

An application for Reconsideration

- by -

P & J International Stoneworks Inc.
("P & J")

- 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: David B. Stevenson

FILE No.: 2006A/135

DATE OF DECISION: January 31, 2007

DECISION

SUBMISSIONS

Jocelyne Pericas	on behalf of P & J International Stoneworks Inc.
Greg Brown	on behalf of the Director
Adam Beedle	on his own behalf

OVERVIEW

1. P & J International Stoneworks Inc. (“P & J”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “Act”) of a decision, BC EST #D026/06, made by the Tribunal on March 7, 2006 (the “original decision”). The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards on December 13, 2005. The Determination considered a complaint filed by Adam Beedle (“Beedle”) alleging P & J had contravened Section 18, Section 40 and Section 58 of the *Act* in respect of his employment..
2. The Determination found that Beedle was an employee of P & J, rather than an independent contractor, and that P & J had contravened those provisions of the *Act*. The Director ordered P & J to pay Beedle wages in the amount of \$2,563.47, including interest, and imposed administrative penalties on P & J under Section 29 of the *Employment Standards Regulation* in the amount of \$1500.00.
3. During the investigation of the complaint, the Director issued a demand for records. P & J did not comply with the demand and was found to have contravened Section 46 of the *Employment Standards Regulations*.
4. The appeal raised the following issues:
 1. Did the Director err in finding Beedle was an employee for the purposes of the *Act*?
 2. Did the Director fail to observe principles of natural justice in making the Determination?
 3. Has new and relevant evidence come available that was not available at the time the Determination was made?
5. The original decision canvassed each of the grounds of appeal, finding the director had not erred in finding Beedle was an employee, had not failed to observe principles of natural justice and not made a case for having the Tribunal allow the new evidence that was submitted with the appeal.
6. P & J has asked the Tribunal to reconsider the decision finding Beedle was an employee of P & J under the *Act*.

ISSUE

7. 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 issue raised in this application, as it was in the appeal, is whether the Director erred in finding Beedle was an employee of P & J under the *Act* and not an independent contractor.

ANALYSIS OF THE PRELIMINARY ISSUE

8. The legislature has conferred a reconsideration power on the Tribunal under Section 116 of the *Act*, which reads as follows:

- 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) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another 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.*

9. 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 made of the merits of the original decision. The focus of a reconsideration application is the original decision.

10. 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.

11. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively re-visit the original decision and come to a different conclusion.
12. 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.
13. After review of the original decision and the submissions of the parties on this application, I have decided this application does not warrant reconsideration.
14. This application was filed with the Tribunal on December 6, 2006 – almost nine months following the date of the original decision¹. The stated reason for requesting a reconsideration is misconduct by Beedle in August 2006 directed at property belonging to P & J which P & J said showed “he is a true criminal with bad intentions”.
15. The length of the delay in filing this reconsideration and the apparent motivation for it militate against the Tribunal exercising discretion in favour of the application. As well, the application does not reveal circumstances where the Tribunal might be disposed to allow reconsideration.
16. Essentially, the application asks the Tribunal to revisit the issue of Beedle’s status as an employee under the *Act*. This issue was decided in the Determination and that decision was reviewed in the original decision. In the original decision, the Tribunal Member found no basis to interfere with the decision of the Director that Beedle was an employee under the *Act*. I can find no error in the original decision. The original decision correctly identified the issue as requiring the application of a legal standard to a set of facts, noted the *Act* did not allow for appeals based on alleged errors of fact unless such findings constitute an error of law, found no error of law in the findings of fact and no error of law in the application in the legal standard applied.
17. The fact that Beedle may have committed an unlawful act unrelated to the reasons for, and the result of, the Determination or the original decision does not provide a valid basis for reconsidering a decision that is otherwise supported on a reasoned analysis of the evidence, the law and the legislation. There are few provisions of the *Act* where motivation or improper conduct is relevant. The question of whether one is an employee under the *Act* is not one of them.
18. It is unnecessary to review in any detail the reasons provided in the original decision for dismissing the appeal on the finding that Beedle was an employee under the *Act*. The reasons clearly and accurately set out the principles and approach applicable to an appeal of such a finding.

¹ The reconsideration application was preceded by correspondence to the Tribunal dated November 7, 2006 which was acknowledged by the Tribunal in a letter dated November 14, 2006 referring P & J to the Tribunal’s website for information regarding reconsideration applications.

19. I will address one particular matter. This application raises once again the point that Beedle had his own GST number, which entitled him to act as a self-employed contractor. That submission suggests Beedle was not, therefore an employee under the *Act* and F & J was not required to pay him wages, make deductions or keep records. That point was expressly addressed in the original decision, where the Tribunal Member stated:

The delegate rightly placed no weight on the fact that Mr. Beedle had a GST number, or that P & J took no statutory deductions from his paycheques.

20. The Tribunal has consistently rejected the proposition that the status of an individual under legislation other than the *Act* should determine that individual's status for the purpose of the *Act* (see, for example, *Project Headstart Marketing Ltd.*, BC EST #164/98; *Ashley and Ferster operating as Body & Soul Health & Beauty Center*, BC EST #D083/99; *Anna-Liisa Koivisto operating as Finn Custom aluminum*, BC EST #D006/05 and BC EST RD#085/06).
21. Additionally, Section 28 of the *Act* requires an employer to keep a record of the information listed in that section for each employee. That statutory requirement that does not depend on the opinion of an employer about who is an employee. The *Act* defines who is an employee and the requirement applies without exception to those who fall within the definition.
22. The application is denied.

ORDER

23. Pursuant to Section 116 of the *Act*, I order the original decision be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal