

An Application for Reconsideration

- by -

Unimaxx Networks Inc.
("Unimaxx")

- 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.: 2012A/119

DATE OF DECISION: November 28, 2012

DECISION

SUBMISSIONS

Dave Hunter

on behalf of Unimaxx Networks Inc.

OVERVIEW

1. Unimaxx Networks Inc. (“Unimaxx”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of a decision, BC EST # D098/12, made by the Tribunal on September 20, 2012 (the “original decision”).
2. The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on June 7, 2012.
3. The Determination was made by the Director on a complaint filed by Andrew Wallwork (“Wallwork”), who alleged Unimaxx had contravened the *Act* by failing to pay regular wages. The Determination found that Unimaxx had contravened Part 3, section 17 and Part 7, section 58 of the *Act* and ordered Unimaxx to pay the complainant \$18,404.61, an amount which included both wages and interest.
4. The Director also imposed administrative penalties on Unimaxx under Section 29(1) of the *Employment Standards Regulation* (the “*Regulation*”) in the amount of \$1,000.00.
5. The appeal filed by Unimaxx sought to have the Determination cancelled, varied and/or referred back to the Director. The appeal was filed late and Unimaxx requested an extension of the time period allowed under the *Act* for filing an appeal.
6. The Tribunal Member of the original decision refused to extend the time period for filing and dismissed the appeal.
7. Unimaxx now seeks reconsideration of the original decision.

ISSUE

8. In any application for reconsideration there is a threshold, or preliminary, issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case warrants reconsideration, the issue raised in this application is whether the Tribunal should grant the request to extend the time period for filing the appeal and consider the merits of the appeal.

ARGUMENT

9. Unimaxx argues the Tribunal Member of the original decision should not have dismissed their appeal; that they believe a sufficiently cogent appeal had been put forward and ought to have been decided in their favour on the merits. They submit that as the appeal had been perfected, albeit 1 ½ weeks late, it was not opposed and no prejudice would have followed from extending the statutory filing period the decision to dismiss the appeal for being out of time was incorrect and a breach of natural justice.

10. Unimaxx says the Tribunal should have dealt with “several serious issues” relating to the Determination. The balance of the submission on this application restates the areas of dispute with the Determination that were raised in the appeal: that Unimaxx did not get a fair and impartial hearing before the Director; that Wallwork was an independent contractor, not an employee; and, in any event, that evidence uncovered after the Determination was made supports their view that Wallwork billed for work that was not authorized, sanctioned or assigned a ticket number. These matters appear to be the “serious issues” that Unimaxx says the Tribunal Member should have dealt with in the original decision.
11. Unimaxx seeks to have this panel refer the matter back to another panel of the Tribunal, with a direction to allow the appeal to stand, and to have the entire matter referred back to another delegate of the Director for a re-hearing of the facts and evidence, including any new evidence Unimaxx wishes to add. Unimaxx says this result would be consistent with the objectives of efficiency fairness and finality found in section 2 of the *Act*.

ANALYSIS OF THE PRELIMINARY ISSUE

12. Section 116 states:

- 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.*

13. As the Tribunal has stated in numerous reconsideration decisions, the authority of the Tribunal under section 116 is discretionary. A principled approach to the exercise of this discretion has been developed. The rationale for this 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 approach is fully described 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 *The Director of Employment Standards (Re Giovanni (John) and Carmen Valoroso)*, BC EST # RD046/01, the Tribunal explained the reasons for restraint:

. . . the Act creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute . . .

There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the “winner” is not deprived of the benefit of an adjudicator’s decision without good reason. A third is to avoid the spectre of a tribunal process skewed in favor of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

14. 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, generally, the correctness of the original decision.

15. 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.
16. 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.
17. 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.

ANALYSIS

18. Having reviewed the original decision, the material in the appeal file and the submissions of the applicant on the reconsideration request against the above framework, I am not persuaded this matter warrants reconsideration. I have two main reasons for reaching this conclusion.
19. First, the decision of the Tribunal about whether to extend the statutory time period for filing the appeal is a matter of discretion, one which is guided by well established principles.
20. One panel of the Tribunal will not lightly interfere with a discretionary decision of another panel. While I do not suggest an exercise of discretion by one panel of the Tribunal can never be reviewed and altered by a reconsideration panel, there is a burden on an applicant challenging a discretionary decision of a Tribunal Member to show the exercise of discretion by that 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.
21. In exercising his discretion in this case, the Tribunal Member addressed those factors identified in the Tribunal's July 17, 2012, letter to the parties. Those factors are well established and have been consistently applied to applications to extend the time period for filing an appeal. The Tribunal Member of the original decision, by considering and applying those factors in making the original decision, did not deviate from established legal principles applicable to such cases. Unimaxx has not shown there was any error in this respect.
22. There is no suggestion of bad faith or arbitrariness in the original decision or that it was based on irrelevant considerations. Unimaxx alleges there is a breach of natural justice in the original decision, but there is simply no basis for such an allegation. Unimaxx was given a full and fair opportunity to state its case for an extension of time and the original decision was firmly grounded in the appeal material, applying well established principles.

23. Accordingly, Unimaxx has not persuaded me there is any basis for interfering with the exercise of discretion by the Tribunal Member in the original decision.
24. Second, I have carefully reviewed the appeal material and agree entirely with the disposition made of the appeal in the original decision.
25. Specifically, I agree that the appeal, as it was framed and submitted, was wholly lacking in merit and had no reasonable prospect of succeeding. I accept completely the analysis and conclusion in the original decision concerning the presumptive merits of the appeal. In particular I accept the Tribunal Member's assessment of the allegations of bias and his conclusion that the substance of the appeal reflected disagreements with, and challenges to, findings of fact which, on their face, were not reviewable under section 112 of the *Act*.
26. The view expressed by Unimaxx in this reconsideration request – that the Tribunal Member of the original decision should have accepted and reviewed the new evidence provided by Unimaxx and ordered a re-hearing of the complaint before another delegate of the Director – does nothing to make the conclusion reached in the original decision incorrect and subject to be set aside on reconsideration.
27. I disagree entirely with the submission of Unimaxx that allowing this application would further any statutory objective found in section 2 or in any other provision of the *Act*. In reality, the result sought by this application runs counter to the very objectives Unimaxx says are being advanced here.
28. In sum, faced with an appeal of dubious merit, it was correct and appropriate for the Tribunal Member in the original decision to take an approach to the application to extend the appeal period that included, in result, an acceptance that it is neither fair nor efficient to put parties through the delay and expense of an appeal process where the appeal has little or no prospect of ever succeeding: *Gerald Knodel a Director of 0772646 B.C. Ltd. carrying on business as Home Delivery*, BC EST # D083/11.
29. Having denied an extension of the time for filing an appeal, there was no reason to conduct a further analysis of the merits in the original decision and there is certainly no reason to do so in the context of this reconsideration application.
30. In sum, Unimaxx has not shown the original decision was wrong in any respect and the application for reconsideration is denied.

ORDER

31. Pursuant to section 116 of the *Act*, the original decision is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal