

An Application for Reconsideration

- by -

John Asfar
("Mr. Asfar")

- 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.: 2010A/147

DATE OF DECISION: December 16, 2010

DECISION

SUBMISSIONS

John Asfar	on his own behalf
Malcolm Green	on his own behalf
Terry Hughes	on behalf of the Director of Employment Standards

OVERVIEW

1. John Asfar (“Mr. Asfar”) seeks reconsideration under section 116 of the *Employment Standards Act* (the “*Act*”) of a decision made by a Member of the Tribunal, BC EST # D110/10, dated October 13, 2010 (the “Original Decision”). The Original Decision considered an appeal of a determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 30, 2010 (the “Determination”). The Determination found that Mr. Asfar contravened Part 3, Section 18 and Part 7, Section 58 in respect of the employment of Malcolm Green (“Mr. Green”), and ordered Mr. Asfar to pay an amount of \$940.51 consisting of \$722.27 for unpaid wages and \$202.34 for annual vacation pay and \$15.90 for accrued interest on these amounts pursuant to section 88 of the *Act*. The Original Decision confirmed the Determination with one small variation, namely, the award for annual vacation pay was reduced from \$202.34 to \$134.89 based on the Member’s conclusion that the delegate did not find any agreement between the employer, Mr. Asfar, and Mr. Greene to pay 6% vacation pay and, therefore, vacation pay should be based on the 4% rate.
2. In this application, Mr. Asfar essentially argues that had the Member, in the Original Decision, properly considered all payments made by Mr. Asfar to Mr. Green since September 1, 2009, when the latter’s employment relationship with Mr. Asfar commenced, he would have concluded that nothing is owed to Mr. Green as Mr. Green was overpaid. In the circumstances, Mr. Asfar appears to argue for a cancellation of the Original Decision for failing to consider all payments made by him to Mr. Green since September 1.

ISSUE

3. 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. If satisfied the case is appropriate for reconsideration, the substantive issue raised in this application is whether the Member, in making the Original Decision, failed to consider payments made by Mr. Asfar to Mr. Green during the latter’s employment with Mr. Asfar and thereby err in confirming the Director’s Determination that Mr. Green was owed wages including vacation pay and interest in the amount of \$940.51 during his period of employment with Mr. Asfar.

ANALYSIS OF THE PRELIMINARY ISSUE

4. Section 116 of the *Act* confers the Tribunal with 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.

5. As indicated by the Tribunal in *Re Eckman Land Surveying Ltd.*, BC EST # RD413/02, the Tribunal's authority under section 116 is discretionary in nature and should be exercised with caution:

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.

6. In *Milan Holdings Ltd.*, BC EST # D313/98, the Tribunal set out a two-stage process for exercising its reconsideration power under section 116 of the *Act*. First, the Tribunal must decide whether the matters raised in the application warrant consideration. 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; and (v) whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.
7. If, after weighing the factors delineated in the first stage above, the Tribunal concludes that a reconsideration application is not appropriate, then the Tribunal will reject the application and provide its reasons for not reconsidering. Conversely, if the Tribunal finds that one or more issues in the application is/are appropriate for reconsideration, the Tribunal will proceed to the second stage in the analysis, which entails an examination of the merits of the application.
8. Having carefully reviewed the Determination, the delegate's Reasons for the Determination, the section 112(5) "record", the Original Decision, the submissions of the parties in the appeal of the Determination, and the written submissions of the parties in the Reconsideration Application, I have decided that this is not a case that warrants reconsideration for the reasons set out below.
9. The primary basis of Mr. Asfar's Reconsideration Application is his allegation that the Member in the Original Decision failed to take into consideration payments made to Mr. Green on account of wages after the commencement of his new employment with Mr. Asfar on September 1, 2009. More particularly, it is Mr. Asfar's contention that had all payments made by Mr. Asfar to Mr. Green since September 1 been considered by the Member against the wages Mr. Green earned during the material period (September 1 to September 18, 2009), it would show that Mr. Green was overpaid and there is nothing owed to him. However, I note that Mr. Asfar, previously on September 16, 2009, advanced this argument in his written submissions in support of his appeal of the Determination and the Member appears to have considered that submission and rejected it for the most part, concluding as follows:

...Mr. Green advanced a claim for nearly \$2,000 but was ultimately awarded only about one-half that figure. The delegate carefully scrutinized the evidence and based on the record before him, I cannot say that his conclusions are clearly wrong save for one matter, namely, the calculation of vacation pay.

