

An Application for Reconsideration

- by -

John Ramos, a Director and Officer of DBD Westcoast Construction Ltd.
("Mr. Ramos")

- 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.: 2016A/135

DATE OF DECISION: October 31, 2016

DECISION

SUBMISSIONS

John Ramos on his own behalf, as a Director and Officer of DBD Westcoast Construction Ltd.

OVERVIEW

1. John Ramos (“Mr. Ramos”) seeks reconsideration of a decision of the Tribunal, BC EST #D106/16 (the “original decision”), dated August 16, 2016.
2. The original decision considered an appeal of a Determination issued by the Director of Employment Standards (the “Director”) on May 11, 2016.
3. The Determination was made by the Director under section 96 of the *Act* on complaints filed by Alan Gazo (“Mr. Gazo”) and Justin Wilson (“Mr. Wilson”), who had alleged DBD Westcoast Construction Ltd. (“DBD”) had contravened the *Act* by failing to pay them regular wages and annual vacation pay. In a Determination issued March 2, 2016 (the “corporate determination”), the Director found Mr. Gazo and Mr. Wilson were owed wages in the amount of \$3,473.60, plus interest to the date of the corporate determination; the total amount of wages found owing in the corporate determination was \$3,606.76.
4. In the Determination, the Director found Mr. Ramos was a director and officer of DBD at the time Mr. Gazo’s and Mr. Wilson’s wages were earned or should have been paid and under section 96 was personally liable to pay wages in the amount of \$3,473.60 plus interest in the amount of \$149.16 and administrative penalties in the amount of \$1,000.00.
5. An appeal of the Determination was filed by Mr. Ramos alleging the Director failed to observe principles of natural justice and asserting that evidence had become available that was not available when the Determination was being made.
6. The Tribunal Member making the original decision found the appeal of the Determination was identical to an appeal made by DBD of the corporate determination and did not address any of the issues to which a person challenging a determination issued under section 96 of the *Act* is limited to arguing: 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 Tribunal Member also found the Director had not erred in making Mr. Ramos personally liable for the administrative penalties imposed on DBD in the corporate determination.
7. The Tribunal Member dismissed the appeal under section 114 of the *Act*.
8. The statutory period for filing an application for reconsideration expired on September 15, 2016. On September 20, 2016, the Tribunal received a request from Mr. Ramos for a two-week extension of the reconsideration time period, citing his lack of experience and a need to get legal counsel. This application was received by the Tribunal on September 30, 2016.

ISSUE

9. 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

10. The arguments made by Mr. Ramos in this application reiterate the arguments made by him in the appeal of the Determination and made by DBD in the appeal of the corporate determination with some additional comments relating to the reasons for dismissing the appeal of the corporate determination.
11. Nothing in the arguments addresses the correctness of the original decision or the basis upon which the original decision was made.

ANALYSIS

12. I commence my analysis of this application with a review of the statutory provisions and policy considerations that attend an application for reconsideration generally.
13. Section 116 of the *Act* reads:
- 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 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.
14. 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.

15. In deciding whether to reconsider, the Tribunal considers timeliness and such factors as the nature of the issue and its importance both to the parties and the system generally. Delay in filing for reconsideration will 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.
16. 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 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.
17. 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.
18. 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.
19. I find this application does not warrant reconsideration.
20. The application has been filed outside of the time period allowed for making reconsideration applications. No satisfactory reason has been given for the delay or the need for an extension of time. When Mr. Ramos speaks of a lack of experience in matters arising under the *Act*, he is doing no more than stating the circumstances of the vast majority of persons involved in proceedings under the *Act*, almost all of which manage to meet statutory deadlines. Inexperience with the processes of the *Act* is not an acceptable basis for missing time limits or granting an extension of those time limits.
21. In any event, this application does not show any error in the original decision. It does not address the legal basis for the original decision; the focus of the application is a continuing disagreement with the corporate determination and the Tribunal’s decision on the appeal of the corporate determination.
22. 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

23. Pursuant to section 116 of the *Act*, the original decision, BC EST # D106/16, is confirmed.

David B. Stevenson
Member
Employment Standards Tribunal