

An Application for Reconsideration

- by -

Thomas Michael Cully, a Director or Officer of Westec Venture Group, Inc.
("Cully")

- 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.: 2002/456

DATE OF DECISION: November 21, 2002

DECISION

OVERVIEW

This is an application, by Thomas Cully (“Cully”), for reconsideration of a Decision of a Tribunal Adjudicator dated June 6, 2002 (“original decision”), pursuant to section 116 of the *Employment Standards Act, R.S.B.C. 1996 c. 113* (“Act”) dismissing an appeal from a Determination issued on January 7, 2002 (“Determination”) by a Delegate of the Director of Employment Standards (“Delegate”). The Adjudicator upheld the Determination, finding Mr. Cully liable for unpaid wages in the amount of for two months unpaid wages for Mr. Robertson in the amount of \$7,204.25 and Mr. Wood for the sum of \$7,211.95, pursuant to section 96 of *Act*, as an officer or director of Westec Ventures Inc (“Westec”). In reasons issued in a separate decision concurrently with this reconsideration application (see #D516/02), I have also dismissed the application of Westec for reconsideration of its liability to Mr. Robertson and Mr. Wood.

In this application I deal only with the application of Mr. Cully to reconsider his liability under s. 96 of the *Act*. The submission of Mr. Cully, filed by a solicitor, contains no challenge to the facts or reasons contained in the Adjudicator’s decision relating to Mr. Cully’s liability under s. 96 of the *Act*. The appeal submission deals solely with Westec’s appeal of its liability. It is incumbent on a party seeking reconsideration to show that the case is a proper one for the Tribunal to exercise its reconsideration power. A failure to identify grounds for reconsideration, and develop a submission, places the application in the nature of a frivolous appeal - one that does not challenge the facts or reasons of a Decision: Sagert, BCEST #D262/96, Mayfair Towing Ltd., BCEST #D128/76. I therefore dismissed this application because there were no grounds raised for a reconsideration of Mr. Cully’s liability, under s. 96 of the *Act*.

ISSUES TO BE DECIDED

Does this case meet the threshold for consideration of the merits of the arguments advanced?

FACTS

This request for reconsideration is decided on the basis of written submission of Mr. Cully filed by counsel, and written submissions filed by Mr. Robertson and Mr Wood jointly. The Delegate made no submissions.

In the Determination dated January 2, 2002, the Delegate found that Jim D. Robertson and Rob Wood, were employees of Westec Venture Group Inc. (“Westec”), employed respectively as creative director, and graphics designer and were entitled to wages. The Delegate found that the wage entitlement of Mr. Robertson, together with interest was \$14,194.59. The Delegate found that the wage entitlement of Mr. Wood, together with interest was \$8,395.46. The Delegate also found in a Determination dated January 7, 2002, that Mr. Cully was a director or officer based on the records available from the Register of Companies. The Delegate found that Mr. Cully was liable, pursuant to section 96 of the *Act*, for two months unpaid wages for Mr. Robertson in the amount of \$7,204.25 consisting of \$6,933.33 and interest of \$270.92. The Delegate also found Mr. Cully liable to Mr. Wood for the sum of \$7,211.95, consisting of wages of \$6,933.33 and interest of \$278.62. Westec and Mr. Cully appealed the Determinations of January 2, 2002 and January 7, 2002.

In a Decision dated June 6, 2002 (“original decision”), issued after an oral hearing, the Adjudicator dismissed the appeal of Westec and Mr. Cully. This is a reconsideration application by Mr. Cully of the original decision finding him liable as a director and officer of Westec. I note that in an appeal by a director or an officer, the appellant, Mr. Cully is limited to arguing the issue of whether that person was a director or officer, and whether there is any mathematical error in the calculation of the award. I have considered and determined Westec’s application for reconsideration in a separate decision issued concurrently with this decision.

The Adjudicator found that Mr. Cully was a director and officer of Westec. The Adjudicator found as facts that Mr. Cully prepared the incorporation documents for Westec. The Adjudicator found that Mr. Cully was listed initially as a director of the company in the records of the Registrar of Companies. Mr. Cully filed a notice with the Registrar in August of 2001 that “he was not a director - secretary only from 2001 AR”. Mr. Cully filed the annual return for Westec and certified it correct on January 31, 2001. He signed as “current director, officer or company solicitor”. The Adjudicator also found that Mr. Cully was self employed, providing accounting and consulting services, to public companies on corporate structuring and regulatory filings. He maintained a registered and records office for 20 to 30 companies, including Westec. Mr. Cully lent money to Westec, took a mortgage as security, and subsequently foreclosed on that mortgage.

