

An application for Reconsideration

- by -

Karl Heinz Gieseler operating as Straight Edge Drywall

- 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: Ian Lawson

FILE No.: 2005A/134

DATE OF DECISION: September 28, 2005

DECISION

SUBMISSIONS

Karl-Heinze Gieseler	on his own behalf
Mary Walsh	on behalf of the Director of Employment Standards

OVERVIEW

1. On April 8, 2005, a Determination was issued by Mary Walsh, a delegate of the Director, against Karl-Heinz Gieseler operating as Straight Edge Drywall and René Gieseler in the amount of \$116.39, on account of wages and interest owing to former employee Nabbimba Samson (“Samson”). An administrative penalty of \$500.00 was imposed for the partnership’s contravention of section 18 of the *Act*. Karl-Heinz Gieseler appealed from this Determination, and on July 13, 2005, Member Westphal dismissed the appeal. Karl-Heinz Gieseler now requests a Reconsideration of the latter decision, pursuant to section 116 of the *Act*. The request was filed on July 26, 2005, and it is now decided on the basis of written submissions and all the material before the Tribunal, including the record of proceedings

FACTS

2. Karl-Heinz Gieseler and René Gieseler operated Straight Edge Drywall as a partnership, engaged in the construction business. On November 13, 2003, René Gieseler hired Samson to perform labour at a jobsite the next day. Samson worked 10 hours, at \$10.00 per hour, but was never paid. After Samson filed a complaint under the *Act*, and after correspondence passed between the delegate and the partnership in 2004, the delegate conducted a complaint hearing on December 9, 2004. Although the partnership was properly served with the Notice of Complaint Hearing, no one but Samson appeared for the hearing. The only communication received by the delegate from Straight Edge Drywall was a letter from René Gieseler dated January 6, 2004, in which René Gieseler is identified as “Projects Manager, Straight Edge Drywall,” stating Samson had only worked 4 hours and had been paid in cash, in advance. It does not appear to be disputed that Samson dealt only with René Gieseler, and had no dealings at all with Karl-Heinz Gieseler. The delegate proceeded with the hearing and concluded Samson had worked the hours he reported, and a Determination was issued against the partnership.
3. Karl-Heinz Gieseler filed an appeal from that Determination, alleging the director erred in law and failed to observe the principles of natural justice in making the Determination. He argued that he was not involved in the operation of Straight Edge Drywall at the time Samson was hired, and had not been involved with that business for more than a year. As Member Westphal noted, the delegate had conducted a search of the Corporate Registry on August 26, 2004, and had found that Straight Edge Drywall continued to be operated as a partnership between René Gieseler and Karl-Heinz Gieseler. Member Westphal referred to section 7 of the *Partnership*

Act, R.S.B.C. 1996, c. 348, which provides that the acts of one partner bind the firm and other partners, unless the first partner had no authority to act for the firm and the person with whom that partner was dealing knew of his or her lack of authority. The Member then stated:

Whether the Appellant is jointly liable with René Gieseler for the Respondent's unpaid wages and for the administrative penalty (which, under s. 98(4) of the *Act*, is a debt due to the government), depends on whether the Appellant was a partner of René Gieseler in Straight Edge Drywall when the Respondent worked for René Gieseler.

Although the Appellant has stated that the partnership with René Gieseler in Straight Edge Drywall has been dissolved, he has not stated precisely when the partnership ended or, in particular, whether it was dissolved before the Respondent performed his day of work for Straight Edge Drywall. Even if the partnership had been dissolved before that date, the Appellant chose not to avail himself of the opportunity to attend the complaint hearing and present evidence to this effect to the Delegate. Since the Appellant had notice of the complaint hearing, it was not a breach of natural justice for the Delegate to proceed with the hearing in his absence. Nor was it an error of law for the Delegate to rely, in the absence of any evidence to the contrary, on the Corporate Registry search that indicated that the Appellant was a partner of René Gieseler in Straight Edge Drywall, and to issue the Determination against both the Appellant and René Gieseler.

4. Karl-Heinz Gieseler's appeal was therefore dismissed.

SUBMISSIONS

5. Karl-Heinz Gieseler submits the partnership was dissolved on April 30, 2004, and attaches a copy of a Dissolution or Change of Partnership or Proprietorship Registration form filed in the Corporate Registry on November 9, 2004. Karl-Heinz Gieseler states that all correspondence respecting the partnership went to René Gieseler after April 30, 2004, and he is not aware whether René Gieseler had new partners after that date. He submits he was not aware of Samson's complaint, and argues the delegate did not make a reasonable effort to settle the Determination directly with René Gieseler. He points out that he has continued to receive correspondence from the Tribunal addressed to the partnership, when the partnership no longer exists (he reports he does not open this correspondence).
6. The Director submits that even if the partnership was dissolved on April 30, 2004, Karl-Heinz Gieseler was a partner at the time Samson's wages were earned and payable, which was November 14, 2003. The Director submits that Karl-Heinz Gieseler "has failed to raise a question of law, fact, principle or procedure which could be deemed so significant to the parties and/or future cases as to warrant a review by the Tribunal."

ISSUE

7. In any request for reconsideration there is a threshold issue whether the Tribunal will exercise its discretion under section 116 of the *Act* to reconsider the original decision.

ANALYSIS OF THE THRESHOLD ISSUE

8. The Tribunal's power to reconsider its decisions is discretionary. A principled approach to the exercise of this discretion has been developed. The rationale for the Tribunal's 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 general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST #D313/98, which can be usefully summarized as follows:
- Any party exercising its right to request the Tribunal to reconsider must first pass the threshold of persuading the Tribunal that it is appropriate to enter upon a reconsideration of the adjudicator's decision. The obligation to satisfy the Tribunal that it ought to embark on a reconsideration may be seen as roughly analogous to the obligation, in some statutory contexts, to obtain leave to appeal before a Tribunal decision may be appealed to the Courts.
 - In recognition of the importance of preserving the finality of adjudicator's decisions, the Tribunal will agree to reconsider those decisions only to the extent that it is first satisfied that one or more of the issues raised in the reconsideration application is important in the context of the *Act*.
 - The Tribunal tends not to be favourably disposed to entering upon a reconsideration where the reconsideration application is untimely, where it asks the panel to re-weigh evidence, and where it seeks what is in essence interlocutory relief.
 - Where the Tribunal agrees to enter upon a reconsideration of a decision, the Tribunal moves, at the second stage, directly to the merits. The standard of review at this stage is the correctness of the decision.
 - Unlike the process for seeking leave to appeal in the Courts, the party requesting the Tribunal to reconsider must address in one submission both the test for reconsideration and the merits of the decision.
9. Upon carefully reading Member Westphal's decision and the Determination on which it is based, and upon considering the reasons Karl-Heinz Gieseler advances, I find without hesitation that the request for reconsideration ought to be denied at the threshold level.
10. Karl-Heinz Gieseler raises no issue that could remotely be described as important in the context of the *Act*. His application is made in a timely way, but it is made in the faint hope I might come to a different conclusion than Member Westphal. That hope amounts to an abuse of the reconsideration power, which must be used with restraint in order to preserve the integrity of the appeal process (*Re Valoroso*, BC EST #RD046/01; *Milan Holdings*, *supra*). An "automatic reconsideration" would delay justice for parties waiting to have their disputes heard (*Re Zoltan T. Kiss*, BC EST #D122/96). Karl-Heinz Gieseler has therefore failed to even come close to

meeting the heavy burden that rests upon him to persuade me that the reconsideration power ought to be exercised in this case and his request is denied.

ORDER

11. Pursuant to section 116 of the *Act*, the request for reconsideration is denied.

Ian Lawson
Member
Employment Standards Tribunal