

An Application for Reconsideration

- by -

Amazon West Contracting Ltd.  
("Amazon West")

- 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:** Kenneth Wm. Thornicroft

**FILE No.:** 2015A/148

**DATE OF DECISION:** December 10, 2015

## DECISION

### SUBMISSIONS

Sebastian Menezes

on behalf of Amazon West Contracting Ltd.

### INTRODUCTION

1. Amazon West Contracting Ltd. (“Amazon West”) applies, pursuant to section 116 of the *Employment Standards Act* (the “*Act*”), for reconsideration of BC EST # D104/15 issued by Tribunal Member Roberts on October 16, 2015.
2. For the reasons set out below, I am of the view that this application does not pass the first stage of the *Milan Holdings* test (see *Director of Employment Standards*, BC EST # D313/98) and, accordingly, must be summarily dismissed.
3. In adjudicating this application, I have reviewed the written submissions filed by Amazon West as well as the complete record that was before Tribunal Member Roberts.

### PRIOR PROCEEDINGS

4. Joshua Ter Veer (“Mr. Ter Veer”) filed an unpaid wage complaint against Amazon West, a drywall and painting contractor. This complaint was the subject of an oral hearing before a delegate of the Director of Employment Standards (the “delegate”) on May 29, 2015, at which Mr. Ter Veer and Mr. Sebastian Menezes (Amazon West’s sole director and officer) attended. There were two principal issues before the delegate: first, whether Mr. Ter Veer was an employee or an independent contractor and, second, if the former, whether he was owed any further wages.
5. By way of a Determination issued on June 29, 2015 (along with accompanying “Reasons for the Determination” – the “delegate’s reasons”), the delegate determined that Amazon West employed Mr. Ter Veer from April 12 to November 18, 2014, and that he was not paid in accordance with the provisions of the *Act*. The delegate awarded Mr. Ter Veer the sum of \$3,855.07 on account of unpaid wages (overtime pay, statutory holiday pay and vacation pay) and section 88 interest. Further, and also by way of the Determination, the delegate levied six separate \$500 monetary penalties (see section 98 of the *Act*) against Amazon West thus bringing the total amount of the Determination to \$6,855.07.
6. On August 6, 2015, Amazon West appealed the Determination alleging all three statutory grounds; namely, that the delegate erred in law; failed to observe the principals of natural justice in making the Determination; and on the ground that it had new and relevant evidence not available at the time the Determination was being made (see subsections 112(1)(a), (b) and (c) of the *Act*). Amazon West’s principal argument was that the delegate erred in finding that Mr. Ter Veer was an employee rather than an independent contractor.
7. Tribunal Member Roberts summarily dismissed the appeal on the basis that none of Amazon West’s grounds of appeal was meritorious. Amazon West now applies for reconsideration of Tribunal Member Roberts’ decision (the “Appeal Decision”).

## FINDINGS AND ANALYSIS

8. Amazon West says that the Appeal Decision is “unjust” and that the delegate’s findings in the Determination were tainted because Amazon West failed to place all of its relevant documents before her. Amazon West attempted to submit these documents to the Tribunal as part of the “record” but, of course, not having been originally submitted to the delegate, these documents could not be included in the subsection 112(5) “record” that was before Tribunal Member Roberts. On reconsideration, Amazon West asks the Tribunal to “consider looking at these documents because they are important to the case”. There are several “new” documents and, in my view, they are very marginally relevant, if at all, and quite apart from that concern, are simply not admissible on appeal (as found in the Appeal Decision at paras. 39 – 42), or on reconsideration, in light of the strict criteria for admissibility of new evidence set out in *Davies et al.*, BC EST # D171/03).
9. Mr. Menezes, on behalf of Amazon West, also seemingly argues that there was a breach of the principals of natural justice at the complaint hearing stemming from the fact that “[m]y verbal English is far from perfect, but it is still understandable which is why I didn’t need a translator during the hearing”. However, Mr. Menezes also undermines this latter assertion when he says: “I have the ability to speak to clients, contract workers and they fully understand what I am saying”. In any event, this very same argument was advanced before, and rejected by, Tribunal Member Roberts (see Appeal Decision, paras. 36 – 38).
10. Amazon West, as it did unsuccessfully on appeal (see Appeal Decision, paras. 43 – 46), continues to assert that Mr. Ter Veer was an independent contractor. I have carefully reviewed the evidence before the delegate at the complaint hearing and her analysis of the issue (see delegate’s reasons, pages R5 – R7) and, having done so, I am of the view that the delegate’s finding on this point was reasonably based on the evidence (this was also Tribunal Member Roberts’ view – see Appeal Decision, paras. 44 – 46). Indeed, I would go further and suggest that the delegate’s finding was correct and that a contrary finding would have been both unreasonable and incorrect.
11. Finally, Amazon West says that the delegate’s unpaid wage award should not stand because, among other things, it is predicated on a “misunderstanding of the industry” and that “the hours calculated do not reflect the industry”. I am puzzled by this assertion since industry practices (and, so far as I can tell there was no cogent independent evidence before the delegate on this point) have little, if any relevance, to this particular employment relationship. The delegate’s task, based on the evidence before her, was to determine how many hours Mr. Ter Veer worked during his tenure with Amazon West and then apply the *Act* accordingly.
12. In calculating the unpaid wage award, the delegate principally relied on invoices submitted by Mr. Ter Veer to Amazon West: “The amount claimed on the Complainant’s invoices was not disputed by the Employer who paid the total amount of hours shown on them at straight time” (delegate’s reasons, page R7). Mr. Ter Veer was entitled to overtime pay because, as an employee rather than an independent contractor, he had a statutory right to overtime pay for all hours worked in excess of the section 40 thresholds. I also note that this argument was never placed before the delegate and appears to have been raised for the first time on appeal (see Appeal Decision, para. 45). Amazon West also takes issue with the statutory holiday pay award, however, the award in regard to three separate statutory holidays was also based on the only time records before the delegate – records that, at least at the complaint hearing, Amazon West accepted as being accurate.
13. As noted in *Milan Holdings, supra* (at page 7):

...the following factors have been held to weigh against a reconsideration: ... the application’s primary focus is to have the reconsideration panel effectively “re-weigh” evidence already tendered before the

adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence)...

The primary factor weighing in favour of reconsideration is 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. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise “a serious mistake in applying the law”...

14. In my view, this application is nothing more than an undisguised attempt to have the Tribunal revisit issues that have already been finally adjudicated without there being any cogent reason for doing so. As such, it does not pass the first stage of the *Milan Holdings* test and thus there is no reason to ask the respondent parties to make any submissions on the merits of the application. I might also add that I consider the application, on its merits, to be wholly unpersuasive.

### **ORDER**

15. Pursuant to subsection 116(1)(b) of the *Act*, Amazon West’s application to have the Appeal Decision reconsidered is refused.

---

**Kenneth Wm. Thornicroft**  
**Member**  
**Employment Standards Tribunal**