

An Application for Reconsideration

- by -

Delta Enterprises Ltd.  
("Delta Enterprises")

- 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:** Kenneth Wm. Thornicroft

**FILE No.:** 2003/029

**DATE OF DECISION:** June 27, 2003

## DECISION

### INTRODUCTION

This is an application filed by Delta Enterprises Ltd. (“Delta Enterprises”) pursuant to section 116 of the *Employment Standards Act* (the “Act”) for reconsideration of an adjudicator’s decision issued on March 4th, 2003 (BC EST # D074/03). By way of this latter decision, the adjudicator confirmed a determination that was issued by a delegate of the Director of Employment Standards on November 28th, 2002 (the “Determination”). Pursuant to the Determination, Delta Enterprises’ former employee, Harcharan S. Gill (“Gill”), was awarded \$27,558.39 on account of unpaid wages and section 88 interest.

### THE REQUEST FOR RECONSIDERATION

Delta Enterprises’ request for reconsideration was filed with the Tribunal on May 6th, 2003. Although this section 116 application is timely it is not, in my view, a meritorious application.

Delta Enterprises, through its legal counsel, submits that the adjudicator’s decision should be cancelled or, alternatively, that “the matter be referred back to the adjudicator for further consideration”. The application is predicated on the following grounds:

- “Significant new evidence has been obtained which affects the reliability of the records which the employee provided to the Delegate and which records were relied upon by the Delegate in substantiating the employee’s claim for wages and overtime”;
- The appeal was adjudicated on the basis of the parties’ written submissions and that procedure, in this case, amounted to a denial of natural justice. Delta Enterprises says that there should have been an oral appeal hearing in this case.

In its May 6th, 2003 submission (attached to the Application for Reconsideration Form), counsel for Delta Enterprises also advances some other arguments, none of which has any merit. First, counsel says that Gill’s complaint should have been filed while he was still employed by Delta Enterprises. Section 74(3) is a complete answer to this assertion and, as detailed in the Determination, Gill’s complaint was timely.

Second, counsel says that Delta Enterprises ought not to be “penalized for its lack of knowledge or failure to consult a lawyer in dealing with this matter”. Although a \$0 penalty was assessed against Delta Enterprises under section 98 of the *Act*, this penalty was not appealed to the Tribunal. Accordingly, this issue cannot now be raised by way of an application under section 116. Further, and in any event, whether Delta Enterprises was, or was not, knowledgeable about its obligations under the *Act* is not relevant since monetary penalties under section 98 of the *Act* are not *mens rea* offences--offences are provided for in section 125 of the *Act* but, so far as I can determine, Delta Enterprises was never charged with an offence under section 125 of the *Act*.

Thirdly, counsel challenges certain findings of fact that were made in these proceedings, however, each of these findings was supported by a proper evidentiary foundation and, accordingly, are binding on me for purposes of this application.

## ANALYSIS

The Tribunal has issued several decisions regarding the permissible scope of review under section 116 of the *Act* (the “reconsideration” provision). In essence, the Tribunal has consistently held that applications for reconsideration should succeed only when there has been a demonstrable breach of the rules of natural justice, or where there is compelling new evidence that was not available at the time of the appeal hearing, or where the adjudicator has made a fundamental error of law. The reconsideration provision of the *Act* is not to be used as a second opportunity to challenge findings of fact made by the adjudicator, unless such findings can be characterized as lacking any evidentiary foundation whatsoever. With the foregoing comments in mind, I now turn to the two principal grounds upon which this application is founded.

### *New Evidence*

The applicant’s “new evidence”, in the main, consists of various “daily logs” that Delta Enterprises now has discovered. There is no suggestion that these logs were not available when the delegate was conducting his investigation or when the appeal was pending. These records could have--and should have--been provided to the delegate. At the very least, these records should have been submitted to the Tribunal as part of the appeal process and, even in that event, this evidence might have been ruled inadmissible under the *Kaiser Stables/Tri-West Tractor* doctrine (see, respectively, BC EST # D058/97 and BC EST # D268/96).

If Delta Enterprises believed that this evidence was relevant to the issues in dispute, it should have tendered this evidence at a much earlier stage in these proceedings--see *Steelhead Business Products Ltd.*, BC EST # D237/97.

As a final comment, I note that this new evidence does not appear to have anywhere near the probative value that counsel ascribes to it and does not substantiate the assertion (which was also addressed in the adjudicator’s reasons for decision) that Mr. Gill was exempted from the overtime provisions of the *Act* by reason of section 37.3 of the *Employment Standards Regulation*.

### *Breach of the Rules of Natural Justice*

In its appeal form, Delta Enterprises requested an oral hearing “so that we can clarify the matter to the fullest extent”. Delta Enterprises did not provide any further submissions as to why, in its view, an oral hearing was necessary. It may be that Delta Enterprises, due to the fact that it did not retain legal counsel for purposes of the appeal, did not “put its best case forward”. However, that fact, of itself, is not a sufficient basis for granting a reconsideration request--*Super Cat International Enterprises Ltd.*, BC EST # D483/98.

Counsel says that Delta Enterprises “believed that there would be a formal hearing where evidence would be presented before a Tribunal”. However, this assertion stands in marked contrast to the Tribunal Vice-Chair’s letter to Delta Enterprises, dated February 25th, 2003, in which she advised the parties that the appeal would be adjudicated based solely on the parties’ written submissions. In an earlier letter to Delta Enterprises, dated January 9th, 2003, the Vice-Chair also indicated that the appeal might be adjudicated solely on the basis of written submissions. Delta Enterprises did not make any submission--other than the brief statement contained in its appeal form--as to why it believed an oral hearing was necessary. Clearly,

Delta Enterprises could not have reasonably laboured under any misconception that an oral appeal hearing was going to be held in this matter.

Section 107 of the *Act* specifically states that the Tribunal is not required to hold an oral appeal hearing and, indeed, most appeals are not adjudicated by way of an oral hearing (see, generally, *D. Hall & Associates v. Director of Employment Standards et al.*, 2001 BCSC 575). In this case, and despite being expressly advised that there would not be an oral hearing, Delta Enterprises failed to provide sufficient evidence to support its grounds of appeal. An oral hearing will usually be held where, based on the written submissions of the parties, there is a genuine issue that cannot be properly adjudicated without the benefit of *viva voce* evidence. However, when the appellant's material does not, on its face, raise a justiciable case, I fail to see why the Tribunal should put the parties to the additional expense and further delay of an oral hearing--such a decision would appear to run counter to the purposes of the *Act* and, in particular, subsections 2(b) and (d).

## **ORDER**

The application to cancel the decision of the adjudicator or, alternatively, to remit the matter back to the original adjudicator, is refused.

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**Kenneth Wm. Thornicroft**  
**Adjudicator**  
**Employment Standards Tribunal**