Mr. Cully represented that he did not perform the duties and roles of an officer. Mr. Cully submitted that he was not involved in the day to day running of Westec. The Adjudicator rejected Mr. Cully’s defence that he was a consultant, and not the properly appointed secretary of the company. Part of the Adjudicator’s decision was based on the issue of credibility. The Adjudicator found that Mr. Cully was a person who purported to provide consulting regarding corporate structuring, provided registered and records offices for 20 to 30 companies, and did regulatory filings for the companies. He was a person who would have known how to cease to be an officer if he chose to cease being an officer.

The Adjudicator considered the definition of secretary set out in section 138 of the *Company Act, R.S.B.C. 1996, c. 62*, and found that Mr. Cully by signing the annual return as an officer performed a function or duty of an officer. . The Adjudicator also considered the recent summary of the Tribunal’s jurisprudence relating to director or officer status contained in Director of Employment Standards, BCEST #D047/01 (the Michalovich decision):

In our view, in summary, the case law reviewed here and in Wilinofsky stands for the following propositions:

1. The corporate records, primarily those available through the Registrar of Companies or available at a corporation’s registered and records office, raise a rebuttable presumption that a person is a director or officer. In other words, the Director of Employment Standards may rely on those corporate records to establish director or officer status.
2. It is then open to the person, who, according to the corporate records, is a director or officer, to prove on the balance of probabilities that the company records are inaccurate, for example, because the person resigned and the documents were not properly processed, a person is not properly appointed etc.
3. There may well be circumstances where it would be inappropriate to find that a person is a director officer despite being recorded as such. However, it will be the rare and exceptional case to be decided on all the circumstances of the particular case and not

simply by showing that he or she did not actually perform the functions, duties or tasks of a director or officer.

4. The determination of director-officer status should be narrowly construed , at least with respect to section 96.

ANALYSIS

In a reconsideration application the burden rests with the appellant to show that the application meets the test for reconsideration. In essence the appellants Westec and Mr Cully submit that the facts found by the Delegate might have been different had Westec chosen to participate in the investigation. This is an issue which falls to be determined in Westec's reconsideration application. I have issued separate reasons for decision dealing with this issue.

The only issue that I consider in this reconsideration application filed by Mr. Cully is whether the Tribunal should exercise its power to reconsider the Adjudicator's decision that Mr. Cully was an officer or director of Westec. Mr. Cully is, however, bound by the result of the Westec reconsideration application.

The reconsideration power of the Tribunal is one to be exercised cautiously. This is because the purpose of the *Act* is to ensure that disputes are resolved fairly and efficiently, that a degree of finality is required, and that the appeal hearing is meant to be the primary forum where the Tribunal corrects errors made by the Delegate. The appeal hearing is not a discovery forum, and the appellant cannot re-litigate the entire appeal on reconsideration. The reconsideration process is meant to review errors that the Adjudicator made at a hearing, which make a difference to the parties, and to the public at large.

The Tribunal has, therefore developed a two stage process in considering applications for reconsideration (see *Milan Holdings Ltd.*, *BCEST #D313/98*). I must first determine whether the matters raised in the application warrant consideration. In particular, while the list is not exhaustive, I must consider whether there has been a failure by the Adjudicator to comply with the principles of natural justice, whether there has been a mistake of fact, whether there is inconsistency with other decisions indistinguishable on their facts, serious and significant new evidence not available at the time of the hearing, mistake in applying the law, failure to adjudicate on all grounds of appeal advanced., or a clerical error in the decision.

The second stage involves a consideration of the merits of the appeal, having first decided that there is a basis for reconsideration.

In my view this is a matter which falls to be determined on the first branch of the Milan Holdings test. The appeal submission filed on behalf of Mr. Cully does not identify any errors made by the Adjudicator in his finding that Mr. Cully was an officer of the Company, or that liability should be imposed on Mr. Cully under section 96 of the *Act*. It is incumbent on a party seeking reconsideration to show that the case is a proper one for the Tribunal to exercise its reconsideration power. A failure to identify grounds for reconsideration and develop a submission relating to reconsideration places the application in the nature of a frivolous appeal - one that does not challenge the facts or reasons of a Decision: *Sagert*, *BCEST #D262/96.*, *Mayfair Towing Ltd.*, *BCEST #D 128/76*. I therefore dismiss this application because there are no proper grounds raised for a reconsideration of Mr. Cully's liability, under s. 96 of the *Act*.

ORDER

Pursuant to section 116 of the *Act*, I order that the Decision in this matter, dated June 6, 2002 be confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal