

An application for Reconsideration

- by -

Alabon Country Kennels Ltd. operating as Alabon Country Kennels and Alabon
Enterprises Ltd. operating as SPCA Thrift Store
("Alabon")

- 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 (as amended)

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2005A/202

DATE OF DECISION: January 31, 2006

DECISION

SUBMISSIONS

On behalf of Alabon: Gordon Sanders
On behalf of the Director of Employment Standards: Ivy Hallam

OVERVIEW

1. This is an application by Alabon Country Kennels Ltd. operating as Alabon Country Kennels and Alabon Enterprises Ltd. operating as SPCA Thrift Store (“Alabon”) for a reconsideration of Decision #D172/05 (the “Original Decision”), issued by the Tribunal on November 8, 2005.
2. Alabon Country Kennels Ltd. operates a dog kennel, and Alabon Enterprises Ltd. operates a thrift store. Mr. Sanders is the sole director and officer of both companies.
3. Liane Lefebvre worked for both companies from May 2003 until March 2004. In June 2004, she filed a complaint alleging that she was owed overtime wages, vacation pay, commission wages, statutory holiday pay and compensation for length of service. Alabon contended that Ms. Lefebvre was a self employed contractor rather than an employee, and that she was not owed additional wages.
4. Following a hearing on Ms. Lefebvre’s complaint, the delegate determined that Alabon Country Kennels and Alabon Enterprises were associated companies under Section 95 of the *Act*. The delegate also determined that Ms. Lefebvre was entitled to wages in the amount of \$4,899.48, and imposed administrative penalties in the amount of \$2000 for Alabon’s contraventions of the *Act*.
5. Alabon appealed the decision on the grounds that new evidence had become available. It advanced a number of arguments in its appeal, including the argument that the companies should not have been found to be associated corporations, and that Ms. Lefebvre was not an employee.
6. Although the sole ground of appeal was that new evidence had become available, the Tribunal member also considered the reasons for an appeal as an error of law.
7. The member reviewed the evidence and the law, and concluded that the delegate had not erred in finding that Ms. Lefebvre was an employee. The member also reviewed the Tribunal’s test for the introduction of new evidence and concluded that Alabon had not met that test.
8. Finally, the member reviewed the evidence and Tribunal tests for the association of companies under section 95, and found that the delegate had not erred in associating the companies. The appeal was dismissed.

ARGUMENT

9. In his reasons for requesting a reconsideration of the Tribunal's decision, Mr. Sanders writes:

...

This Employment Standards has taken Ms. Lefebvre word 100%. Ms. Lefebvre never showed for meeting. There is so many reasons why Ms. Lefebvre was upset. She got caught, she was a bitter person. Its her word she worked overtime, there were people who did not agree. I seen her at the computer for her own use so many times. Ms. Lefebvre was pays my myself she at no time spoke about overtime...[reproduced as written].

10. The Director seeks to have the reconsideration application dismissed on the basis that it fails to disclose any valid reason for the reconsideration.
11. In reply, Mr. Sanders states that the delegate never met Ms. Lefebvre, but if she had she would have arrived at a different conclusion.

ISSUES

12. There are two issues on reconsideration.
1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?
 2. If so, should the decision be cancelled or varied or sent back to the member?

ANALYSIS

13. The *Employment Standards Act*, R.S.B.C. 1996 c. 113 ("Act") confers an express reconsideration power on the Tribunal. Section 116 provides
- (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) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

The Threshold Test

14. The Tribunal reconsiders a Decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *Act* detailed in Section 2 "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act."

15. In *Milan Holdings (BCEST # D313/98)* the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. 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. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.
16. The Tribunal may agree to reconsider a Decision for a number of reasons, including:
- The adjudicator fails to comply with the principles of natural justice;
 - There is some mistake in stating the facts;
 - The Decision is not consistent with other Decisions based on similar facts;
 - Some significant and serious new evidence has become available that would have led the Adjudicator to a different decision;
 - Some serious mistake was made in applying the law;
 - Some significant issue in the appeal was misunderstood or overlooked; and
 - The Decision contains a serious clerical error.
- (*Zoltan Kiss BC EST#D122/96*)
17. While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.
18. After weighing these and other factors, the Tribunal may determine that the application is not appropriate for reconsideration. Should the Tribunal determine that one or more of the issues raised in the application is appropriate for reconsideration, the Tribunal will then review the matter and make a decision. The focus of the reconsideration member will in general be with the correctness of the decision being reconsidered.
19. In *Voloroso (BC EST #RD046/01)*, the Tribunal emphasized that restraint is necessary in the exercise of the reconsideration power:
- .. the Act creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute...
- There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the “winner” is not deprived of the benefit of an adjudicator’s decision without good reason. A third is to avoid the spectre of a tribunal process skewed in favor of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.
20. Having reviewed the material, I am not persuaded that a reconsideration of the matter is warranted. The sole basis for the reconsideration is an allegation that the delegate was wrong in finding as she did.

21. The basis for the reconsideration application is, in all essential respects, identical to that advanced before the Tribunal at the first instance. The member fully analyzed those arguments in light of the *Act*, the common law and Tribunal jurisprudence. While it is evident that Mr. Sanders continues to disagree with the Determination, he has advanced no clear and compelling basis for reconsideration.
22. Alabon has not raised significant questions of law, fact, principle or procedure that should be reviewed because of their importance to the parties and/or their implications for future cases. I am also not persuaded that Alabon has made out an arguable case of sufficient merit to warrant the exercise of the reconsideration power.

ORDER

23. Pursuant to Section 116 of the *Act*, I deny the application for reconsideration.

Carol L. Roberts
Member
Employment Standards Tribunal