

An Application for Reconsideration

- by -

Laara Kencayd operating as Laara Esthetics
("Laara")

- 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: M. Gwendolynne Taylor

FILE No.: 2002/509

DATE OF DECISION: January 15, 2003

DECISION

This decision based on written submissions presented by Laara Kencayd, Jessica Holliday and the Director of Employment Standards.

OVERVIEW

This is an application by Laara Kencayd (“Laara”) for reconsideration of a decision (“decision”) of the Employment Standards Tribunal dated June 4, 1996. The application for reconsideration was submitted on October 2, 2002.

The chronology leading to the application for reconsideration is as follows:

- the Director of Employment Standards issued a Determination dated February 14, 1996 which found that Laara Kencayd operating as Laara Esthetics owed Jessica Holliday (“Holliday”) the sum of \$845.70 as wages and accrued interest, based on minimum wage requirements;
- Laara appealed this decision to the Tribunal on March 7, 1996 on the grounds that Holliday was not an employee;
- in a decision dated June 4, 1996, the Tribunal determined that Holliday was an employee and confirmed the Director’s determination;
- in August 2002, Laara contacted the Tribunal and on October 2, 2002 she submitted the application for reconsideration.

Laara submitted that she had not received the Tribunal’s decision until approximately July 22, 2002. Laara’s grounds for reconsideration are that the Tribunal erred in stating the facts, that there is significant and serious new evidence which was not previously presented, and that she had understood she would be given opportunity to provide more detailed and explicit information to the Tribunal on significant issues.

ISSUE

1. As a threshold issue, is this an appropriate case for the Tribunal to exercise discretion to reconsider under s. 116 of the Act?
2. If it is an appropriate case for reconsideration, did the adjudicator err in finding that Holliday was an employee entitled to payment of the minimum wage?

APPLICATION FOR RECONSIDERATION

Grounds for Reconsideration

Section 116 does not set out the grounds on which the Tribunal may reconsider a decision. The Tribunal uses its discretion to reconsider with caution, 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."

In *Milan Holdings* (BC EST # D313/98) the Tribunal set out a principled approach in determining when to exercise its discretion to reconsider. 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.

In *Zoltan Kiss* (BC EST # D122/96), the Tribunal set out a number of grounds for reconsidering a decision:

- The adjudicator failed 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 some serious clerical error.

While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.

Timeliness

Section 116 does not set out time limits for filing a request for reconsideration. The Tribunal has found that if an application for reconsideration has not been filed in a timely fashion and there is no valid cause for the delay, a reconsideration hearing should not be allowed: *Re British Columbia (Director of Employment Standards)*, BCEST #D122/98. In that case, the Tribunal denied an application by the Director because it was not filed until 6 months after the decision. The Director's reason for the delay was time required to obtain a legal opinion to determine whether to proceed with the application. The Tribunal noted that the scheme of the Act emphasizes expeditious resolution of disputes based on the principles of natural justice.

THE FACTS AND SUBMISSIONS

Kencayd and Holliday signed an agreement in November 1994 for Holliday to provide services as a nail technician for Laara Esthetics. The Tribunal's decision noted that the agreement included a minimum term of employment of three months, confirmation that Holliday was to comply with the rules and regulations of the shop, provision for Holliday to "receive 50% of commission for services she provides to customers

of the shop and that Laara would withhold ‘the normal government deductions’ ...’ in the normal course of employment”” and the days and hours that Holliday would work.

The decision states that Laara did not dispute Holliday’s records of the hours she worked, that Laara did not maintain records because she did not consider Holliday to be an employee, that Laara paid Holliday a total of \$120 and that Holliday’s last day was December 31, 1994. In the Decision, the Tribunal noted that written submissions were received from Laara, Holliday and the Director.

As I understand Laara’s application for reconsideration, it appears that Laara disputes the hours worked and the amount paid, as well as the finding that Holliday was an employee. Laara’s grounds for reconsideration are that the Tribunal erred in stating the facts, that there is significant and serious new evidence which was not previously presented because many of Laara’s records were in storage, Kencayd was in the process of moving and her health was deteriorating, and that Kencayd had understood she would be given opportunity to provide more detailed and explicit information to the Tribunal on significant issues.

Laara’s submission relates an unfortunate sequence of health problems as well as discovery of a pre-existing medical condition, and other personal losses and traumas, which resulted in Laara Kencayd not being able to devote her attention to this case. It has recently come to her attention again because of attempts by the Director’s office to collect the amount awarded. Laara’s submissions include a candid overview of Kencayd’s poor financial situation since the time of the events which gave rise to this case.

Laara submits that she never received the Tribunal’s decision and suggests the reason might be that she moved as of March 31, 1996 and the Tribunal probably mailed it to her old address, 456G Gorge Road East. She states that she gave the Tribunal her home telephone number and address. The Tribunal records indicated that at some point, not dated, Laara gave the Tribunal a new address, which was 456G Gorge Road East and that was where the decision was mailed.

The Director and Holliday filed submissions opposing the application for reconsideration.

REASON AND DECISION

In my view, Laara has not substantiated grounds for the Tribunal to hear the application for reconsideration. I have given consideration to the various factors the Tribunal has enumerated as substantive grounds for reconsideration and I have considered the issue of the delay. In my view, Laara has not made out a case on either of those points.

On the substantive grounds, I find that Laara has not demonstrated that the Tribunal denied or limited her opportunity to present evidence and make submissions prior to issuing the Determination. It is apparent that the Tribunal processed Laara’s appeal in a timely fashion and took submissions from Laara, Holliday and the Director. I find that she has not demonstrated that the Tribunal’s findings of fact were erroneous based on all of the evidence and submissions. She may not agree with the findings, but it is apparent that the Tribunal had evidence upon which to found those facts and findings. Additionally, I find that Laara has not substantiated that there is significant new evidence that could not have been presented at the time. The onus was on Laara to ensure her evidence was before the Tribunal.

On the timeliness issue, I find that Laara has not substantiated that the delay in filing the application is reasonable, based on the contention that the Tribunal’s decision was not received until 6 years later.

Section 115 of the Act requires that the Tribunal make a copy of its written decision available to an appellant. There is no requirement for how that is to be delivered. Section 29 of the **Interpretation Act**, [RSBC 1996] Ch. 238, includes the following definition:

"**deliver**", with reference to a notice or other document, includes mail to or leave with a person, or deposit in a person's mail box or receptacle at the person's residence or place of business;

According to the Tribunal's record, the decision was sent to Laara at the address she had provided. I find there is nothing incorrect in the manner in which the Tribunal attempted to deliver the decision. By operation of section 115, the onus on the Tribunal is only to make it available, not to ensure delivery.

I appreciate that Laara Kencayd may have experienced many traumatic, stressful and distracting events around the time these events were unfolding, and in the years that followed. However, she filed the appeal with the Tribunal and could have contacted the Tribunal at any time to determine what happened with the appeal.

I have concluded that the application for reconsideration must fail both on the grounds of lack of timeliness in filing the application and on the substantive issue.

ORDER

Pursuant to Section 116(1), I order that the application for reconsideration is dismissed.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal