

An application for Reconsideration

- by -

Nick DiMambro and 518820 B.C. Ltd. operating as DiMambro & Associates
("DiMambro")

- 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.: 2005A/172

DATE OF DECISION: November 17, 2005

DECISION

SUBMISSIONS

Nick DiMambro	on his own behalf and on behalf of 518820 B.C. Ltd.
Stephen Funk	on his own behalf
Theresa Robertson	on behalf of the Director

OVERVIEW

1. Nick DiMambro and 518820 B.C. Ltd. operating as DiMambro & Associates (“DiMambro”) seek reconsideration under Section 116 of the *Employment Standards Act* (the “Act”) of a two decisions of the Tribunal, BC EST #D195/04 and #D130/05. The former was made by the Tribunal on November 15, 2004 and the latter was issued on August 29, 2005. The latter decision was issued as a result of a “referral back” order made in the former decision. Collectively they will be referred to as the “original decisions”.
2. The original decisions considered two appeals of a Determination issued by a delegate of the Director of Employment Standards on May 18, 2004. The Determination found DiMambro had contravened the *Act* in respect of the employment of Stephen Funk (“Funk”) and ordered Dimambro to pay wages to Funk in the amount of \$2,792.73, including interest under Section 88 of the *Act*.
3. In BC EST #D195/04, the Member referred two matters back to the Director for further investigation - the amount of Funk’s unpaid wage entitlement; and Mr. DiMambro’s status personally as an “employer” under the *Act*. Apart from these two matters, the Determination was “confirmed in all other respects”, which included confirming Funk’s status as an employee under the *Act* and rejecting an allegation the Director had failed to comply with principles of natural justice in making the Determination. In BC EST #D130/05, the Member varied the Determination to delete the order to pay against the 518820 B.C. Ltd., confirmed Mr. DiMambro’s status as an “employer” and ordered Mr. DiMambro to pay Funk an amount of \$5,391.76, plus interest under Section 88 of the *Act*.
4. This application was filed with the Tribunal by DiMambro on September 21, 2005. There is no issue concerning the timeliness of the application. The application asks the Tribunal to review the original decision on three grounds:
 1. the Director and the Member erred in finding Funk was an “employee” of DiMambro
 2. the Member erred by not deciding the effect of the restoration of the numbered company; and
 3. the Director failed to comply with principles of natural justice and fairness by supressing information and making unreasonable findings.

ISSUE

5. In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case is appropriate for reconsideration, the substantive issue raised in this application, as it was in the appeal, is whether there were errors made by the Member and the Director on Funk's status under the *Act*, by the Member concerning the relevance of the numbered company and whether the Director failed to comply with principles of natural justice.

ANALYSIS OF THE PRELIMINARY ISSUE

6. The legislature has conferred an express reconsideration power on the Tribunal in Section 116 which provides:

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.*

7. Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. 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 (Reconsideration of BC EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. 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.

8. Consistent with the above considerations, 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.

9. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively “re-weigh” evidence already submitted to the panel which made the original decision (as distinct from tendering new evidence or demonstrating an important finding of fact made without a basis in the evidence) and come to a different conclusion.
10. 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.
11. After review of the original decision, the submissions of the parties and the material on file, I have decided this application does not warrant reconsideration.
12. This application is nothing more than an attempt by DiMambro to re-argue the appeal. It is grounded only in a refusal by DiMambro to accept the following conclusions from the original decisions:
 - (a) that in reaching the conclusion Funk was an employee for the purposes of the *Act*, the delegate reviewed the applicable legal principles and the evidence and made a correct determination based on the evidence (BC EST #D195/04, page 8);
 - (b) that as a result of the delegate’s conclusion that Funk was employed by a proprietorship - Mr. DiMambro operating under the firm name “Nick DiMambro & Associates” - the status of the numbered company (in terms of whether it had been fully restored) was entirely irrelevant (BC EST #D130/05, page 5); and
 - (c) the natural justice allegations were “wholly unsupported by any credible evidence” (BC EST #D195/04, page 7).
13. It is unnecessary to restate or elaborate on the reasoning applied by the Member in reaching the above conclusions. It is sufficient to say those conclusions were adequately supported by the material in the record or, in the case of the natural justice issue, by the absence of material in the record supporting that allegation. The application is denied.

ORDER

14. Pursuant to Section 116 of the *Act*, I order the original decisions be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal