An Application for Reconsideration

- by -

Coregenesis Systems Inc.
("Coregenesis")

- 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.: 2002/506

DATE OF DECISION: November 13, 2002

DECISION

OVERVIEW

Coregenesis Systems Inc. ("Coregenesis") seeks reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision of the Tribunal, BC EST #D332/02 (the "original decision"), dated July 18, 2002, which confirmed a Determination made on May 3, 2002. Coregenesis says the original decision was based on erroneous evidence. Coregenesis asks that the original decision be set aside and an oral hearing be held on their appeal of the Determination.

Coregenesis has also requested a suspension of the effect of the Determination under Section 113 of the *Act* pending the outcome of this application and, if necessary, a judicial review.

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 are whether the original decision was based on erroneous evidence, whether the Tribunal should hold an oral hearing on the appeal of the Determination. Depending on the outcome of the foregoing issues, the question of a suspension of the effect of the decisions may also arise.

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

(a) reconsider any order or decision of the tribunal, and

(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.

(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 applicant satisfies the Tribunal at the first stage of the analysis, the Tribunal will address the substantive issue raised in the reconsideration.

ARGUMENT AND ANALYSIS

I find that none of the matters raised in this application warrant reconsideration. The reasons for that conclusion follow.

The Determination addressed a complaint filed by Sara B. Church that Coregenesis had failed to pay regular wages and holiday pay. The Determination found that wages, including holiday pay, in an amount of $7,164.45 were owed. In stating the position of Coregenesis on the complaint, the Determination included the following:

> He (Mr. Dorn Beattie, President of Coregenesis) acknowledges there are outstanding wages payable to the complainant.

The Determination noted the following evidence:

> The complainant has provided a letter dated March 12 in which the employer sets out the outstanding wages as of March 15, 2002. Mr. Beattie agrees he authored the letter and both parties agree with the amounts.

Until this application, neither of those statement have ever been disputed, or challenged in any way, by Coregenesis.

The Determination was appealed because of new information that came to Coregenesis after the Determination was issued. In the appeal, Coregenesis alleged the complainant had seized company property that was worth more than her wage claim and had refused to return it. In support of the appeal,

Mr. Beattie, on behalf of Coregenesis, filed a letter, dated May 24, 2002, which it had delivered to the delegate who had written the Determination. The following comment was included in that letter:

> You (the Director's delegate) have used a letter that I provided to all my staff as a show of good faith and an honorable approach to a difficult situation. This letter now being used as evidence by Ms. Church was created *because I have no dispute with the amount owing* and have every intention of meeting my moral and legal commitment.
> (emphasis added)

The appeal letter went on to ask for assistance in having the complainant return the property which Coregenesis alleged belonged to it and suggested one way that could be done would be to vary the Determination, although nothing in the appeal letter indicates what form the variance should take. I note that this letter was written after the Determination was issued. The Determination clearly set out the calculation upon which the amount of the Determination was based.

The Adjudicator of the original decision clearly understood what was being requested by Coregenesis on its appeal, stating the issue to be decided as follows:

> Although Coregenesis does not dispute wages owing, it contends that it has new information that was not considered at the time of the investigation. It contends that, since the determination was issued, it has determined that Ms. Church has wrongfully appropriated Coregenesis property, and that it has no obligation to pay her wages owing until that property is returned.

The original decision confirmed the Determination, stating:

> It is not for this Tribunal to make a determination as to whether an internet domain name is the property of Coregenesis. Ms. Church disputes that it is. However, even if the name registration is Coregenesis property, Coregenesis has no legal entitlement to withhold Ms. Church's wages until she transfers it to the comapny.

In this application, Coregenesis alleges the Determination and original decision were based on erroneous evidence, specifically a letter dated March 12, 2002. This is the same letter referred to in the excerpt from the Determination that I have transcribed above. For clarification, the letter itself, which was signed by Mr. Beattie (and for which he says the company 'accepts responsibility') included the following:

> The company acknowledges and assumes full responsibility for all outstanding wages, and further it is the intent of the company to repay you the back wages you are owed and to assess severance and outstanding vacation pay. Our records currently reflect the following payroll periods due to you:

What followed was an outline of 'payroll dates' and 'net salary outstanding' in the same manner and in the same amounts as the 'outstanding wages' were set out in the Determination.

Coregenesis denies the amount stated to be owing in that letter, At the same time, Coregenesis acknowledges that vacation pay in the amount of $1722.66 and wages are owed for 77.5 'volunteer' hours.

As indicated above, until this application, Coregenesis had never taken issue that the amount set out in the March 12, 2002 letter, and confirmed by the Determination, was the amount of wages owed to the complainant. In response to this point being made in the Director's submission in reply to this

application, Mr. Beattie, on behalf of Coregenesis says, "my denial of the amount was stated as soon as I was aware of the amount demanded". That assertion is inconsistent with the available material, including comments contained in submissions filed by, and documents signed by, Mr. Beattie on behalf of Coregenesis. I do not believe it and I do not accept it.

Coregenesis has submitted two letters written by employees who attended the March 12, 2002 meeting, ostensibly as evidence of the 'true intent' of the March 12, 2002 letter. Neither says that letter does not accurately reflect the wages owed to the complainant up to March 15, 2002. As such, they are not evidence of the dispute raised in this application. As well, Coregenesis has not explained why this information, now deemed important, was not provided either during the investigation or during the appeal. To the extent the inclusion of those letters in the application was designed to suggest Ms. Church accepted that she would not be paid the wages the letter indicated were owing to her if there was no investment in the company from the Calgary group, I agree with the Director that such an understanding runs afoul of Section 4 of the *Act* and cannot be given effect.

This application is denied.

Coregenesis has also applied under Section 113 of the *Act*, requesting that the Tribunal suspend the effect of the Determination pending the outcome of this application and, if necessary, a judicial review. Section 113 of the *Act* reads:

> *113. (1) A person who appeals a determination may request the tribunal to suspend the effect of the determination*
>
> *(2) The tribunal may suspend the determination for the period and subject to the conditions it thinks appropriate, but only if the person who requests the suspension deposits with the director either*
>
> *(a) the full amount, if any, required to be paid under the determination, or*
>
> *(b) a smaller amount that the tribunal considers adequate in the circumstances of the appeal.*

In light of my conclusion on the application for reconsideration, it is unnecessary to consider whether the application by Coregenesis under Section 113 of the *Act* for a suspension of the effect of the Determination pending the outcome of this application.

Coregenesis has, however, also asked for a suspension of the effect of the Determination pending the outcome of a judicial review. The Tribunal has no authority to grant such relief. In *The City of Surrey*, BC EST #D049/99, the Tribunal was faced with an argument that it had no jurisdiction to suspend the effect of Determination in the context of an application for reconsideration. The Tribunal did not agree there was any such a limitation on their authority under Section 113, but in so doing, also stated its view that such authority was limited to those matters over which it had jurisdiction under the *Act*:

> Clearly, the language, context and purpose of s. 113 is such that the power should be exercised by the Tribunal only in the context of the proceedings over which it has exclusive jurisdiction. The language should not be read so as to permit the Tribunal to encroach on the role of the courts or other adjudicative bodies merely because a person has appealed sometime in the past: see *Re New Pacific Limousine Service Inc.* BC EST #D054/96; *Re Paradon Computer Systems*, BC EST #D221/98. Section 113 must be limited in scope to proceedings over which the Tribunal has exclusive appellate jurisdiction.

The jurisdiction of the Tribunal is defined by the scope of the *Act*. It has no jurisdiction over matters that proceed to the courts by way of judicial review. That limitation prevents the Tribunal from exercising its authority under Section 113 in a way that assumes authority over a matter before the courts.

In any event, having looked at the material and arguments and applied those to the factors considered by the Tribunal when deciding if it is appropriate to exercise its authority under Section 113 of the *Act*, I would not agree to suspend the effect of the Determination on the terms proposed by Coregenesis. I would adopt and apply the comments of the Tribunal in *Tricom Services Inc.*, *supra*, that:

> . . . it is important to note that the legislature has provided, as a first proposition, that a suspension should only be ordered if the "total amount" of the determination is posted; a "smaller amount" should only be ordered if such lesser amount would be "adequate in the circumstances of the appeal". In my opinion, the "adequacy" of any proposed deposit must be evaluated not only from the perspective of the employer, but also from the perspective of any employees whose rights might be affected by a suspension order.

In this case, it is clear that Coregenesis is in a precarious financial position. Any delay in the collection of the balance of the amount owed may significantly prejudice the ability of the Director to collect that amount and the right of the employee to receive the full amount of her unpaid wages.

ORDER

Pursuant to Section 116 of the *Act*, I order the original decision, BC EST #D332/02 be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal