

An application for Reconsideration

- by -

Heron Construction & Millwork Ltd.
("Heron")

- 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/108

DATE OF DECISION: November 26, 2008

Section 65(1)(e) states Section 63 and 64 do not apply to an employee employed at one or more construction sites by an employer whose principal business is construction. Construction is defined as: the construction, renovation, repair or demolition of property or the alteration or improvement of land.”

6. The balance of the submissions in the reconsideration application pertain to that very issue and repeat Heron’s submissions made earlier in the appeal of the Determination before the Tribunal member.

ISSUE

7. In an 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. Only if the Tribunal is satisfied that the case is appropriate for reconsideration, the substantive issue raised in the reconsideration application will be considered. In this particular case, the substantive issue is whether the Director erred in finding that Mr. Leung was not exempt from the application of Section 63 of the *Act* by virtue of the application of Section 65(1)(e) of the *Act*.

ANALYSIS OF THE PRELIMINARY ISSUE

8. Section 116 of the *Act* affords the Tribunal the authority to reconsider and confirm, cancel or vary its own orders or decisions:

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.

9. The reconsideration power of the Tribunal in Section 116 of the *Act* is discretionary as indicated by the Tribunal 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.

10. In exercising its discretion under Section 116 of the *Act*, the Tribunal has developed a principled approach. In particular, the Tribunal employs a two-stage process as set out in *Re British Columbia (Director of Employment Standards) (sub nom Milan Holdings Ltd.)* BC EST #D313/98. 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 (reweigh) 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.

11. If after weighing the factors in the first stage of the reconsideration process, the Tribunal concludes that the application is not appropriate for reconsideration then the Tribunal will reject the application and provide its reason for not reconsidering. Alternatively, if the Tribunal finds that one or more of the issues in the application are appropriate for reconsideration, the Tribunal will proceed to the second stage in the analysis and reconsider the merits of the application.
12. Having carefully reviewed the Determination, the record before the Director at the time the Determination was made, the Original Decision, including the written submissions of Heron in the appeal of the Determination, and the written submissions of Heron in the reconsideration application, I agree with the Director that Heron is seeking the Tribunal to effectively reweigh the evidence already provided to the Tribunal member in the appeal of the Determination and previously to the Delegate before the Determination was made. More specifically, Heron is asking this reconsideration panel to revisit the issue of Mr. Leung's status as an employee and particularly the applicability of Section 63 of the *Act* to Mr. Leung in light of Section 65(1)(e) of the *Act*. This very question was dealt with by the Director in the Determination and subsequently ruled on by the Tribunal member in Heron's appeal of the Determination. In the Original Decision, the Tribunal member did not find any basis to interfere with the decision of the Director on this issue and I cannot find any error in the Original Decision.
13. This Tribunal has indicated in previous reconsideration decisions that the reconsideration process in Section 116 of the *Act* is not meant to allow dissatisfied parties a further opportunity to reargue their cases. Accordingly, I have decided that this application does not warrant reconsideration and therefore I dismiss it.

ORDER

14. Pursuant to Section 116 of the *Act*, I order the Original Decision, BC EST #D087/08, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal