An Application for Reconsideration

- by -

Director of Employment Standards
(the "Director")

- 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

ADJUDICATOR: David B. Stevenson

FILE No.: 2002/110

DATE OF DECISION: May 21, 2002

DECISION

OVERVIEW

The Director of Employment Standards (the "Director") seeks reconsideration under Section 116 of the *Employment Standards Act* (the "*Act*") of a decision of the Tribunal, BC EST #D649/01, dated December 6, 2001 (the "original decision") which considered and decided one issue arising from several Determinations issued by the Director from the bankruptcy of two firms, Lasik Vision Corporation ("Lasik Corp.") and Lasik Vision Canada Inc. ("Lasik Inc.") The Director says the original decision contains serious errors of law in its interpretation of the effect of a declaration under Section 95 of the *Act* and in its interpretation and application of Section 96 of the *Act*. The Director also says the Panel in the original decision committed a jurisdictional error by making decisions on matters not before it and on facts not before it.

While the length of time taken by the Director to file this application for reconsideration is at the limit of what the Tribunal would consider appropriate, I have decided this application should not be denied because of the nearly three month delay in filing it with the Tribunal.

ISSUE

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 issues raised in this application are whether the original Decision contained serious errors of law in its interpretation and application of Sections 95 and 96 of the *Act* and whether, in the circumstances. the original panel committed a jurisdictional error.

ANALYSIS OF THRESHOLD ISSUE

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*
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> *(a) reconsider any order or decision of the tribunal, and*
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> *(b) cancel or vary the order or decision or refer the matter back to the original panel.*
>
> *(2) The director or a person named in a decision or order of the tribunal may make an application under this section.*
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> *(3) An application may be made only once with respect to the same order or decision.*

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 Adjudicator's decision. 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 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.

If the matters warrant reconsideration, the second stage is a full analysis of the substantive issue or issues raised in the application for reconsideration. While the above list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very limited circumstances. The reconsideration process was not meant to allow parties another opportunity to re-argue their case. As stated in *Milan Holdings Ltd*., *supra*:

> It would be both unfair and inefficient if the Tribunal were to allow, in effect, two hearings of each appeal where the appeal hearing becomes nothing more than a discovery process for a reconsideration application.

The Director argues that the circumstances justifying a reconsideration of the original Decision can be based on a serious mistake of law in the decision and its inconsistency with other decisions of the Tribunal.

I am not satisfied there is any matter that warrants reconsideration.

I will first deal with the argument that the Panel of the original Decision exceeded its jurisdiction. As I read the original Decision, no final conclusion has been made on the correctness of the Section 95 Determination. The original Decision addressed only whether such a Determination was precluded by provisions in the *Bankruptcy and Insolvency Act*. The conclusion of the Panel on that issue says the Director was not precluded from associating those entities under Section 95, notwithstanding two of them were in bankruptcy proceedings, or from issuing a Determination against one of the entities forming part of the association. The original Decision also specifically contemplates future consideration of other arguments raised by one of the appellants on the correctness of the Section 95 Decision:

> ICON submits that the section 95 Determination ought to be cancelled or varied on other grounds, however, I am not addressing those arguments at this time.

Any suggestion that the Director has not received a fair hearing or has been prejudiced by the Decision is premature. If the Director has a concern that some incorrect factual presumptions may have crept into the original Decision, that concern can, and should, be addressed when the hearing resumes and not in an application for reconsideration.

The above also disposes of a substantial part of the argument on Section 95. I do not read the original Decision as having disposed of the Section 95 Determination on the merits nor do I read the original Decision as reaching conclusions that were not contemplated by the Order made following the prehearing conference. The Order, which is reproduced in the original Decision, says the Panel would "*issue written reasons for decision regarding the application of sections 95 and 96 in this matter*".

The key point in the argument on the interpretive issue arising is that a Determination associating 'corporations' under Section 95 encompasses the 'whole' of a corporation, including the directors of that corporation. The implication is that a Determination associating corporations also associates all of their directors as parts of the resulting statutory 'person'. That cannot be so. If it were, why would Section 96, at least so far as it includes a 'person who was a director . . . of a corporation . . .', be necessary? Also, it would make the limitation of liability on a director of a corporation illusory. If the legislature intended that a Section 95 Determination associating corporations could catch all 'directors' of those corporations, then those individuals, like all other entities included in a Section 95 determination, would be jointly and separately liable for the entire amount of wages owed, without limitation. There is no merit to such an assertion and no support in the legislation. Nor do I find support for the suggestion that all persons associated under Section 95 ought to be considered 'employers' under the *Act* once the association is made. The liability of persons associated under Section 95 arises because of the association - the *Act* does not categorize them, they are identified simply as "one person for the purposes of this *Act*" once the associated Determination is made. The association itself is not identified in any other terms. The Director notes the definition of employer includes a person "who is or was responsible, directly, or indirectly, for the employment of the employee". That point is commented on in the original Decision:

> . . . if the associated firm is an "employer", there is no need for a Section 95 declaration - - liability for unpaid wages can be imposed directly without having to resort to section 95.

An association can be comprised of several different entities - corporations, individuals, firms, syndicates and associations, any combination of them. The association is no more than a statutory fiction - one person comprised of several parts - designed to help ensure the payment of wages owed under the *Act*. I note the original decision does not preclude associating individual directors or officers under Section 95 if the relevant criteria are present.

I am not persuaded there is any error of law in the interpretation and application of Section 96, nor do I agree that the original Decision is inconsistent with any prior decisions of the Tribunal. Counsel for the Director has not provided a single decision where the Tribunal has considered the liability under Section 96 of directors or officers of corporate entities associated under Section 95 with the defaulting employer. For reference, Section 96 states:

> 96. (1) A person who was a director or officer of a corporation at the time wages of an employee of the corporation were earned or should have been paid is personally liable for up to 2 months' unpaid wages for each employee.
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> (2) Despite subsection (1), a person who was a director or officer of a corporation is not personally liable for
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> (a) any liability to an employee under section 63, termination pay or money payable under a collective agreement in respect of individual or group terminations, if the corporation is in receivership or is subject to action under section 427 of the Bank Act (Canada) or to a proceeding under an insolvency Act,
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> (b) vacation pay that becomes payable after the director or officer ceases to hold office, or

> (c) money that remains in an employee's time bank after the director or officer ceases to hold office.
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> (2.1) If a corporation that is a talent agency has received wages from an employer on behalf of an employee and fails to pay those wages, less any fees allowed under the regulations, to the employee within the time required under the regulations,
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> (a) a person who was a director or officer of the corporation at the time the wages were received is personally liable for the amount received by the corporation from the employer, less any fees allowed under the regulations, and
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> (b) that amount is considered for the purposes of subsection (3) to be unpaid wages.
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> (3) This Act applies to the recovery of the unpaid wages from a person liable for them under subsection (1) or (2.1).

Counsel for the Director argues the Panel of original Decision erred in law by not giving a 'broad and liberal' interpretation to the provisions of Section 96. I have no disagreement with the general proposition that a broad and generous interpretation of the *Act* is justified in light of its being remedial legislation. There is, however, no rule of law that states the *Act* must be given a broad and liberal interpretation, without regard for the language or the *Act* as a whole. It is no more than a principle of statutory interpretation applicable to remedial statutes such as the *Act*. The actual statement confirming the proper approach is found in the following comment from the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. In some cases the broad and liberal approach must give way to the plain meaning of the language.

As in any principle of statutory interpretation, and consistent with the above statement, the starting point is the words of the statute. They cannot be avoided or ignored; any resulting interpretation must give effect to the grammatical and ordinary sense of the words used. In *Douglas Mattson and the Director of Employment Standards*, BC EST # RD647/01, the Tribunal stated:

> Principles of statutory interpretation are not licence for a Court or Tribunal to ignore the plain meaning of the words of a statute and substitute its view of the legislative intent based solely on that body's judgment about what is 'fair', 'logical' or 'rational', or what 'should be'. In *Office and Professional Employees' International Union, Local 378 -and- British Columbia (Labour Relations Board)*, [2000] B.C.J. No. 1225; [2000] BCSC 939, the Court said, at para. 24:
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> > However, the permitted ambit of interpretation is not infinite. The Board may not under the guise of interpretation substitute its own policy judgment for that of the Legislature. As the Court of Appeal, in a slightly different context, has stated:
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> > The fact that the Council and the arbitrator have special expertise with respect to the field of industrial relations does not give them the power to usurp the legislative function. (cf. BCGEU v. British Columbia (Industrial Relations Council) (1988), 33 B.C.L.R. (2d) 1 at 23 (B.C.C.A.)).
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> . . . In Biller v. British Columbia (Securities Commission), [2001] B.C.J. 515; [2001] BCCA 208, our Court of Appeal stated:

> The first step in statutory interpretation is to determine if there is a plain meaning of the statutory provision in question. This determination must be made after consideration of the statute as a whole.

I agree with the statement in the original Decision that the liability imposed on officers and directors under Section 96(1) is predicated on the existence of an employment relationship between the individual claiming under the *Act* and the corporation of which the 'person' being referred to was a director or officer. I do not agree that the interpretive approach in the original Decision constitutes an error of law. Rather, I find it constitutes a 'grammatical and ordinary sense' reading of the words used in Sections 95 and 96. There is nothing inconsistent with the *Act* in the approach taken in the original Decision. The original Decision legitimately questions why individuals who were neither formally designated nor actually functioning as directors and officers of the employer should be held personally liable for wages owing. The objective of the *Act* is not simply to make anybody responsible for wages owing to employees, but to make the employer responsible for paying those wages. Section 96 is consistent with that objective to the extent it makes those persons (directors and officers) who have responsibility for the business affairs of a corporation and some ability to control those affairs responsible for its liability to its employees. It seems unfair, as well as being inconsistent with that objective, to impose such a liability on persons who have no ability or opportunity to limit or control the wage liability of another corporation. Counsel for the Director has not provided any support for an interpretation of Section 96 that would require complete strangers to the employment relationship to be responsible for wages owing under the *Act*. That result does not occur in any other provision of the legislation.

It is apparent that the Director disagrees with the interpretation placed on Section 96 in the original Decision, but mere disagreement with the interpretation given in the original decision does not of itself constitute an error in law. Before concluding there was any error in law, I would need to be convinced first, that the legislature intended all the component parts of 'the person' created by an associated determination are also 'employers' for all purposes of the *Act*; second, that the legislature intended the term 'person' in Section 95 and the term 'corporation' in subsection 96(1) are synonymous; and third, that the legislature intended the 'corporation' referred to in subsection 96(1) to be inclusive of all corporations associated under Section 95.

The application is denied.

ORDER

Pursuant to Section 116 of the *Act*, I order the original decision, BC EST # D649/01, be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal