

An Application for Reconsideration

- by -

Western Outdoor Advertising Inc.
("Western" or "the company")

- of a Decision by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: John M. Orr

FILE No.: 2000/724

DATE OF DECISION: January 22, 2001

DECISION

OVERVIEW

This is an application by Western Outdoor Advertising Inc. ("Western" or "the company") under Section 116 (2) of the *Employment Standards Act* (the "Act") for a reconsideration of a Decision #D406/00 (the "Original Decision") which was issued by the Tribunal on September 29, 2000.

The original decision was issued in response to an application by Western for an extension of time, pursuant to section 109(1)(b) of the *Act*, for the filing of an appeal against a determination issued May 10th 2000 by the Director of Employment Standards. The extension of time was not granted and therefore the determination remained in effect. Western now requests that the Tribunal reconsider the adjudicator's decision to deny the extension of time.

ANALYSIS

The current suggested approach to the exercise of the reconsideration discretion under section 116 of the *Act* was set out by the Tribunal in *Milan Holdings Ltd.*, BCEST #D313/98. In *Milan* the Tribunal sets 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. In deciding this question the Tribunal should consider and weigh a number of factors such as whether the application is timely, whether it is an interlocutory matter, and whether its primary focus is to have the reconsideration panel effectively "re-weigh" evidence tendered before the adjudicator.

The Tribunal in *Milan* went on to state that the primary factor weighing in favour of reconsideration is whether the applicant has raised significant questions of law, fact, principle or procedure of sufficient merit to warrant the reconsideration. The decision states, "at this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general". Although most decisions would be seen as serious to the parties this latter consideration will not be used to allow for a "re-weighing" of evidence or the seeking of a "second opinion" when a party simply does not agree with the original decision.

It is one of the defined purposes of the *Act* to provide a fair and efficient procedure for resolving disputes and it is consistent with such purposes that the Tribunal's decisions should not be open to reconsideration unless there are compelling reasons: *Khalsa Diwan Society* BCEST #D199/96.

The circumstances in which an application for reconsideration will be successful will be limited. In a Reconsideration decision dated October 23, 1998, *The Director of Employment Standards*, BCEST #D475/98, the Adjudicator sets out those limits as follows:

Those circumstances have been identified in several decisions of the Tribunal, commencing with

Zoltan Kiss, BCEST #D122/96, and include:

- * 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*

In my opinion this is not a case that warrants the exercise of the reconsideration discretion. There is no new information in the application for reconsideration that was not presented to the adjudicator of the original decision. There is no submission that the adjudicator in the original decision made any mistake of fact or law or that her decision was inconsistent with other decisions of the Tribunal. There is no significant new evidence presented that was not available to be presented at the earlier stages of this matter. There is no submission that the adjudicator misunderstood or failed to deal with any serious issue.

In essence Western is simply reiterating the arguments made to the adjudicator and is seeking to have the reconsideration panel substitute its exercise of discretion for that of the adjudicator. The granting of an extension of the time period for requesting an appeal even though the period has expired is a discretionary remedy, which, of course, must be exercised judiciously.

While I do not think that this is a case which warrants reconsideration, I think it warrants comment that the adjudicator analysed very carefully and thoroughly the issues raised about service of the determination and found quite properly that the determination was legitimately served on Western – see the reconsideration decision of this Tribunal in *Re: Director of Employment Standards (Chucks Window Cleaning)* BCEST #D330/00. She also weighed very carefully the fundamental principles of the legislation and the conflicting interests of the parties. There is no doubt that the adjudicator exercised her discretion in a careful, fair, and judicious manner. Even if I were inclined to exercise my discretion differently it would not be appropriate for me to substitute my discretion for that of the adjudicator of the original decision where such discretion has been properly exercised.

ORDER

This Tribunal declines to reconsider the original decision BC EST #D406/00 and it is hereby confirmed.

JOHN M. ORR

John M. Orr
Adjudicator
Employment Standards Tribunal