

An application for Reconsideration

- by -

Colonies.Com Holdings Inc.  
("Colonies")

- 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:** Shafik Bhalloo

**FILE No.:** 2008A/109

**DATE OF DECISION:** November 21, 2008

## DECISION

### OVERVIEW AND SUBMISSIONS OF THE PARTIES

1. Rodney J. Yong-Set (“Mr. Yong-Set”) filed a complaint under Section 74 of the *Act* (the “Complaint”) alleging that Colonies.Com Holdings Inc. (“Colonies”) contravened the *Act* by failing to pay him vacation pay. A delegate of the Director of Employment Standards (the “Delegate”) investigated the Complaint and received submissions and evidence from both Mr. Yong-Set and Colonies’ director and owner, Mr. Rick Godwin (“Mr. Godwin”). The Delegate subsequently issued his Determination on May 22, 2008, finding Colonies to have failed to pay Mr. Yong-Set vacation pay in contravention of Section 58 of the *Act*, and ordered Colonies to pay him the amount of \$1,146.77 which amount included both outstanding vacation pay and accrued interest payable under Section 88 of the *Act*.
2. The Delegate also imposed two administrative penalties of \$500 each on Colonies under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”). The administrative penalties were in respect of contraventions of Sections 58 (vacation pay) and 28 (payroll records) of the *Act*. The latter contravention was based on the Delegate’s finding that Colonies failed to record the dates of the annual vacation taken by Mr. Yong-Set, the amounts paid by Colonies to him and the days and amounts owing to him by Colonies.
3. Colonies appealed the Determination to the Tribunal on dual grounds; namely, the Director failed to observe the principles of natural justice in making the Determination and evidence had become available that was not available at the time the Determination was being made.
4. The Tribunal member, in the original decision (BC EST #D089/08) made on September 2, 2008 (the “Original Decision”), carefully reviewed each of the grounds of appeal and found no support for either ground. With respect to the natural justice ground of appeal, the Tribunal Member stated:

I have reviewed the entirety of the record, and all of the submissions made prior to and since the Determination. I find that the Director did consider and weigh all of the evidence provided. The Director is not obligated to rely on all of the evidence, but rather to consider the evidence and determine on that evidence as a whole what did and did not transpire. The conclusions reached in this manner certainly are consistent with some of the documentary evidence and inconsistent with other documentary evidence. This does not mean that the evidence not followed was not considered, but rather that it was not accepted as factual, relevant, or persuasive. There was no indication that the relevant evidence was overlooked by the Director. Further, I find that the reasoning in the Determination is adequate in its discussion of the evidence, notwithstanding that it does not specifically refer to each document submitted.
5. With respect to the new evidence ground of appeal, the Tribunal member concluded in the Original Decision that the alleged new evidence did not satisfy the Tribunal’s test for introducing new evidence, since there was no evidence to support that the proffered new evidence did not exist or was not available at the time the Determination was made. The Tribunal member was also not satisfied that the alleged new evidence had any probative value. Accordingly, the Tribunal member rejected the new evidence ground of appeal as well.
6. Colonies now seeks a Reconsideration of the Original Decision stating, “(a) full review of all evidence should be done”. Colonies further asserts that “every point in the appeal is to be reconsidered” and

resubmits a copy of the two and one-half pages of the written submissions it previously submitted in its appeal of the Determination which the Tribunal member carefully considered in the Original Decision.

7. Colonies also attaches a single additional page of new submissions in the Reconsideration application. I have read all of the submissions of Colonies in their entirety and do not propose to set out those submissions that Colonies made previously in appealing the Determination but only those submissions that are new submissions. The new submissions are:

1. Tribunal member states several times that the Director does not have to rely on one document. Tribunal member fails to comprehend the appeal point that the director does rely on one document (the ROE). The Tribunal member gets our appeal point backwards. Therefore the Tribunal member is stating the Director's decision should NOT be based on one document, which is exactly our point.
2. Tribunal member did not consider the new evidence of emails attached to the appeal. In an email dated November 15, 2006 Mr. Joel Allen and Ms. Gloria Doerksen agreed vacation should be two weeks. In an email dated November 9, 2007 Mr. Yong-Set is unclear as to company vacation policy regarding two or three weeks, carry over etc. (see attached). The company paid to recover deleted data from Gloria Doerksen's computer. These emails were not discovered until August 2008. It was not known by the company at the time that the Director made his decision that it would be based on one single incorrect document created by Gloria Doerksen and therefore the company spent additional resources to find further evidence to demonstrate the incorrectness of this document and Gloria Doerksen's verbal claims to the Director.
3. The Director relied on one document created by one person over all the other documents some of which show the incorrectness of that single document he based his decision on. The Director is fining the company for improper employee records AND basing the decision solely on one of those improper employee records. Gloria Doerksen created this document that the Director based their sole decision on. Her resume and cover letter were not offered in the initial complaint because the company had no idea her opinion and her incorrect document would be the sole source of the director's determination. In addition to that the Director acknowledged several times that it was clear that there were employee record issues as a result of Gloria Doerksen.

The appeal process is a waste of time if none of the evidence is reconsidered, and it becomes a defense of the director's determination. The Tribunal Member did not even read the appeal as is strongly evident from their reply.

8. The Director, in response to Colonies submission, states that the latter's Reconsideration application should be dismissed as it has failed to satisfy the threshold test for reconsideration set out in the *Milan Holdings Ltd.* decision. More specifically, the Director submits that Colonies is primarily focused on having the reconsideration panel re-weigh the evidence submitted to the Tribunal member in the appeal of the Determination.
9. Colonies previously paid a portion of the Determination - \$423.08- to the Employment Standards Branch and obtained a suspension of the Determination while the appeal of the Determination was under consideration. However, in its Reconsideration application, Colonies has not made any submissions with respect to the continued suspension of the Determination. The Director submits that Colonies should pay the balance of the Determination pending the Reconsideration application. In light of my decision in the Reconsideration application, I need not determine the suspension issue.

10. Colonies, as in the case of its appeal of the Determination, is seeking an oral hearing of its Reconsideration application stating “(a)n oral hearing is mandatory”. I do not find any basis for holding an oral hearing in this Reconsideration application. I feel it is appropriate to consider the reconsideration application on the basis of the written submissions of the parties, the record of the Director and the Determination.

## ISSUES

11. In any application for reconsideration there is a preliminary or a threshold issue of whether the Tribunal will exercise its discretion under section 116 of the *Act* to reconsider the Original Decision. Only if the Tribunal is satisfied that the case is appropriate for reconsideration, the substantive issues raised in the reconsideration application will be considered. In this case, the substantive issues are whether the Director failed to observe the principles of natural justice in making the Determination and whether new evidence has become available that was not available at the time the Determination was being made.

## ANALYSIS

12. Section 116 of the *Act*, which confers reconsideration power on the Tribunal, reads:

***Reconsideration of orders and decisions***

**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.*

13. As indicated in previous Reconsideration applications, Reconsideration is not an automatic right of any party dissatisfied with an order or a decision of the Tribunal. It is within the sole discretion of the Tribunal whether or not it will reconsider an order or a decision of the Tribunal, as section 116 uses permissive (and not mandatory) language in employing the word “may” in describing the authority of the Tribunal to consider reconsideration applications.

14. Further, in exercising its discretionary power in section 116, the Tribunal is to be very cautious and mindful of the objects of the *Act* as indicated in *Re Eckman Land Surveying Ltd.* BC EST #RD413/02:

Reconsideration is not a right to which a party is automatically entitled, rather it is undertaken at the discretion of the Tribunal. The Tribunal uses its discretion with caution in order to ensure: finality of its decisions; efficiency and fairness of the appeal system and fair treatment of employers and employees.

15. In *Re British Columbia (Director of Employment Standards) (sub nom. Milan Holdings Ltd.)*, BC EST #D313/98 the Tribunal delineated a two-stage process governing its decision to exercise the reconsideration power. First, the Tribunal must decide whether the matters raised in the application warrant reconsideration. In determining this question, the Tribunal will consider a non-exhaustive list of

factors that include such factors as: (i) whether the reconsideration application was filed in a timely fashion; (ii) whether the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already provided to the adjudicator; (iii) whether the application arises out of a preliminary ruling made in the course of an appeal; (iv) whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases; (v) whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

16. On the basis of both the statutory guidelines and the guidelines delineated in the tribunal's own decisions governing reconsideration applications, I find that this is not a case warranting the exercise of this Tribunal's discretion in favour of reconsidering the Original Decision.
17. In my view, in addition to Colonies' failure to raise any significant questions of law, fact, principle or procedure or present any arguable case of sufficient merit to warrant a reconsideration of the Original Decision, Colony is clearly attempting to have this Tribunal re-weigh evidence that was provided to the Delegate during the investigation and the Tribunal member during the appeal of the Determination. This is quite evident in the submission of Colonies when it states "(a) full review of all evidence should be done" and "every point in the appeal is to be reconsidered" and attaches the exact same two-and-a-half pages of written submissions it submitted in its appeal of the Determination previously and attempts to buttress those submissions with a page of its new submissions containing primarily arguments previously made to the Delegate during the latter's investigation of the Complaint or the Tribunal member in the appeal of the Determination. While I do not propose to reiterate those arguments here I have set them out verbatim earlier in my decision.
18. In my view, it is quite clear that Colonies is dissatisfied with the Original Decision for confirming the Determination. However, as previously indicated by this Tribunal, it is neither appropriate in an Appeal nor in a Reconsideration application for a party to reargue or seek re-weighing of its case in the hope of finding a more sympathetic ear. Reconsideration is not an opportunity for a hearing *de novo* and therefore I dismiss Colonies' Reconsideration application.

## **ORDER**

19. Pursuant to Section 116 of the *Act*, I order the Original Decision, BC EST #D089/08, be confirmed.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**