

An Application for Reconsideration

- by -

Hans Rudolf Tschudi, a Director of Imagination (Canada) Corporation
("Mr. Tschudi")

- 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: Rajiv K. Gandhi

FILE No.: 2017A/114

DATE OF DECISION: December 18, 2017

DECISION

SUBMISSIONS

Hans Rudolf Tschudi on his own behalf as a Director of Imagination (Canada) Corporation

OVERVIEW

1. Mr. Tschudi is a director of Imagination (Canada) Corporation (“Imagination”).
2. In a separate filing, Imagination applied for reconsideration of a decision of the Employment Standards Tribunal issued on August 14, 2017 (the “Corporate Decision”, reported at BC EST #D087/17), relating to a determination issued by a delegate (the “Delegate”) of the Director of Employment Standards on February 3, 2015 (the “Corporate Determination”), arising out of a complaint (the “Complaint”) originally filed by Xuewen Liang (the “Employee”) on August 21, 2013. That reconsideration application has now been refused (the “Corporate Reconsideration”, reported at BC EST # RD129/17).
3. In this application, Mr. Tschudi asks the Tribunal to reconsider a decision issued on August 14, 2017 (the “Section 96 Decision”, at BC EST #D088/17), relating to a second determination (the “Section 96 Determination”) issued by the Delegate with respect to the liability of Mr. Tschudi under sections 96(1) and 98(1) of the *Employment Standards Act* (the “ESA”).
4. Those sections provide as follows:
 - 96 (1) *A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee.*
 - 98 (1) *In accordance with the regulations, a person in respect of whom the director makes a determination and imposes a requirement under section 79 is subject to a monetary penalty prescribed by the regulations.*
5. As with the Corporate Determination, Mr. Tshudi when filing his appeal sought an extension of time according to section 109 of the *ESA*, because it was filed more than two years after the Section 96 Determination, well outside the time allowed in section 112(3). Mr. Tshudi claims not to have received notice of the determinations until served with a Writ of Execution in early 2017.

FACTS

The Determination

6. In the Corporate Determination, Imagination was ordered to pay the Employee outstanding wages in the amount of \$24,588.35, compensation for length of service equal to \$9,538.46, vacation pay calculated as \$2,047.61, accrued interest, and \$1,500.00 in administrative penalties.

7. By way of the Section 96 Determination, Mr. Tschudi was determined to be liable under section 96 of the *ESA* to pay wages in the amount of \$10,953.33 together with accrued interest and, under section 98 of the *ESA*, to pay administrative penalties equal to \$1,500. The Delegate specifically found that Mr. Tschudi was both aware of, and personally responsible for, Imagimation's failure of to pay wages to the Employee, when due.

The Tribunal Decision

8. In the Section 96 Decision, Mr. Tschudi's request for an extension of time was refused. The Tribunal Member considering that appeal noted the existence of material in the Record confirming that the Section 96 Determination was sent to Mr. Tschudi by registered mail on July 12, 2016 (to two different addresses, no less). Although the Record does not include confirmation of delivery, it likewise does not include a record of delivery failure. As in the Corporate Reconsideration, I note that section 122(1)(b) of the *ESA* deems service of the Section 96 Determination to be complete without actually requiring proof of delivery.
9. The Tribunal Member went on to dismiss the substance of Mr. Tschudi's appeal, in part for his failure to demonstrate a basis for relieving him of personal liability.

Reconsideration

10. In this application for reconsideration, Mr. Tschudi submits that the Tribunal Decision should be varied, cancelled, or referred back to the Tribunal Member considering the Appeal. He cites reasons identical to those raised by Imagimation and addressed in the Corporate Reconsideration.
11. As in that matter, subsequent to receipt of the reconsideration applications it was determined by the Tribunal two electronic mail correspondences from Mr. Tschudi were not disclosed to the Tribunal Member hearing the appeals.
12. The first message, sent to the Tribunal on May 17, 2017 at 2:25 P.M., contains the following text:

Thank you for letting me know how to ask for an extension.

I have not yet received the missing Reason for Determination, dated February 3, 2015, and I am being sent in circles from one office to the other. Thus, it is not possible to file the new documentation by this afternoon. In addition, having to produce three files out of the one large file is an overwhelming amount of work.

I would thus like to ask for a two week extension in order to collect the necessary Reason for Determination as well as for completing the new files for the Tribunal.

Thank you for your consideration

Kind regards,

H.R. Tschudi

13. The second, sent to the Tribunal on June 2, 2017 at 10:37 A.M., includes the following text:

I have finally been able to sort out the missing Reasons for Determination with [the Delegate]. According to him, it is a simple dating mistake in the determination of February 3, 2014. This should have been February 3, 2015. Thus, there are only two Reasons for Determination, not two [sic].

Since so much time has been spent in trying to resolve this, I would like to ask you to proceed with my applications as one package.

Thank you and have a wonderful weekend.

Kind regards,

H.R. Tschudi

ANALYSIS

14. In considering this application for reconsideration, I have reviewed:

- (a) the Director's Record;
- (b) submissions from Mr. Tschudi concerning the Appeal, dated February 21, 2017 but not received by the Tribunal until April 27, 2017;
- (c) correspondence from Mr. Tschudi to the Tribunal dated May 17, 2017, and June 2, 2017 (the "previously undisclosed materials", to which I referred previously);
- (d) the Corporate Decision;
- (e) the Section 96 Decision; and
- (f) submissions from Mr. Tschudi on this reconsideration application, received September 13, 2017, and October 17, 2017.

Reconsideration

15. In limited circumstances, a Tribunal decision may be reconsidered according to section 116 of the *ESA*.
16. The discretion to do so must be exercised with restraint, and then only in a manner that is both fair to the parties and consistent with the underlying purpose of the statute. (see *Milan Holdings Inc.*, BC EST # D313/98, at page 6, and *The Director of Employment Standards (Re Giovanni (John) and Carmen Valoroso)*, BC EST # RD046/01, at page 4)
17. Requests for reconsideration are ordinarily subject to a two-step approach.
18. Requests for reconsideration are ordinarily approached in two steps. In the first, the applicant seeking reconsideration must satisfy the Tribunal that a question of fact, law, principle, or procedure, flowing from the Section 96 Decision, is so important that it warrants reconsideration.

19. If this threshold test is satisfied, the Tribunal will then consider whether the Section 96 Decision is correct. If it is, the reconsideration will be refused. If it is not, the underlying decision may be varied.
20. In the absence of exceptional circumstances, reconsideration is unlikely. (see *Tagirova and Baranova*, BC EST # RD065/16, at paragraphs 20 and 21). It should not be undertaken where the primary goal of the application is to “re-weigh” evidence already tendered.
21. The test for granting an extension of time is set out at paragraph 21 of the Section 96 Decision:

The Tribunal has developed a principled approach to the exercise of its discretion as set out in Re Niemisto, BC EST # D099/96. The following criteria must be satisfied to grant an extension:

- i) there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;*
- ii) there has been a genuine and on-going bona fide intention to appeal the Determination;*
- iii) the respondent party (i.e., the employer or employee), as well the Director, must have been made aware of this intention;*
- iv) the respondent party will not be unduly prejudiced by the granting of an extension; and*
- v) there is a strong prima facie case in favour of the appellant.*

22. According to the Tribunal Decision, Mr. Tschudi did not satisfy the first part of the *Niemisto* test.
23. Considering the evidence in hand at the time, I cannot say that the result was incorrect. I do not believe that the “previously undisclosed materials”, taken at face value, change that outcome. That said, and even though the previously undisclosed materials are not determinative, it is possible that with the benefit of those items the Tribunal Member hearing the Appeal might have reached a different conclusion when assessing whether Mr. Tschudi had a “reasonable and credible explanation” for missing the statutory deadline for filing an appeal.
24. However, I am still not satisfied that the threshold test has been satisfied.
25. As noted at paragraphs 27 and 28 of the Section 96 Decision,

27. *It is firmly established that a person challenging a determination issued under section 96 of the Act is limited to arguing those issues which arise under that provision: whether the person was a director or officer when the wages were earned or should have been paid, whether the amount of the liability imposed is within the limits for which a director or officer may be found personally liable; and whether circumstances exist that would relieve the director or officer from personal liability under section 96(2) of the Act. The director/officer is precluded from raising and arguing the corporate liability: see Kerry Steineman, Director/Officer of Pacific Western Vinyl Windows & Doors Ltd., BC EST # D180/96.*

28. *Mr. Tschudi has provided nothing in the appeal that addresses any of those matters that are allowed to be raised by him relating to his liability under section 96 of the Act.*

26. In this reconsideration application, Mr. Tschudi's submissions in this application for reconsideration follow those advanced in the Corporate Reconsideration but do not in any way raise a question of fact, law, principle, or procedure, flowing from the Section 96 Decision, that is relevant to a finding of liability under sections 96 or 98 of the *ESA*.
27. Mr. Tschudi did not convince the Tribunal Member hearing his appeal that there was a strong *prima facie* case.
28. Mr. Tschudi was a director of Imagination and the company's guiding mind when wages were earned by the Employee. Mr. Tschudi is the one who failed to pay while concurrently encouraging the Employee to continue to provide employment services, to the Employee's ultimate detriment.
29. There is nothing in Mr. Tschudi's reconsideration application which leads me to conclude differently.
30. The previously undisclosed materials notwithstanding, Mr. Tschudi has not shown exceptional circumstances warranting reconsideration. There is nothing in his submissions that, in my view, present a question of fact, law, principle, or procedure, flowing from the Section 96 Decision, requiring reconsideration.

Conclusion

31. Mr. Tschudi's application does not meet the threshold test.

ORDER

32. The Section 96 Decision is confirmed according to section 116 of the *ESA*. Mr. Tschudi's application for reconsideration is refused.

Rajiv K. Gandhi
Member
Employment Standards Tribunal