, and should, have provided the evidence they sought to introduce on appeal in dealing with their position on "taxable benefits" during the complaint process.

28. Further, in addition to the failure to provide the evidence contained in the report during the complaint process, the Tribunal Member making the original decision was not satisfied that evidence was even relevant to the issues raised by the appeal. Nothing in the outline provided by Serendipity Winery directly responds to that finding.

29. In respect of the third ground, Serendipity Winery's dispute with the comments made in para. 19 of the original decision show no error on the part of the Tribunal Member. The comments made concerning the contents of the "record" and the failure of Serendipity Winery to obtain a garnishing order are, based on an examination of the "record", entirely correct, as is the summary of the Tribunal's jurisprudence regarding section 21 of the *Act*. The suggestion the Tribunal Member "ignored evidence" (which can only refer to

relevant evidence) is speculative at best and not borne out by a functional analysis of the original decision. The question of whether, as a matter of law, Serendipity Winery was entitled to "set-off" business expenses from wages owed was addressed emphatically in the original decision.

30. On the fourth ground, I do not find that the Tribunal Member committed an error of law in interpreting and applying section 21(1) of the *Act* in the circumstances of this case. In any event, the Tribunal Member was correct in finding section 21(1) was not implicated because on the facts, Serendipity Winery had not deducted income tax, CPP and EI in accordance with the applicable federal statutes and remitted those deductions to the Canada Revenue Agency but rather, on the basis of testimony provided by Mr. Kanazawa and Ms. Kingston (the principle of Serendipity Winery), had "simply engaged in a form of unilateral self-help and took a 100% deduction (to *its own credit* – not for income tax or any other federally-mandated deduction) from Mr. Kanazawa's wages". It follows from these comments that I do not accept either the fifth or sixth grounds. Both of these submissions are predicated upon an error in the original decision relating to the interpretation of section 21(1) and its application to the facts of the case. I do not find the Tribunal Member of the original decision misconstrued and/or ignored section 21(1) of the *Act*. I agree completely with the analysis, reasoning and finding made in the original decision on the applicability of section 21(1) in the circumstances.

31. On the seventh ground, I agree with the original decision that the facts of this case are in no way analogous to those found in the Tribunal decision in *Lea*, BC EST # D137/03, where the question of whether a deduction was or was not protected by section 21(1) of the *Act*, a question which had been raised and not addressed by the Director, was referred back to be adjudicated. On the findings made in this case, there was no question that the deduction taken by Serendipity Winery was not one protected by section 21(1); it was taken "on account of a claim – not yet adjudicated – that arose under a separate business arrangement between the parties". As a result of that finding, and its confirmation in the original decision, there was no reason to refer the matter back to the Director to consider whether the amount taken by Serendipity Winery was "protected" by section 21(1) of the *Act*.

32. The eighth ground is answered above: Serendipity Wines did not withhold wages from Mr. Kanazawa for income tax or any other federally-mandated deduction, but had engaged in a form of "self help" that did not implicate section 21(1) of the *Act*.

33. Finally, I find no error in the analysis in the original decision of the argument by Serendipity Winery that Mr. Kanazawa was "effectively paid" most of the wages owed to him by way of a set-off against amounts he owed to Serendipity Winery. The analysis is firmly and correctly grounded in provisions of the *Act*.

34. In sum, the reconsideration, on its face, has no merit. Applying principles consistent with the Tribunal's approach to applications for reconsideration and adopting the criteria for extending the statutory time periods found in the *Act*, the request for an extension of time is denied and the application for reconsideration is dismissed.

ORDER

35. The requested extension of time is denied and, pursuant to section 116 of the *Act*, the original decision, BC EST # D073/15, is confirmed.

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David B. Stevenson
Member
Employment Standards Tribunal