An Application for Reconsideration

- by -

Charles Bruce Wood, a Director or Officer of Orion Truck Centre Ltd.
("Wood")

- 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.: 2002/358

DATE OF DECISION: September 25, 2002

DECISION

OVERVIEW

Charles Bruce Wood, a Director or Officer of Orion Truck Centre Ltd. ("Wood") seeks reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision of the Tribunal, BC EST #D192/02 (the "original decision"), dated May 15. 2002. The original decision considered an appeal of a Determination issued on February 7, 2002.

In the application, Wood raises four issues.:

1. The Director erred in failing to issue and file a Determination against other directors and/or officers of the company. This issue was argued and addressed in the original decision.
2. The Adjudicator of the original decision took a wrong view of his jurisdiction under Section 113 of the *Act*.
3. The line of authority developed by the Tribunal that precludes a director or officer of a corporation from challenging a corporate Determination which was not appealed is wrong.
4. The original decision contains an error of law in the manner Section 96 of the *Act* was interpreted and applied to the circumstances. Central to this issue is the effect of the recent amendments to Section 96 of the *Act*, which, in part, excuse a director or officer of a corporation which is subject to an action under Section 427 of the *Bank Act (Canada)* or to a proceeding under an insolvency act from any liability for wages.

This application for reconsideration has been filed in a timely way.

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 is whether the original decision was correct in the application of Section 97 of the *Act*.

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 be 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 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.

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.

I do not find any of the issues or related arguments raised by Wood sufficient to meet the threshold test established by the Tribunal to warrant the exercise of discretion to reconsider decisions.

ARGUMENT AND ANALYSIS

A reconsideration is not simply another opportunity to re-argue the appeal, hoping the reconsideration panel will have a different opinion than the Adjudicator of the original decision. It is not enough for an applicant to simply state there was an error, rather, an applicant must show the existence of an error through a reasoned analysis of the facts and applicable legislative provisions.

The first two issues raised by Wood do no more than seek to have the reconsideration panel second guess the conclusions reached in the original decision, with no additional reasons or argument provided for doing so and without showing any demonstrable error. The decision on the first issue is soundly based in the provisions of the *Act*. The Adjudicator of the original decision was correct in his conclusion that the *Act* does not require that the director/officer liability must be shared. There is nothing in the *Act* that would support the argument that director/officer liability must be shared.

On the second issue, it is relevant to note exactly what was being requested by Wood and what the response in the original decision was:

> . . . Mr. wood argues that the Determination be suspended pending the liquidation of the assets of the bankrupt Employer. He relies on Section 113. . . .
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> First, I am not convinced that I have the jurisdiction to do as Mr. Wood suggests. My jurisdiction is the *Act*. The main purpose of Section 113, as I see it, is to grant relief from a Determination pending the outcome of appeal proceedings to the Tribunal. *Second, even if I had jurisdiction I would deny the request*. . . . In result, I will not exercise my discretion to grant the suspension.
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> (emphasis added)

In effect, this aspect of the application represents no more than a request that the reconsideration panel override a discretionary decision the Adjudicator in the original decision, without providing any reason for doing so.

On the third issue, I am not inclined to revisit the Tribunal's decisions limiting a director or officer from challenging a corporate determination. On the other hand, the Tribunal has recognized that the rationale for those decisions is questionable in the case of Determination issued against a bankrupt company. In *Theodore (Ted) W Myrah, a Director or Officer of No. 289 Taurus Ventures Ltd.*, BC EST #D265/01, the Tribunal stated:

> The Tribunal, as well as the courts, have taken the view that a director or officer of a company is, for the purposes of applying the doctrine of issue estoppel, a privy of the company. The rationale for taking that approach has largely been justified by finding the director or officer to be a controlling or operating mind of the company. The difference in this case is that Myrah was not a director of three of four of the companies when the corporate Determination was issued, had no control over the management or business of the companies and, as the Director so forcefully pointed out in raising the preliminary objection to Myrah bringing an appeal of the corporate Determination, had no legal authority to conduct an appeal of the corporate Determination. The "party" to the corporate Determination, and the person with authority in respect of it on behalf of the bankrupt companies, was the Trustee in Bankruptcy, not Myrah. The Director argues this matter should be overlooked because Myrah could have sought an assignment of the Trustee in Bankruptcy's right to appeal. That misses the point. If the doctrine of issue estoppel, as applied in previous Tribunal decisions, is to be applied in this case, I must be convinced that Myrah was a party, or was a privy, to the proceeding in which the estoppel is raised.

Notwithstanding there may be some merit to the argument that directors and officers of bankrupt companies should not be denied the opportunity to challenge the amounts found owing in the corporate Determination, Wood did not raise any issue in his appeal of the determination issued against him relating to the correctness of the corporate Determination. His appeal raised only three issues: whether he was personally liable for vacation pay owed to employees; whether the directors liability must be shared equally by all those who were directors during the relevant period of time; and whether the effect of the Determination should be suspended. It was unnecessary for the issue raised in this application to be decided in the context of the grounds of appeal. A reconsideration application is not a process for addressing new grounds of appeal.

On the final issue, the Tribunal has already provided the answer, which I endorse and adopt. In *Stanley D. Ginsburg, a Director or Officer of Express Punching Service Inc. operating as Gold Label Garments,*

the Tribunal decided the amendments to Section 96 of the *Act* did not affect employee rights that had crystallized before May 30, 2002 the date those amendments came into force:

> The amended Act does not contain any transitional provisions that would warrant this by the Tribunal. The meaning of section 96(2) as suggested by the Appellant, would interfere with a right that was already vested as of the date that the amendments came into force. The right was vested in the Employee because a Determination was issued.
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> I note that the issue of the affect of new legislative amendments was dealt with recently by the Tribunal in *Oakcreek Golf and Turf Inc.*, BC EST # RD366/02. This case involved an application for reconsideration on the basis of the new amendments, and the change in the Employer's liability for wages from two years in the former act, to six months in the recent amendments.
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> > I cannot agree that this raises a significant issue for tribunal jurisprudence warranting reconsideration. First, with respect to any retroactive application of the Amendment Act, I note that the complaint, the Determination, and the Decision were all completed within the time frame of the Act prior to Royal Assent to the Amendment Act. In deciding that the Amendment Act has no application in this matter, I am guided by Driedger on the Construction of Statutes (3d ed., Butterworths, 1994):
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> > > "When a court is called on to interpret legislation, it is not engaged in an academic exercise. Interpretation involves the application of legislation to facts in a way that affects the well-being of persons for better or worse. Not surprisingly, the courts are interested in knowing what the consequences will be and judging whether they are acceptable. Consequences judged to be good generally are presumed to be intended and are regarded as part of the legislative purpose. Consequences judged to be unjust or unreasonable are regarded as absurd and are presumed to have been unintended. Where it appears that the consequences of adopting an interpretation would be absurd, the courts are entitled to reject it in favour of a plausible alternative that avoids the absurdity." (p. 79).
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> > In my view it would be absurd for the legislature to have intended to invite applications for reconsideration of all decisions made between proclamation of the Act establishing the 2-year time limit in 1995 and Royal Assent of the Amendment Act in 2002. This remains an act, a purpose of which, as articulated in Section 2 is "To provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act." I find that it would produce an absurd result were I to agree with Oakcreek that the time limit for collecting on wages owed in the new Amendment Act should be a factor in deciding whether to reconsider a claim made under the former time limit.
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> I note that legislation often alters the rights that existed up until the date of the amendment. Here we are talking about rights that existed, and were crystallized in a Determination or an enforceable order before the legislative amendment came into effect. In my view, this legislative amendment is not clear enough to take away these rights of the Employees that existed and were determined on May 27, 2002.
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> I note that Driedger gives a good definition of a "retroactive statute" in Construction of Statutes (2d edition) at p 186:
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> > A retroactive statute is one that operates backwards, that is to say, it is operative as of a time prior to its enactment. It makes the law different from what it was during a period prior to its enactment. A statute is made retroactive in one of two ways: either it is stated that it shall be deemed to have come into force at a time prior to its enactment, or it is expressed to be

> operative with respect to past transactions as of a past time, as, for example, the Act of Indemnity considered in Phillips v. Eyre. A retroactive statute is easy to recognize, because there must be in it a provision that changes the law as of a time prior to its enactment.
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> There is a strong presumption in the interpretation of statutes against giving an enactment a retroactive effect. A legislature can bring into force retroactive legislation, but the intention to give a statute a retroactive effect must be clearly ascertainable from the statutory language. In my view, section 96(2) of the *Act* cannot be given a retroactive effect, because this would require clearer language such as set out above in Driedger.

In the circumstances of this application, both the Determination and the original decision were issued before May 30, 2002. As noted in the above excerpt, a Determination is a legal order which may be enforced as a court order: *cf.* Section 91 of the *Act*. As well, under Section 110 of the *Act*, a decision of the Tribunal is final and binding.

For the above reasons, the application is denied and the original decision is confirmed.

ORDER

Pursuant to Section 116 of the *Act*, I order that the application for reconsideration of Tribunal Decision BC EST #D192/02 be dismissed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal