

An application for Reconsideration

- by -

Chubb Richards operating as Brian's Tree Service & Window Washing  
("Brian's")

- 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.:** 2006A/97

**DATE OF DECISION:** December 5, 2006

## DECISION

### SUBMISSIONS

Chubb Richards	on behalf of Brian's Tree Service & Window Washing
Neil Moncrieff	on his own behalf
Kathleen Demic	on behalf of the Director

### OVERVIEW

1. Chubb Richards operating as Brian's Tree Service & Window Washing ("Brian's") seeks reconsideration under Section 116 of the *Employment Standards Act* (the "Act") of a decision, BC EST #D086/06, made by the Tribunal on August 4, 2006 (the "original decision"). The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards on November 4, 2005. The Determination found Brian's had contravened Sections 18, 21, 40 and 58 of the *Act* in respect of the employment of Gary Kuse, Neil Moncrieff and Laura Sommerfeld and ordered Brian's to pay wages and interest amounting to \$1,282.77.
2. The Director also imposed administrative penalties under Section 29 of the *Employment Standards Regulation* in the amount of \$2000.00.
3. Brian's appealed the Determination. The appeal was filed with the Tribunal on June 16, 2006 – nearly six months after the appeal period set out in Section 112 of the *Act* had expired. The original decision considered whether the Tribunal should exercise its discretion under Section 109(1)(b) and allow the appeal to proceed. For reference, Section 109(1)(b) states:

*109 (1) In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following: . . .*

*(b) extend the time period for requesting an appeal even though the period has expired.*
4. The Tribunal Member making the original decision considered the facts and the factors relevant to whether to allow the request for an extension and found no basis for exercising the Tribunal's discretion in Brian's favour. No new facts or factors relevant to the question of timeliness have been added to this application.

### ISSUE

5. 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 is appropriate for reconsideration, the substantive issue raised in this application is whether the Tribunal should exercise its discretion to extend the time for filing the appeal.

## ANALYSIS OF THE PRELIMINARY ISSUE

6. The legislature has conferred an express reconsideration power on the Tribunal in Section 116 which provides:
- 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.*
7. Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's 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 general approach to reconsideration is set out 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 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 the original decision.
8. Consistent with the above considerations, 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.
9. 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.
10. 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.
11. After review of the original decision, the variance, the submissions of the parties and the material on file, I have decided this application does not warrant reconsideration.

12. The reasons for denying the request are clear, comprehensive and consistent with long standing principles applied by the Tribunal to requests under Section 109(1)(b). Brian's has shown no error of any sort has been made in the original decision.
13. More particularly, since the question of whether to extend the time for filing an appeal was a matter of discretion for the Tribunal Member making the original decision, it is necessary for Brian's 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, nor, I would add, is it alleged.
14. This application is denied.

**ORDER**

15. Pursuant to Section 116 of the *Act*, I order the original decision be confirmed.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**