

An Application for Reconsideration

- by -

Shiming S. Yuan  
("Yuan" or "employee")

- 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:** Paul E. Love

**FILE No.:** 2001/084

**DATE OF DECISION:** May 16, 2001

## DECISION

### OVERVIEW

This is an application for reconsideration, made by Shiming S. Yuan of a decision of the Employment Standards Tribunal (“Tribunal”) dated October 12, 2000 ( the “original decision”). Mr. Yuan’s complaint regarding overtime and regular wages was settled by the parties on February 8, 2000. Despite complaints about the settlement and involvement from the office of Mr. Yuan’s member of the legislative assembly, Mr. Yuan signed further settlement documents and picked up a cheque for settlement funds. The Delegate issued a Determination where she found no duress or coercion and ceased to investigate the complaint. Upon appeal, the Determination was confirmed and the Adjudicator found, after an oral hearing that there was no duress and coercion. Mr Yuan applied for a reconsideration of that decision. In my view, the application for reconsideration fails as Mr. Yuan sought primarily to have this panel re-weigh the evidence before the Delegate and the Adjudicator. There was no serious issue raised that the discretion exercised by the Delegate in refusing to continue the investigation was unreasonable.

### ISSUES TO BE DECIDED

As a threshold issue, is this a proper case for the exercise of the Tribunal’s discretion to reconsider under s. 116 of the *Act*?

### FACTS

I note that the reconsideration application was filed January 25, 2001, however, the Director has not taken an objection to the timeliness of the application.

This reconsideration application is decided upon written submissions of the employer, and counsel for the Director of Employment Standards.

Mr. Yuan worked for North Vancouver Export -Import Trade of Canada Limited & Super Chestnuts Inc. (“Super Chestnuts”) as a technician making the chestnut roaster and helping to establish the business. He lived with Guo Qiang Hong, the principal of Super Chestnuts, between May 1998 and November of 1998. He invested \$12,000 in Super Chestnuts, and became a director.

Mr. Yuan complained to the Employment Standards Branch that he was owed overtime and regular wages. As a result of the complaint, an initial investigation was conducted. The Delegate, based on the information provided by Mr. Yuan sent a letter to Super Chestnuts suggesting that the employer pay some money or provide information. The employer forwarded information suggesting that Mr. Yuan was not an employee but a partner and

minority shareholder in Super Chestnuts. The investigation was turned over to another Delegate. On February 8, 2000 a fact finding meeting and settlement conference was held, and Mr. Hong, Mr. Yuan, the Delegate and another officer, Michael Fu, attended as interpreter. This meeting resulted in a settlement in the amount of \$1,200, of Mr. Yuan's claim in the amount of \$8,000. There was a brief hand-written settlement agreement signed by the parties. Mr. Yuan was unhappy with the settlement. He contacted his local Member of the Legislative Assembly (Ms. Sawicki) and a representative from the MLA's office called the Delegate communicating to the Delegate the view that Mr. Yuan had been coerced into accepting a settlement. The Delegate indicated that since Mr. Yuan's cheque had not arrived yet, she would contact Mr. Hong, and let him know that Mr. Yuan changed his mind and issue a determination. There was more contact between the MLA's office and the Delegate over the course of a week. Mr. Yuan picked up the cheque and signed a receipt of payment and termination of complaint form on February 16, 2000. He took this action more than one week after the meeting.

The Delegate issued a Determination which found that Mr. Yuan was given an opportunity to accept or reject the settlement agreement, and that he voluntarily signed the documents. The Delegate found that the Director had authority to assist in settling a complaint, and found no violation of section 78(1)(2)(3) of the *Act*. The Delegate exercised her discretion to cease investigating the file. The Delegate did not issue a Determination on the merits of Mr. Yuan's complaint.

I note that much of the appeal submission made by Mr. Yuan deals with the merits of his complaint. The issue, however, before the Delegate was whether Mr. Yuan settled his complaint. The issues before the Adjudicator were:

1. Was Yuan coerced or intimidated into signing the settlement agreement;
2. Was the Act misinterpreted or misrepresented to Yuan by the investigator;
3. Whether the agreement is based on an incorrect interpretation of the Act and were the requirements of the Act waived for the employer.

Yuan sought to have the Adjudicator "finalize a previous case officer's preliminary decision to order the employer to pay \$8,544.67 of wages owing to him". Mr. Yuan was advised by the Adjudicator that the Adjudicator would uphold the Determination or set it aside, and remit the matter to the Delegate for a Determination. The Adjudicator determined that the November 10, 1999 letter referred to by Mr. Yuan was not a decision or a determination.

In his request for reconsideration dated January 25, 2001, Mr. Yuan's grounds for reconsideration are:

1. Important new evidence that showed that an officer defined him as an employee at an earlier time, but had given a different definition at the time of the settlement meeting.

2. Mistakes in stating the facts.
3. Mistake in applying the law with regard to whether Mr. Yuan was an employee.

Counsel for the Director submitted that it is clear that no earlier officer issued any Determination awarding Mr. Yuan wages. The issue in the Determination was whether Mr. Yuan should be bound by his settlement agreement. Counsel argues that the adjudicator did not err in finding that Mr. Yuan was aware of his rights to refuse the offer and appeal a determination. Counsel says that Mr. Yuan was not misled that the fundamental aspect of the settlement agreement was that it would settle and terminate his claim under the Act.

The Adjudicator found that Mr. Yuan disputed little of the evidence of the Delegate concerning settlement discussions. In the Decision the Adjudicator reviewed in detail (at pages 4 to 6) the evidence surrounding the settlement discussions of the parties. The Delegate's version of the settlement discussions was corroborated by Mr. Hong. The Adjudicator found that while Mr. Yuan may have felt pressured to sign off on the settlement agreement given Ms. Hallam's assessment of the case, Mr. Yuan was aware at all times of his right to refuse to settle and to have the matter go to a Determination. Mr. Yuan also had a cooling off period, and the assistance of his MLA. I note that the evidence before the Adjudicator also consisted of evidence from the Delegate that Mr. Yuan, had in his past dealings with Mr. Hong, sought further monies after issues had been settled between them.

## ANALYSIS

In an application for reconsideration, the burden rests with the appellant, in this case the employee to show that this is a proper case for reconsideration, and that the adjudicator erred such that I should vary, cancel or affirm the Decision. An application for reconsideration of a Tribunal's decision involves a two stage analysis, as set out in *Milan Holdings Ltd.*, BC EST # D186/97:

At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration: Re British Columbia (Director of Employment Standards), BCEST #D122/98. In deciding this question, the Tribunal will consider and weigh a number of factors. For example, the following factors have been held to weigh against a reconsideration:

- (a) Where the application has not been filed in a timely fashion and there is no valid cause for the delay: Re British Columbia (Director of Employment Standards), BCEST #D122/98. In this context, the Tribunal will consider the prejudice to either party in proceeding with or refusing the reconsideration: Re Rescan Environmental

Services Ltd. BC EST #D522/97 (Reconsideration of BCEST # D007/97).

- (b) Where the application's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): Re Image House Inc., BCEST #D075/98 (Reconsideration of BCEST #D418/97); Alexander (c.o.b. Peregrine Consulting) BCEST #D095/98 (Reconsideration of BCEST #D574/97); 323573 BC Ltd. (c.o.b. Saltair Neighbourhood Pub), BC EST #D478/97 (Reconsideration of);
- (c) Where the application arises out of a preliminary ruling made in the course of an appeal. "The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid multiplicity of proceedings, confusion or delay": World Project Management Inc., BCEST # D134/97 (Reconsideration of BCEST #D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.

The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": Zoltan Kiss, supra. As noted in previous decisions,

"The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons": Khalsa Diwan Society (BCEST #D199/96, reconsideration of BCEST #D114/96).

After weighing these and other factors relevant to the matter before it, the Panel may determine that the application is not appropriate for reconsideration. If so, it will typically give reasons for its decision

not to reconsider the adjudicator's decision. Should the Panel determine that one or more of the issues raised in the application is appropriate for reconsideration, the Panel will then review the matter and make a decision. The focus of the reconsideration panel "on the merits" will in general be with the correctness of the decision being reconsidered.

The very point of reconsideration being to provide a forum for sober reflection regarding questions which are considered sufficiently important to warrant such review, we consider it sensible to conclude that questions deemed worthy of reconsideration - particularly questions of law - should be reviewed for correctness.

The reconsideration power is one to be exercised with caution. A non-exhaustive list of grounds for reconsideration include:

- (a) a failure by the adjudicator to comply with the principles of natural justice;
- (b) a mistake of fact;
- (c) inconsistency with other decisions which cannot be distinguished;
- (d) significant and serious new evidence that has become available and that would have lead the adjudicator to a different decision;
- (e) misunderstanding or failing to deal with an issue;
- (f) clerical error.

I note that is substance this is an application for reconsideration of a decision which reviewed the discretion of the Delegate to cease an investigation. In section 76(2)(g) of the *Act*, the director has a discretion to refuse to investigate or may stop an investigation where the dispute that caused the complaint is resolved. The test for the review of an exercise of discretion is set out in *Jody L. Goudreau and another, BC EST # D066/98*:

The Tribunal will not interfere with the exercise of discretion unless it can be shown that the exercise was an abuse of power, the Director made a mistake in construing the limits of her authority, there was a procedural irregularity or the decision was unreasonable. Unreasonable, in this context, has been described as being:

... a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to

consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably”. *Associated Picture Houses v. Wednesbury Corp.* [1948] 1 K.B. 223 at 229. Absent any of these considerations, the director even has the right to be wrong.

Section 81 of the Act requires the Director to include, in a determination, the reasons for it. When assessing an argument that the Director has considered immaterial factors or failed to consider material factors, the Tribunal will confine itself to an examination of the relevant determination.

In *Takarabe and others*, BCEST # D160/98, the Tribunal added the following comment:

In *Boulis v. Minister of Manpower and Immigration* (1972), 26 D.L.R. (3d) 216 (S.C.C.) the Supreme Court of Canada decided that statutory discretion must be exercised within “well established legal principles”. In other words, the Director must exercise her discretion for bona fide reasons, must not be arbitrary and must not base her decision on irrelevant considerations.

I note that the Decision does not comment on the test to be applied when reviewing a discretion exercised by the Delegate under the Act. In my view the test is one of unreasonableness. In applying the test to this case the question before the Adjudicator was whether it was unreasonable for the Delegate to conclude that the parties had reached a settlement without duress, or coercion, and without misrepresentation? It is clear that the Adjudicator did not approach the appeal as a review of the discretion of the Director in ceasing to investigate a complaint. In my view, the Adjudicator applied a correctness test, and came to the conclusion that the Delegate correctly concluded that a settlement was reached without coercion and without a mistaken interpretation of the Act. I cannot but conclude that the “correct exercise of discretion” is also a reasonable exercise of discretion.

In my view it is apparent that Mr. Yuan wishes me to re-weigh the evidence that was before the Adjudicator, and come to a different conclusion. The issues which he raises on reconsideration are somewhat irrelevant to the issue of whether the Delegate determined that a settlement was reached, and whether that discretion to cease investigating was exercised in a reasonable manner. The issues raised by the appellant are somewhat irrelevant to the issue of duress or misrepresentation. I note that the issues before the Adjudicator consisted of whether a settlement agreement reached should be set aside on the basis of duress or misrepresentation. The Adjudicator conducted an oral hearing and heard from Mr. Yuan, the principal of the business, Mr. Wong, and the Delegate. The Adjudicator was not persuaded

by Mr. Yuan. The adjudicator applied the appropriate law in reviewing the issues of duress and misrepresentation.

In my view this is not an appropriate case for reconsideration, as the appellant seeks me to re-weigh the evidence before the Adjudicator and Delegate and I dismiss this application for reconsideration on the first branch of the Milan Holdings Ltd. test.

**ORDER**

Pursuant to section 116 of the Act, I order that the Tribunal Decision Number BC EST # D414/00 dated October 12, 2000 be confirmed.

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**Paul E. Love**  
**Adjudicator**  
**Employment Standards Tribunal**