The delegate, at page R6 of his reasons, determined that the employment relationship between the parties commenced as of September 1, 2009, and only lasted for a couple of weeks: “I find John Asfar was the employer starting September 1, 2009” and later on at the same page: “The email by Mr. Green stating that he was not working past September 18 is un-contradicted. I find that the evidence does not support a finding that work was performed during the week of September 21 to 25, 2009.”

The delegate did *not* find that there was an express agreement to pay 6% vacation pay and Mr. Asfar was *not* declared to be a ‘successful employer’ under section 97 such that Mr. Green’s prior service (and concomitant *Act* entitlements) was preserved and carried forward. That being the case, it would seem that Mr. Green was only entitled to vacation pay at a rate of 4% consistent with section 58 of the *Act* (I calculate this entitlement to be \$134.89). I propose to vary this one aspect of the Determination.

10. In the circumstances, I find that the Member did not err in upholding the delegate’s Determination with respect to unpaid wages to Mr. Green and varying the calculation for vacation entitlement. I also find that the overpayment Mr. Asfar argues Mr. Green received in September, and which the Member failed to consider, are payments made to Mr. Green for August 2009. In the Determination, at page R6, the delegate made a finding of fact and Mr. Asfar agreed to pay the final wages for August 2009 despite the bankruptcy of Mr. Green’s former employer, as he wanted Mr. Green to carry on working for him personally. The delegate notes:

I find John Asfar continued to employ Malcolm Green after September 1, 2009. I accept that Mr. Asfar agreed to personally take care of any further wages earned or owing after the bankruptcy. Mr. Asfar agreed to pay the final wages for August, 2009 despite the bankruptcy of the employer up to that time. He wanted to keep Mr. Green working to complete some website work. I find John Asfar was the employer starting September 1, 2009.

11. Therefore, I do not find the Member erred in not taking into consideration all payments made to Mr. Green in September, after the bankruptcy of the former employer. I find that the wages paid to Mr. Green in September for work he performed for the bankrupt employer in August 2009 prior to his engagement with Mr. Asfar was properly treated by the delegate and that he did not credit those payments to Mr. Asfar insofar as Mr. Asfar’s new employment engagement with Mr. Green during September 1 to September 18.
12. In my view, Mr. Asfar’s Reconsideration Application is simply an attempt to re-argue the matter he argued before the Member of the Original Decision. The reconsideration process in section 116 of the *Act* is not meant to allow dissatisfied parties a further opportunity to re-argue their cases. In my view, therefore, Mr. Asfar’s Reconsideration Application fails in the first stage of the two-stage analysis delineated in *Milan Holdings Ltd.* While I am not required to proceed to the second stage of the analysis and review the merits of the application at this stage, I have considered Mr. Asfar’s reasons for seeking reconsideration and, as alluded above, find no merit in those reasons and I am persuaded in that decision by the following submissions of the Director:

Mr. Asfar’s first submission of December 24, 2009 noted that despite the bankruptcy, he agreed to personally pay Mr. Green for August 2009 wages earned prior to the bankruptcy as well as extra payments for accrued vacation pay owed to Mr. Green. These payments were made in September 2009. These were unrelated to the period for which wages were found owing in the Determination. This is evident in the December 24, 2009 submission.

13. As a result, I reject Mr. Asfar’s Reconsideration Application.
14. On a different note, in Mr. Green’s submissions in response to Mr. Asfar’s Reconsideration Application, I note that Mr. Green challenges the variation of the vacation pay award by the Member who calculated it based on the 4% vacation pay rate instead of the 6% rate the delegate used in the Determination. Effectively,

Mr. Green, without bringing his own reconsideration application, is seeking to have this matter reconsidered in context of Mr. Asfar's Reconsideration Application. This is not appropriate for Mr. Green to do. If Mr. Green wishes to raise his own challenge of a matter he contends was inappropriately determined in the Original Decision, he may do so by bringing his own reconsideration application in a timely manner, which he has failed to do here. Therefore, I will not be considering the substance or merits of his submissions on the matter here.

ORDER

15. Pursuant to section 116 of the *Act*, I order the Original Decision, BC EST # D110/10, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal