

An Application for Reconsideration

- by -

Sally Lush operating as Sal's Cleaning Service
(“Sal's Cleaning”)

- 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: Carol L. Roberts

FILE No.: 2001/772

DATE OF DECISION: January 14, 2002

DECISION

This is a decision based on written submissions by Sally Lush on behalf of Sal's Cleaning Service, and Lynda Schapansky.

OVERVIEW

This is an application by Sally Lush operating Sal's Cleaning Service (Sal's Cleaning"), pursuant to Section 116(2) of the Employment Standards Act ("the Act"), for a reconsideration of Tribunal Decision BC EST #D581/01 (the "Original Decision"), issued by the Tribunal on October 25, 2001.

Although the Original Decision confirmed a Determination made by a delegate of the Director issued June 1, 2001 that Ms. Schapansky was an employee, it referred the matter of wage calculation back to the Director.

ISSUE TO BE DECIDED

Whether the reconsideration power should be exercised in light of the discovery of new and relevant documentation.

FACTS

The facts, as set out by the adjudicator, are not in dispute.

Sal's Cleaning operates a cleaning business. Schapansky performed cleaning services for Sal's Cleaning between June 12 and June 30, 2000. The delegate concluded that Schapansky was an employee, and owed wages and vacation pay. On appeal, the adjudicator upheld the determination that Schapansky was an employee. As the hearing, the parties disputed the number of hours Schapansky worked.

The adjudicator's decision is as follows:

The Delegate's calculations are based on invoices submitted to him by the parties. The Appellant says that the invoices in some case are duplicate, have been altered or the original is missing. According to the Appellant's calculations, submitted to the Tribunal in the course of the appeal, Schapansky did not work more than 68 hours. The Respondent explains that she did not receive the invoice book until a week and a half after she started with Sal's Cleaning - and to an extent it was filled out from memory - and she candidly accepts that there may be inaccuracies with respect to dates or duplicates of invoices. In her evidence, however, she points out that many of the invoices are written by Lush (and signed by Schapansky). It is clear that some of the invoices have been changed. In one of

her submissions, the Respondent indicates that she worked 130 hours, based on her calculations. In her direct testimony, the number was somewhat higher. However, at the hearing, she indicated that she was prepared to accept an estimate prepared by the settlement officer of the Tribunal (submitted by the Appellant) of 114 hours. In all of the circumstances, I find that is a fair and reasonable assessment of the hours worked.

The adjudicator sent the matter back to the Director for calculation based on 114 hours worked plus vacation pay and interest.

ARGUMENT

Ms. Lush seeks a reconsideration of the Original Decision on the grounds that new and relevant information has become available. That information are a detailed summary of the hours worked by Ms. Schapansky prepared by another employee, Joanne Kirkpatrick, from her personal working diary, correspondence from various clients that contradict the hours claimed by Lynda Schapansky, and a copy of a letter from Ms. Schapansky in which she claimed to work 23 to 27 hours in one day.

Ms. Lush states that, in view of Ms. Schapansky's errors and omissions, Ms. Kirkpatrick's documentation be accepted as the best evidence.

Ms. Schapansky contends that Ms. Kirkpatrick did not know where she worked each day, and did not know anything about her schedule.

ANALYSIS

Section 116 of the Act provides that

- (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 an decision or order of the tribunal may make an application under this section

...

The Tribunal has established a two stage analysis for an exercise of the reconsideration power (*Milan Holdings Ltd.* (BC EST #D313/98)).

At the first stage, the panel decides whether the matters raised in the application 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 that are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. (*Milan Holdings*, p. 7)

The Tribunal has held that a reconsideration will only be granted in circumstances where it can be demonstrated that there has been a breach of the rules of natural justice, where there is compelling new evidence that was not available at the new hearing, or where the adjudicator made a fundamental error of law. (*Bicchieri Enterprises Ltd.* (BCEST #D335/96))

The scope of review on reconsideration is a narrow one (see *Kiss* BCEST#D122/96):

1. failure by the adjudicator to comply with the principles of natural justice,
2. mistake in stating the facts,
3. failure to be consistent with other decisions which are not distinguishable on the facts,
4. significant and serious new evidence that would have led the adjudicator to a different decision,
5. misunderstanding or a failure to deal with a significant issue in appeal, and
6. a clerical error in the decision.

In my view, Ms. Lush has not raised significant questions of law, fact, principle or procedure. Therefore, I conclude this is not an appropriate case for exercising the reconsideration power.

Ms. Lush failed to maintain proper records in the first instance. At the appeal hearing, she agreed to pay Ms. Schapansky for 114 hours. She now claims that she has new evidence to support a reconsideration.

The evidence is neither new nor significant. Because Ms. Kirkpatrick is an employee of Sal's, I infer, that the evidence was available, given due diligence, at the time of the hearing. Ms. Lush does not provide any evidence as to why that evidence was not presented either during the investigation or at the appeal hearing. In any event, there is some question as to the reliability of the documentation.

Although the parties have had a number of opportunities to resolve this matter with the delegate as well as the Tribunal's settlement officer, they have been unable to do so. Interpersonal difficulties between the parties is not a proper ground for a reconsideration.

ORDER

The application for reconsideration is dismissed.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal