Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Gulf Coast Materials Ltd.
("Gulf Coast")

- 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.: 2009A/107

DATE OF DECISION: November 23, 2009

DECISION

SUBMISSIONS

Gwendoline Allison and David Lunny	Counsel for Gulf Coast Materials Ltd.
Gwendoline Allison	Counsel for Bhora Mayer
George F. Gregory	Counsel for Mhinder Mayer
Mhinder Mayer	on his own behalf
Danny Helgesen	on his own behalf
Adele J. Adamic	Counsel for the Director of Employment Standards

OVERVIEW

1. Gulf Coast Materials Ltd. ("Gulf Coast") seeks reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision, BC EST # D077/09, made by the Tribunal on July 20, 2009 (the "original decision"). The original decision considered two appeals of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on February 24, 2009. The Determination considered a complaint filed by Danny Helgesen ("Helgesen") alleging Gulf Coast had contravened requirements of the *Act* in respect of his employment by failing to pay him wages.

2. The Determination found that Gulf Coast had contravened section 17 the *Act* and ordered the payment of wages, and interest under section 88 of the *Act*, in the amount of $33,369.35 and imposed an administrative penalty on Gulf Coast for a contravention of the *Act* in the amount of $500.00.

3. Bhora Mayer, in his capacity as President of Gulf Coast, appealed the Determination on the ground the Director erred in law in finding there was an employment relationship between Helgesen and Gulf Coast.

4. Helgesen appealed the Determination on the ground the Director had erred in law in limiting his wage claim to a six month period, which in the circumstances commenced with his employment on October 15, 2007 and ended on April 15, 2008.

5. The original decision dismissed the appeal filed by Gulf Coast and allowed the appeal filed by Helgesen, referring that matter back to the Director.

6. In this application for reconsideration, Gulf Coast has revisited its disagreement with the finding of an employment relationship between Helgesen and Gulf Coast and has challenged the finding in the original decision on the wage recovery period.

7. Since the filing of this application, there has been a change in counsel representing Gulf Coast that I will note so as to avoid any concern or confusion.

8. The application was originally filed on August 19, 2009, by Ms. Allison, of Clark Wilson LLP, on behalf of Bhora Mayer and Gulf Coast. Responses to the application were filed by Helgesen, Mhinder Mayer, and the Director. On October 15, 2009, Ms. Allison notified the Tribunal that Mhinder Mayer had raised an issue

concerning the authority of Clark Wilson LLP to act on behalf of Gulf Coast and, as a result of that objection and consistent with an Order made by the Supreme Court of British Columbia on July 29, 2009, Gulf Coast would be represented on the application by Jensen Lunny MacInnes Law Corporation. This was confirmed in a communication to the Tribunal from Mr. Lunny on October 16, 2009.

9. On November 6, 2009, the Tribunal received responses to the submissions filed by Helgesen, Mhinder Mayer, and the Director from Mr. Lunny, on behalf of Gulf Coast, and from Ms. Allison, on behalf of Bhora Mayer.

10. In his reply submission, Mr. Lunny, among other arguments which are outlined below, has submitted that an oral hearing is required. This is the first such indication in the file from any party. It is noted in the original decision that none of the parties sought an oral hearing on the appeal. Mr. Lunny also seeks to introduce evidence into this application that was not before the Director when the Determination was being made and not submitted in the appeal process, even though most of this evidence existed and could have been produced during the either process. There is no explanation from Mr. Lunny why the material that was available was not provided to the Director or submitted with the appeal. It is suggested an oral hearing should be conducted and the documents received to remedy a breach of natural justice and lack of procedural fairness, which is premised on the assertion that Bhora Mayer was not interviewed during the complaint process.

11. No other party has raised natural justice or procedural fairness issues at any stage of the complaint. The merit of these allegations will be addressed below.

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 is appropriate for reconsideration, the substantive issues raised in this application are whether the Director erred in law in deciding there was an employment relationship between Helgesen and Gulf Coast and whether the Tribunal Member erred in deciding the appropriate recovery period.

THE THRESHOLD ISSUE

13. The legislature has conferred a reconsideration power on the Tribunal under Section 116 of the *Act*, which reads as follows:

> *116. (1) On application under subsection (2) or on its own motion, the tribunal may*
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> *(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.*

14. 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. In *Milan Holdings Ltd.*, BC EST # D313/98 (Reconsideration of BC EST # D559/97), the Tribunal discussed the fundamental purpose and application of the reconsideration power:

> While the Director or a person named in a tribunal decision has the right to make application for reconsideration (s. 116(2)), the decision whether to exercise the reconsideration power is specifically left to the discretion of the Tribunal: s. 116(1). The Tribunal has sought to exercise that discretion in a principled fashion, consistent with the fundamental purposes of the *Act*. One such purpose is to *"provide fair and efficient procedures for resolving disputes over the application and interpretation of the Act"*: s. 2(d). Another is to *"promote fair treatment of employees and employers"*: s. 2(b).
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> To realize these purposes in the context of its reconsideration power, the Tribunal has attempted to strike a balance between two extremes. On the one hand, failing to exercise the reconsideration power where important questions of fact, law, principle or fairness are at stake, would defeat the purpose of allowing such questions to be fully and correctly decided within the specialized regime created by the *Act* and Regulations for the final and conclusive resolution of employment standards disputes: *Act*, s. 110. On the other hand, to accept all applications for reconsideration, regardless of the nature of the issue or the arguments made, would undermine the integrity of the appeal process which is intended to be the primary forum for the final resolution of disputes regarding Determinations. An "automatic reconsideration" approach would be contrary to the objectives of finality and efficiency for a Tribunal designed to provide fair and efficient outcomes for large volumes of appeals. It would delay justice for parties waiting to have their disputes heard, and would likely advantage parties with the resources to "litigate": see *Re Zoltan T. Kiss* (BC EST #D122/96).

15. The Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the focus of a reconsideration application is the original decision. 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.

16. 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.

17. 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: see, for example, *Joyce Middleton operating as Reflexology and Stress Clinic*, BC EST # RD126/06.

18. While the Tribunal has adopted a principled approach about whether to reconsider, there is no formula that dictates the outcome of a reconsideration application. There is room for judgment in applying the relevant factors. As the Tribunal stated in *Valorosa*, BC EST # RD046/01:

> Having devoted significant energy to elucidating the principles governing the Tribunal's discretion under s. 116, we hasten to add that one cannot dictate the outcome of its exercise in advance. A great strength of our legal system – one that is at once frustrating for students of law and compellingly true for those administering it – is that "it all depends on the circumstances".

19. 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, or issues, raised by the reconsideration.

20. Initially, this application was grounded solely on alleged errors of law by the Director and by the Tribunal Member in the original decision. In his November 6, 2009, reply on behalf of Gulf Coast, Mr. Lunny raised natural justice and procedural fairness arguments relating to the complaint process.

THE ORIGINAL DECISION

21. To a considerable degree, the submissions of Gulf Coast and Bhora Mayer have not addressed the reasoning in the original decision, particularly on the employment issue. The central elements of the original decision are provided below.

22. On the issue of the wage recovery period, the Tribunal Member was directed to section 80 of the *Act*. The Tribunal Member considered whether that section imposed a "ceiling", limiting a complainant to a maximum wage recovery period of six months' wages, and found that it did not. The rationale for that conclusion can be found in the following excerpts from the original decision:

> "In my view, the reference to "six months" in subsection 80(1)(a) simply fixes the historical point in time from which the complainant's unpaid wage claim may be calculated, but it does not mandate a fixed interval limiting the maximum claim period for any and all unpaid wage claims. If the Legislature had intended to limit all unpaid wage claims under the *Act* to a defined six-month interval it could have simply done so by removing the word "beginning" in subsection 80(1) and perhaps by including other directory language in subsections 80(1)(a) and (b). I agree with the Director's position that was also successfully advanced in *Orca Security Corporation*, *supra*, namely, that section 80(1)(a) defines the commencement of the wage recovery period but does not necessarily fix the duration of that period (see para. 52)." (at para 23)
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> "if one were to give effect to Bhora Mayer's argument that Mr. Helgesen cannot recover any wages after the date of his complaint (even though such wages were earned and payable), the employer would unfairly benefit from the employee's labours – a result that hardly seems consonant with the remedial nature of the *Act* scheme." (at para 24)
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> ". . . in the case of an ongoing employment relationship, . . . I see no sensible reason for requiring the employee to file another complaint and for successive determinations to be issued each limited to a 6-month post-complaint interval. Such a process seems needlessly bureaucratic and not at all in keeping with the stated purpose of the *Act* to promote fair and efficient dispute procedures (section 2(d)). It should also be noted that the Director's jurisdiction to investigate a possible unpaid wage issue is not predicated on the existence of a formal complaint (see section 76(2))." (at para 27)
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> ". . . in the unusual case where the employment continues after the complaint has been filed there is nothing in the *Act* that limits the complainant's unpaid wage claim to a defined 6-month period." (at para 27)

23. I would add that the conclusion reached in the original decision is entirely consistent with the fundamental statutory obligation imposed on employers in the *Act*, which is to pay wages earned to employees for worked

performed. That statutory obligation never "ends"; it is a continuing obligation on an employer as long as there is work being performed by an employee for that employer.

24. The suggestion by counsel for Gulf Coast and Bhora Mayer that the *Act* should be interpreted to allow an employer to avoid this basic statutory obligation because an employee seeks to exercise his or her statutory right to file a wage claim under the *Act* is unfair and absurd and should be avoided unless there is direct and specific language compelling such a result.

25. At its core the application for reconsideration on this issue simply disagrees with the interpretation given in the original decision to section 80(1).

26. On the employment issue, the relevant conclusions in the original decision are found at pages 9 and 10, where the Tribunal Member reviews the findings in the Determination and considers whether there is a proper basis for them:

> "First, the delegate concluded . . . Helgesen was an "employee" as defined in section 1 of the *Act*. Second, the delegate concluded . . . Helgesen was employed by Gulf Coast. I am unable to conclude that either finding amounts to an error of law inasmuch as the delegate appears to have correctly applied the relevant statutory definitions to the facts at hand." (at para 31)
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> ". . . the delegate did not conclude Gulf Coast was Mr. Helgesen's employer simply because it benefited from his services. Rather, the delegate considered, in addition, that i) Mr. Helgesen was engaged by a person apparently in a position of authority with Gulf Coast, ii) no person other than Gulf Coast received the benefit of Mr. Helgesen's labours, iii) Bhora Mayer took no formal legal steps to have Mr. Helgesen barred from the workplace, and iv) bearing in mind the relevant statutory definitions, Mr. Helgesen performed work that was normally performed by an employee and was subject to Gulf Coast' direction and control (exercised by Mhinder Bayer)." (at para 34)
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> ". . . Bhora Mayer does not challenge that factual determination [that Mhinder Mayer was the one brother most closely involved in the day-to-day management of Gulf Coast] and, in any event, challenges to findings of fact cannot constitute an error of law unless there is no proper evidentiary foundation for the disputed fact (an issue which does not arise in these appeals). The delegate determined, based on largely uncontroverted evidence, that i) Mhinder Mayer hired Mr. Helgesen, ii) Mr. Helgesen worked at Gulf Coast's worksite, and iii) he provided services that tangibly benefited Gulf Coast. Mhinder Mayer never purported to engage Mr. Helgesen on behalf of any person other than Gulf Coast and there is no evidence in the material before me suggesting that Mr. Helgesen worked anywhere other than at the Gulf Coast work site on Salt Spring Island. In light of these findings, and the statutory definitions of "employee", "employer" and "work" contained in section 1 of the *Act*, I am unable to conclude that the delegate's finding that Mr. Helgesen was employed by Gulf Coast during the relevant period constitutes an error of law." (at para 35)

27. It is apparent that the decision on the employment issue in the original decision was based on findings of fact made by the Director applied to definitions in the *Act*.

ARGUMENTS AND ANALYSIS ON THE THRESHOLD ISSUE

28. In the initial submission supporting the application for reconsideration, Ms. Allison argued that reconsideration was appropriate because the focus of the application is not to re-weigh evidence tendered, but to have the Tribunal "address the legal obligations which arise from the conduct of the parties".

29. The matters which fall within that general description are identified as the finding of an employment relationship between Helgesen and Gulf Coast, the finding that Helgesen was an employee of Gulf Coast and was owed wages by Gulf Coast and the conclusion that the wage recovery period was not, in the circumstances, limited to a six month period preceding Helgesen filing his complaint.

30. Ms. Allison generally summarizes the position of Gulf Coast and Bhora Mayer on the application as follows:

> 4. This case is unusual and raises the legal issue of who has authority to hire an employee, in the case where two directors of a closely-held company do not agree to hire the individual and the individual seeking to become any employee has actual knowledge of the lack of agreement.
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> 5. This case is further complicated by the facts that the director who purported to hire the individual specifically lacked the authority of Gulf to pay the individual; the person with such authority refused to hire the individual; the individual was paid by the wife of one party; and the individual was aware at all times of the refusal to hire and pay him.

31. As I have already noted above, in his November 6, 2009, submission, Mr. Lunny has added that reconsideration is appropriate because principles of natural justice were not complied with, there is new evidence which would lead to a different conclusion, there was a serious mistake in law, there was a failure to understand and deal with a significant issue in the appeal, and there was a failure to consider relevant facts. Mr. Lunny indicates his submission is being made "in the context of valid corporate authority, and its importance in relation to employer and employee issues".

32. At the outset, I reject any suggestion there has been a breach of natural justice or lack of procedural fairness, even if it is correct that Bhora Mayer was not personally interviewed during the complaint process. It is apparent from the material in the file that Bhora Mayer was well aware of the full nature of the claim being made by Helgesen and given ample opportunity to respond to it. Bhora Mayer was represented by legal counsel throughout the complaint process and several submissions were made on his behalf by legal counsel. Those submissions express his view on the facts and his position on the issues raised in the complaint, including the position that Helgesen was not an employee of Gulf Coast because Mhinder Mayer had no actual authority to hire him.

33. It is also noted in the original decision that the same submission was made in the appeal, which was brought by Bhora Mayer:

> "Bhora Mayer's principal position is that Mhinder Mayer did not have the lawful independent authority to hire Mr. Helgesen and, accordingly, Mr. Helgesen was not lawfully employed by Gulf Coast."

34. The same position is being advanced as the basis for this application. What is notable, and relevant to a consideration of Mr. Lunny's position on the above points, is that the appeal was not grounded in an alleged failure to comply with principles of natural justice.

35. I will address the argument that an oral hearing is necessary.

36. Mr. Lunny supports his submission for an oral hearing and a new evidentiary review, in part, by challenging the factual finding in the Determination that "Bhora Mayer took no formal legal steps to have Mr. Helgesen barred from the workplace". Mr. Lunny alleges this finding is in error because Bhora Mayer had contacted the RCMP to inquire about having them remove Helgesen from the worksite. He has provided some supporting documents relating to that allegation.

37. There are four obvious problems with this argument, leading to a conclusion there is no merit to it. First, it is raised on behalf of Bhora Mayer. Mr. Lunny is not counsel for Bhora Mayer, but for Gulf Coast. If there is any validity at all to this point, it should be raised by Ms. Allison, who represents Bhora Mayer. It has not. Second, it is raised for the first time in this application in the final response of Gulf Coast, notwithstanding there were several opportunities to provide this information to the Director and the Tribunal, including the opportunity to review and comment on a draft of the Director's findings prior to the issuance of the Determination, the appeal and the initial submission on this application. Third, the actual finding of the Director in the Determination was that "the only action taken [against Helgesen] is a refusal to process the payment of wages". That is a completely accurate statement as it stretches credulity to suggest contacting the RCMP and being immediately told they would not get involved, as "taking formal legal steps". And fourth, the finding of the Director is one of fact that is not "clearly in error".

38. Mr. Lunny also says the Director, and the Tribunal, erred in "placing any reliance upon the fact that the payroll is handled by Bastion Management – a company aligned to Bhora's group of companies". The reference to Bastion Management appears to have been made to explain how it was that Helgesen never received any wages from Gulf Coast and why the loan arrangement between Helgesen and Kelly Mayer was established. The actual comment is found in the Determination in a recitation of the background and evidence provided in the complaint process. There is no indication in the original decision, or indeed in the Determination, that comment was relied on to find Helgesen was an employee of Gulf Coast. Whether Mr. Lunny disagrees with the reference to Bastion Management in the original decision, he has failed to provide a nexus between that reference and the challenged finding on Helgesen's relationship with Gulf Coast.

39. Mr. Lunny has provided excerpts from the Articles of Association of Gulf Coast. In addition to being information that could have been provided earlier in the processes, I do not find this information to be either significant or probative of the issues raised in this application.

40. For the same reason, I do not find the Supreme Court Order to be probative of the issues that are being argued in this application. The Determination was not based on any legal assessment of Mhinder Mayer's actual authority within Gulf Coast, but on the conclusion of the Director that in the circumstances Helgesen was entitled to rely on the direction and instruction of a senior manager and 50% owner of Gulf Coast that he was hired and should continue to work. As the Tribunal Member stated in the original decision:

> Clearly, and Bhora Mayer does not challenge this proposition, in the usual course of events someone in the position of Mhinder Mayer would have the presumptive legal authority to bind the company to an employment contract. (at para. 30)

41. In sum, I reject the suggestion there is significant new evidence that justifies an oral hearing or a re-examination of the findings of fact that were made in the Determination and accepted in the original decision.

42. With those extraneous matters fleshed out of the submissions, this application adds nothing new to the issue of whether Helgesen was an employee of Gulf Coast. All of the other submissions in the application relate in some form to the authority of Mhinder Mayer to hire Helgesen.

43. Mhinder Bayer and Helgesen have not made any submission directed to the threshold issue.

44. The Director says the Applicant has not met the threshold requirements for advancing the application to the second stage of analysis. The Director says that, in essence, the findings of an employment relationship between Helgesen and Gulf Coast and that Helgesen was an employee of and was owed wages by Gulf Coast

are the same questions that were advanced and argued in the appeal. It is submitted that the application only recasts those same arguments and seeks a different result.

45. The Director also says the original decision fully canvassed the applicable statutory provisions and purposes relating to the wage recovery period and the application has provided no basis for revisiting that issue.

46. I have decided this application does not warrant reconsideration.

47. I can find no error of law in the original decision on either of the issues raised.

48. On the issue of the employment relationship, whatever Mhinder Mayer's actual legal authority might be within Gulf Coast, the Determination found he had sufficient authority in the circumstances found to exist at the time to create an employment relationship between Helgesen and Gulf Coast and that the elements of that relationship fell within the relevant statutory definitions of "employee", "employer" and "work".

49. Counsel for Gulf Coast and Bhora Mayer continue to assert in this application that Mhinder Mayer had no actual authority to hire Helgesen to Gulf Coast and, consequently, Helgesen could not have been employed by that company. Those assertions continue to miss the point and, in any event, were reviewed and answered in the original decision. The focus of this application from Gulf Coast and Bhora Mayer has been to provide further argument on the absence of actual authority. In essence, they seek a review and re-weighing of the arguments already made and not accepted. That is not an appropriate use of the reconsideration power given to the Tribunal under section 116.

50. The original decision on the wage recovery period is consistent with the language found in section 80, consistent with the fundamental statutory obligation on an employer to pay wages to an employee for work performed and consistent with the expressed purposes of the *Act*, with its objectives and with the remedial nature of the legislation. It is the correct decision and reconsideration is both unnecessary and unwarranted.

ORDER

51. Pursuant to Section 116 of the *Act*, I order the original decision, BC EST # D077/09, be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal