

An Application for Reconsideration

- by -

Nigel Patrick Turner a Director and Officer of 0708964 B.C. Ltd.
("Turner")

- 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.: 2011A/105

DATE OF DECISION: December 6, 2011

ARGUMENT

8. The same arguments are made in this application against the Determination as were made in the appeal.
9. In respect of the original decision, counsel for Mr. Turner says the Tribunal Member misdirected himself on the law in two ways.
10. First, counsel argues, the Tribunal Member's conclusion that section 96(4) of the *Act* "does create the very liability that has been imposed on Mr. Turner" is inconsistent with section 45 of the *Regulation*, which says section 96 does not apply to a director or officer of a charity.
11. Second, the Tribunal Member's comment that "subsection 96(4) may be superfluous" was an error because, as counsel submits, absent subsection 96(4) there is no basis for holding Mr. Turner personally liable as the director or officer of an entity treated as one employer.
12. In summary, counsel for Mr. Turner says because Mr. Turner was a director of a society to whom section 96 does not apply, he cannot be made personally liable under subsections 96(1) or (4) of the *Act*.
13. The Director has submitted a response to the application for reconsideration.
14. The Director says the central argument made in this application was made during the investigation and in the appeal. The Director, understandably, agrees with the original decision and notes once again that the personal liability of Mr. Turner under section 96 arose from his position as a director and officer of 0708964 B.C. Ltd., not as a director of Vancouver International Primary and Secondary School.

ANALYSIS OF THE PRELIMINARY ISSUE

15. 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.*
16. 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.

17. 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.
18. 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.
19. 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.
20. 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.
21. I am not persuaded this matter warrants reconsideration or that there is any error of law in the original decision.
22. I agree completely with the analysis made by the Tribunal Member in the original decision. In particular, I agree there is nothing in the language of the *Act* or *Regulation* that would immunize a person who is, on a clear reading and application of section 96 of the *Act*, personally liable as a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid only because that person is also a person described in section 45 of the *Regulation*.
23. The application is denied.

ORDER

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

David B. Stevenson
Member
Employment Standards Tribunal