

BC EST #D468/00
Reconsideration of BC EST #D341/00

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Geoffrey B. Godding
("Godding")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 200/582

DATE OF DECISION: October 30, 2000

DECISION

OVERVIEW

On April 18th, 2000 a delegate of the Director of Employment Standards (the “delegate”) issued a Determination under file number ER 093-243 holding that Geoffrey B. Godding (“Godding”) was not an “employee” as defined in section 1 of the *Employment Standards Act* (the “Act”) and thus was not entitled to be paid compensation for length of service (see section 63 of the *Act*). Godding alleged that had been employed by Protux Systems Inc. (“Protux”) and that his employment was terminated by Protux without payment of compensation for length of service or proper written notice in lieu of such compensation.

Godding appealed the Determination to the Tribunal and in a written decision issued on August 14th, 2000 (BC EST #D341/00), Adjudicator Stevenson confirmed the delegate’s finding that Godding was an independent contractor and not an “employee” as defined in the *Act*. Accordingly, Godding’s appeal was dismissed and the Determination confirmed.

Godding has now applied, pursuant to section 116 of the *Act*, for reconsideration of Adjudicator Stevenson’s August 14th decision.

THE REQUEST FOR RECONSIDERATION

Godding’s request for reconsideration is contained in a letter (to which are attached several documents) to the Tribunal dated August 20th, 2000 and filed with the Tribunal on August 22nd, 2000. This letter is the only submission filed by Godding in support of his request for reconsideration.

ANALYSIS

In his August 20th letter, Godding takes issue with certain findings of fact made by the Adjudicator—most of which, in my view, are of only peripheral relevance—but does not attack the central facts upon which both the Determination and appeal decision were predicated.

Applications for reconsideration do not proceed as a matter of statutory right. The Tribunal *may* reconsider a previous decision (see section 116 of the *Act*). In *Milan Holdings Ltd.*, BC EST #D313/98, the Tribunal stated that it would exercise its discretion to reconsider a previous decision on the basis of a two-part inquiry. First, the issue(s) raised in the reconsideration request must be sufficiently significant to warrant further inquiry and, second, assuming the first threshold has been satisfied, the Tribunal will then examine the merits of the application and decide if the adjudicator’s decision ought to be overturned (*e.g.*, where the adjudicator has made a significant error in interpreting the *Act* or where there has been a failure to comply with the principles of natural justice) or referred back to the original adjudicator. In order to meet the first branch of the test, the applicant must raise a serious question “of law, fact or principle or procedure [that is] so significant that [the adjudicator’s decision] should be reviewed” (*Milan*

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Holdings at p. 7). In my view, Godding’s application for reconsideration does not raise a such a serious question; Godding’s application simply sets out some comparatively minor quibbles with respect to certain findings of fact, none of which have much bearing on the central issue, namely, was Godding an “employee” (as defined in the *Act*) or an independent contractor?

The Tribunal has repeatedly stressed that the reconsideration provision of the *Act* (section 116) is not to be used to simply re-argue the case on appeal. Applications for reconsideration will succeed only when there has been a demonstrable breach of the rules of natural justice (not applicable here), or where there is compelling new evidence that was not available at the time of the appeal hearing (there is none here), or where the adjudicator has made a fundamental error of law (I find no such error). 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. A reconsideration request will not succeed unless it can be said that the adjudicator’s decision was obviously incorrect.

The evidence in this case showed that Godding—who was operating a trucking business via an incorporated entity—was an independent contractor working under a contract *for services* (rather than a contract *of service*). I am satisfied that neither the delegate nor Adjudicator Stevenson erred in concluding that Protux was Godding’s (or, more correctly, the incorporated business enterprise that Godding controlled) customer, not his employer.

ORDER

The application to vary or cancel the decision of Adjudicator Stevenson in this matter is refused.

Kenneth Wm. Thornicroft

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal