

An Application for Reconsideration

- by -

AdvancedIO Systems Inc.  
("ASI")

- 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.:** 2015A/153

**DATE OF DECISION:** December 16, 2015

## DECISION

### SUBMISSIONS

Andreas Grooters

on behalf of AdvancedIO Systems Inc.

### OVERVIEW

1. AdvancedIO Systems Inc. (“ASI”) seeks reconsideration of a decision of the Tribunal, BC EST # D106/15 (the “original decision”), dated October 19, 2015.
2. The original decision considered an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on July 10, 2015.
3. The Determination was issued on complaints filed by Hazam Ghanam, Paul R. Russell and Wesam Darwish (collectively “the complainants”), who alleged ASI had contravened the *Employment Standards Act* (the “Act”) by failing to pay regular wages and vacation pay.
4. In the Determination, the Director found ASI had contravened Part 3, section 18 and Part 7, section 58 of the *Act* in respect of the complainants and ordered ASI to pay the complainants wages and interest in the amount of \$48,113.77 and imposed administrative penalties on ASI in the amount of \$1,000.00.
5. The appeal filed by ASI alleged the Director failed to observe principles of natural justice in making the Determination, by accepting false claims from the complainants, miscalculating vacation pay owing and, as a result, finding two of the complainants were entitled to wages that were not actually owing to them. ASI also grounded its appeal on evidence becoming available that was not available when the Determination was being made.
6. Although not listed as a ground of appeal, ASI asked the Tribunal to review whether the complainants were eligible to access the *Act*. This request infers the Director had erred in finding the complainants were not professional engineers and were not excluded from the *Act* under section 31(f) of the *Employment Standards Regulation* (the “Regulation”).
7. The Tribunal Member making the original decision dismissed the appeal and confirmed the Determination.
8. The Tribunal Member found the Director had not failed to observe principles of natural justice, finding ASI had been provided with sufficient opportunity to participate in the complaint process; that Mr. Jason Neale and Mr. Andreas Grooters, the representatives of ASI in respect of the complaints, had participated in numerous exchanges with the investigating delegate of the Director.
9. The Tribunal Member found the Director had not erred in finding the complainants were not excluded from the *Act*.
10. The Tribunal Member declined to accept the “new evidence” submitted with the appeal, noting one of the documents submitted with the appeal was included in the section 112(5) record and the others did not satisfy the requirements for admitting new evidence under the test set out in *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST # D171/03. That test requires an appellant seeking to have new or additional evidence introduced with an appeal to demonstrate the evidence was not reasonably available and

could not have been provided during the complaint process, is relevant to a material issue in dispute, is credible, in the sense that it be reasonably capable of belief, and it is probative, in the sense of being capable of resulting in a different conclusion than what is found in the Determination. The Tribunal Member found ASI had not demonstrated the evidence could not, with the exercise of due diligence, have been provided during the complaint process or that it was credible and probative.

11. The Tribunal Member found ASI had no evidentiary basis for challenging the vacation entitlements of the complainants. Particularly, the Tribunal Member found ASI could not challenge the finding made by the Director on the vacation entitlement rate for Wesam Darwish, stating the proper time to raise a challenge to Mr. Darwish's submission on his vacation rate was in the investigation process where he could have answered that challenge, but they did not and could not raise it in the appeal.

## ISSUE

12. 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 cancel the original decision and refer the matter back to the original panel or, if more appropriate, to the Director.

## ARGUMENT

13. ASI contends they have not had the right to know the case against it, the opportunity to present its case or the right to be heard by an independent decision maker. ASI submits the claims made by the complainants are "still unclear" and ASI does not yet have full access to its files in order to support its case. ASI says this fact, and the reasons for it, are included in the Determination but have not been recognized and given proper effect in the original decision. Because of those circumstances, ASI submits it was wrong for the Tribunal Member of the original decision not to accept the evidence it presented with the appeal and it would be wrong not to refer the matter back to the Director to consider the additional evidence provided by ASI and to re-evaluate the evidence provided by the complainants.
14. ASI submits "no independent decision maker has heard this case", as they would have challenged the authenticity of the claims made by the complainants, would have found contradictions in the claims and the supporting documentation and would have found evidence that ASI "has challenged the Director's queries over the course of the process". ASI submits the Director acted without "actual" evidence and on a view of the facts that could not reasonably be entertained. ASI makes several arguments about the validity, as evidence, of the material accepted by the Director as proof of the claims of the complainants.
15. ASI asserts its access to records relevant to the claims has been severely restricted by the insolvency proceeding in which the company was engaged commencing late in 2013. ASI submits the new management, which was installed October 30, 2013, had no access to company servers or to a complete hardcopy of employee files for a period of time. ASI says that over the course of restructuring the company's operations it found employee files in some of the "200+" boxes of corporate documents that are still in the process of being sorted. ASI says the Tribunal Member making the original decision was wrong in "questioning the credibility" of the new evidence submitted with the appeal and, instead, should have questioned the credibility of the claims and the "failure of the [D]irector to reference check the claim submitted". ASI says the Tribunal should have corrected this omission by referring the entire matter back to the Director to re-investigate, allow ASI to submit its evidence, and provide ASI with its right to be heard by "an independent decision maker".

16. ASI makes several statements of fact that are inconsistent with the findings made in the Determination, which it says have now been proven - by the documents submitted by ASI with the appeal – but were “overlooked” by the Director in the Determination.
17. Finally, ASI says it has additional evidence to prove the complainants have filed a false claim.

## ANALYSIS

18. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally. As a result of amendments to the *Act* made in the *Administrative Tribunals Statutes Amendment Act, 2015*, parts of which came into effect on May 14, 2015, section 116 reads:

- 116** (1) *On an 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 served with an order or a decision of the tribunal may make an application under this section.*
- (2.1) *The application may not be made more than 30 days after the date of the order or decision.*
  - (2.2) *The tribunal may not reconsider an order or decision on the tribunal's own motion more than 30 days after the date of the decision or order.*
- (3) *An application may be made only once with respect to the same order or decision.*
- (4) *The director and a person served with an order or a decision of the tribunal are parties to a reconsideration of the order or decision.*

19. Except for the inclusion of statutory time limits for filing an application for reconsideration and for the Tribunal reconsidering its own orders and decisions, the amendments are unlikely to alter the Tribunal’s approach to reconsiderations.
20. In that respect, the Tribunal has said the authority of the Tribunal under section 116 is discretionary. A principled approach to this discretion has been developed and applied. The rationale for this approach is grounded in the language and purposes of the *Act*. One of the purposes of the *Act*, found in section 2(d), is “to provide fair and efficient procedures for resolving disputes over the application and interpretation” of its provisions. Another stated purpose, found in section 2(b) is to “promote the fair treatment of employees and employers”. The approach is fully described in *Milan Holdings Inc.*, 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 a 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” not be 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 favour of persons with greater resources, who are able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

21. In deciding whether to reconsider, the Tribunal considers such factors as timeliness, the nature of the issue and its importance both to the parties and the system generally. Undue delay in filing for reconsideration will mitigate against, and likely lead to a denial of, an application. 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.
22. The Tribunal has accepted an approach to applications for reconsideration that resolves itself 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 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.
23. 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.
24. 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 in the reconsideration.
25. I am not satisfied this application warrants reconsideration. I am satisfied, based on the material before the Tribunal Member in the appeal and considering the allowable scope of review under section 112 of the *Act*, there was no error made in the original decision.
26. Much of this application is focussed on the reconsideration panel ignoring the decision in the original decision to disallow the new evidence submitted with the appeal, accepting the arguments against the Determination, setting aside the original decision and referring the matter back to the Director for a complete re-investigation. The application utilizes all potential arguments to achieve this objective: breach of procedural fairness, bias, misunderstanding and misapplying evidence, ignoring submissions and evidence, accepting false claims and false evidence from the complainants, deceitful conduct by the complainants, acting without evidence and wrongly questioning the credibility of the applicant. They are the same arguments made in the appeal.
27. This application is clearly within that category where its primary focus is to have the reconsideration panel re-visit the original decision and come to different conclusion. That weighs heavily against this application. The insurmountable difficulty for ASI in this application is that virtually all of the submissions made in this application are, as they were in the appeal, supported by nothing more than allegation and assertion. As was made clear in the original decision, there is no objective evidentiary basis for these arguments. All of them were, in one form or another, raised in the appeal and addressed in the original decision.
28. In respect of the challenge to the Tribunal Member making the original decision not accepting the new evidence submitted with the appeal, ASI has not shown there was any error made on that matter in the

original decision. I agree with the conclusions and analysis provided in the original decision in respect of the documents sought by ASI to be included with the appeal. I will comment on the finding in the original decision that the evidence presented lacked sufficient credibility to satisfy that aspect of the test for admitting new evidence. That finding is not an aspersion on ASI, its representatives or its shareholders, but reflects an assessment of whether the submitted evidence, because of the inability of the Tribunal Member to decipher or make out the signatures on the documents, could reasonably be accepted as establishing they were signed by Mr. Darwish. That is a reflection on the nature of the documents presented, not the presenter.

29. To the extent the allegations of bias by ASI might extend to the Tribunal Member making the original decision, I only note that the burden of proving actual or reasonable apprehension of bias is high and demands “clear and convincing” objective evidence. Bias is not established on subjective opinions, however strongly those opinions are held. There is nothing close to meeting this burden in the application.
30. In sum, there is nothing in this application that would justify the Tribunal using its authority to allow reconsideration of the original decision and accordingly the application is denied.

## **ORDER**

31. Pursuant to section 116 of the *Act*, the original decision, BC EST # D106/15, is confirmed.

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**David B. Stevenson**  
**Member**  
**Employment Standards Tribunal**