

An application for Reconsideration

- by -

Global Plumbing, Heating and Gas Fitting Ltd.
("Global")

- 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.: 2011A/151

DATE OF DECISION: November 28, 2011

DECISION

SUBMISSIONS

Hassan Naghibzadeh on behalf of Global Plumbing, Heating and Gas Fitting Ltd.
Robert D. Krell on behalf of the Director of Employment Standards

OVERVIEW AND SUBMISSIONS

1. This is an application filed by Global Plumbing, Heating and Gas Fitting Ltd. (“Global”), pursuant to section 116 of the *Employment Standards Act* (the “*Act*”), for reconsideration of a Tribunal Member’s decision issued on September 20, 2011 (BC EST # D102/11) (the “Original Decision”). The Tribunal Member confirmed a Determination that was issued by a Delegate of the Director of Employment Standards (the “delegate”) on June 24, 2011, wherein the delegate concluded that Global contravened sections 17, 18, and 28 of the *Act* in respect of the employment of Mr. Mehrdad Ghahremani (“Mr. Ghahremani”) and ordered Global to pay the latter wages, annual vacation pay, and accrued interest in the amount of \$1,941.47. The delegate also imposed three (3) administrative penalties in the amount of \$500.00 for each of the said contraventions.
2. In its appeal of the Determination, Global contended that the Director failed to observe the principles of natural justice in making the Determination and sought to have the Determination varied. It is noteworthy that in its submissions in support of the Appeal, Global did not dispute the wage determination, but contended that the three (3) administrative penalties were “unfair” and should be set aside.
3. In the Original Decision, the Tribunal Member, in dismissing Global’s appeal, stated Global did not discharge the burden placed upon it to show that the Director failed to comply with the principles of natural justice in making the Determination. The Tribunal Member also considered Global’s appeal in context of the error of law ground of appeal (although not argued by Global) and found that the Director did not err in law in imposing the administrative penalties on Global. More specifically, the Tribunal Member noted that Global, in its appeal submissions, did not dispute the Director’s finding that it contravened three (3) sections of the *Act*. Therefore, according to the Tribunal Member, once the delegate made a finding of a contravention, there is no discretion as to whether an administrative penalty could be imposed, nor is there any discretion as to the amount of the administrative penalty that is determined by the *Employment Standards Regulation* (the “*Regulation*”).
4. In its Reconsideration application, Global, through its Director and Officer, Mr. Hassan Naghibzadeh (“Mr. Naghibzadeh”), makes the following brief written submissions which I have set out verbatim:

I like to have oral hearing, I have strong feeling the dicission was made from Nanaimo branch (by Bob Crows) was totally unfair that is why I like someone else can hear the short story as I mentioned before I have no problem to pay the fellow His money as a matter of fact his cheque is going to be in Nanaimo Branch by next week but about Penalty they were suppose to charge me one time \$500.00 not three times, I am happy to pay \$500.00 Penalty not three for the resone his money was ready from last year But he was asking for \$25.00 per hour not 8.00 base on 200 Hours that is why I couldn’t issue his cheque from day first and as far I understand and Nanaimo branch explained to me this \$1000.00 extra is for not paying my employee on time.

Thank you and I hope this Problem can resolved with right and honest judgement. [sic]

5. It is noteworthy that Mr. Naghibzadeh made similar submissions challenging the administrative penalties in Global's appeal of the Determination previously, although in the appeal he was challenging all three (3) administrative penalties and, in the reconsideration application, he states that Global is content with paying one (1) of the penalties.
6. I also find noteworthy the Director's observations in the appeal of the Determination wherein he states "the appeal appears to be based on the appellant's fairness of mandatory penalties under the Employment Standards Act (the "Act") and not the actual findings of contraventions of the Act". I note the Director has not made any further submissions in the Reconsideration application.
7. I also note that Mr. Ghahremani has not made any submissions in the Reconsideration application.
8. Having delineated the background and submissions of the parties in Global's Reconsideration application, I note that Global is seeking an oral hearing of its application. Pursuant to Rule 26 of the Tribunal *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, telephone and oral hearings. In my view, an oral hearing of the reconsideration application is not necessary and, therefore, I propose to adjudicate Global's reconsideration application based on the written submissions of the parties and a review of both the Determination and the Original Decision.

ISSUE

9. In this, as in any other 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. Only if the Tribunal is satisfied that the case is appropriate for reconsideration, the Tribunal will then proceed with consideration of the substantive issues or the merits of the application. In this case, the substantive issue is whether the Tribunal Member erred in law or in principle in confirming the Determination relating to the administrative penalties imposed on Global.

ANALYSIS OF THE PRELIMINARY ISSUE

10. 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.

11. In *Re Eckman Land Surveying Ltd.*, BC EST # RD413/02, the Tribunal indicated that its 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.

12. In an earlier decision 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.
13. 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 reconsideration application and provide its reasons. Conversely, if the Tribunal finds that one or more issues in the application warrant reconsideration, the Tribunal will proceed to the second stage in the analysis, which entails an examination of the merits of the application.
14. Having reviewed the Determination, the delegate's Reasons for the Determination, the section 112(5) "record", the Original Decision, and the submissions of both Global and the Director, I find that this is not a case that warrants reconsideration for the reasons set out below.
15. I have noted previously that Mr. Naghibzadeh made similar submissions challenging the administrative penalties in Global's appeal of the Determination as he is now in Global's Reconsideration application. I agree with the Director's earlier submissions in the appeal of the Determination that Global did not dispute "the actual findings of contraventions of the Act" but simply the fairness of the administrative penalties imposed under the *Regulation*. In the circumstances, I find myself agreeing with the conclusion of the Tribunal Member in the Original Decision, namely, that there is no error in the Delegate's decision to impose the administrative penalties because once the delegate finds a contravention of the *Act*, there is no discretion as to whether an administrative penalty can be imposed. Section 98 of the *Act* (set out below) is instructive in this regard and governs the imposition of monetary penalties where a Director makes a determination against a person and imposes a requirement under section 79. This section uses mandatory language and there is no discretion in the Director to do otherwise:
- 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.
- (1.1) A penalty imposed under this section is in addition to and not instead of any requirement imposed under section 79. [emphasis added]
16. I also agree with the Tribunal Member that Section 29(1) of the *Regulation* sets out a schedule of monetary penalties and the Director has no discretion in changing those penalties. In the circumstances, I find Global has failed to make out an arguable case of sufficient merit to warrant the reconsideration and do not find any basis to disturb the Original Decision. I also find the Director correctly concluded that Global did not discharge the onus upon it to show a breach of natural justice on the part of the Director in making the Determination.
17. Finally, I would like to note that I find that Global's reconsideration application is simply an attempt to re-argue the matter Global, or Mr. Naghibzadeh, has already argued before the Tribunal Member in the appeal of the Determination. The reconsideration process in section 116 of the *Act* is not meant to allow a

dissatisfied party a further opportunity to re-argue its case. In my view, therefore, Global's Reconsideration application fails in the first stage of the two-stage analysis delineated in *Milan Holdings Ltd.* and I reject it.

ORDER

18. Pursuant to section 116 of the *Act*, I order the Original Decision, BC EST # D102/11, be confirmed.

Shafik Bhalloo
Member
Employment Standards Tribunal