

An Application for Reconsideration

- by -

Sunny Trails Club carrying on business as The Campground

- 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: Yuki Matsuno

FILE No.: 2009A/018

DATE OF DECISION: May 19, 2009

DECISION

SUBMISSIONS

John S. Piamonte	on behalf of Sunny Trails Club carrying on business as The Campground
Lucienne Winder	on behalf of Lucienne Winder and Shellan Rigg
Gagan Dhaliwal	on behalf of the Director of Employment Standards

OVERVIEW

The Determinations, Interim Decision and Referral Back

1. Sunny Trails Club carrying on business as The Campground (the“Appellant” or “STC”) applies for reconsideration of Decision BCEST #D018/09, issued by the Tribunal on January 30, 2009 (the “Decision”). The Decision concerned an appeal by STC of a determination (the “Determination”) dated January 4, 2008 and written by a delegate of the Director of Employment Standards (the “Director”). In that Determination, the delegate found that Lucienne Winder and Shellan Rigg were employees, not contractors, of the Appellant, and found that the Appellant owed them wages in the amount of \$11,472.80.
2. The Determination was appealed by all parties and the Tribunal issued a decision with respect to the Determination on April 14, 2008 (the “Interim Decision”). In the Interim Decision, the Tribunal Member affirmed the delegate’s finding that Lucienne Winder and Shellan Rigg (collectively, the “Complainants”) were employees, not contractors. However, she found that the delegate erred in that he acted on a view of the facts which could not reasonably be entertained in arriving at his conclusion regarding the Complainants’ wage entitlements. The Tribunal Member also found that the delegate failed to observe the principles of natural justice in not disclosing to STC the names of witnesses on behalf of the Complainant. The Tribunal Member referred the Determination back to the delegate for reconsideration of one matter only: the Complainants’ wage entitlement.
3. A second delegate for the Director undertook the referral back and conducted an investigation of the Complainants’ wage entitlement. She sought the parties’ submissions with respect to the hours worked by the Complainants, which were then exchanged amongst the parties. The parties had an opportunity to respond to each others’ documents. Both parties were provided with witness statements of each party and were given the opportunity to respond. The delegate spoke to a small sample of witnesses provided by both parties (although both parties requested that she interview all of their witnesses again), visited the campsite, and in particular spoke to the current host and groundskeeper of The Campground. The delegate then wrote a referral back report dated October 29, 2008 in which she described and summarized the evidence; noted the areas of disagreement between the parties regarding the evidence, such as the number of campsites available for rental and the size of the overall campsite; and noted discrepancies between the assertions of the parties and the evidence. The delegate observed that it was a challenge to assess the Complainants’ wage entitlements because no one kept accurate records of hours of work; the Complainants did not work on a set schedule; and there was no way to accurately assess the number of campers at the site at any given time due to the nature of the receipts as well as missing receipts. The delegate made findings based on the evidence before her by determining the duties of the complainants based on their contracts and witness statements; assigned time to the facts, assessing a variety of factors based on the evidence before her as well other information

such as the day of the week and whether it was a long weekend; and then calculated the wage entitlements of the Complainants to be \$2,187.95 for Shellan Rigg and \$1,548.21 for Lucienne Winder. The calculations were shown in a spreadsheet attached to the report, along with a document explaining the calculations.

4. By letter dated October 30, 2008, the Tribunal invited the parties to send any replies to the referral back report by a certain date. The Tribunal also advised that it would assign a Tribunal Member to decide the appeal, and that in a decision the Tribunal Member may confirm, vary, or cancel the Determination or refer it back to the Director. The Appellant, the Complainants, and the Director all tendered submissions that were considered by the Tribunal Member in coming to her Decision.

The Decision

5. In the Decision, the Tribunal Member began by outlining the factual background of the matter. To summarize the circumstances briefly, the Appellants both worked for STC performing duties related to the operation and maintenance of The Campground. Mr. Rigg worked for STC from April 1, 2003 to September 1, 2006, while Ms. Winder worked for STC June 15, 2006 to September 15, 2006.
6. The Tribunal Member then summarized the referral back report as well as the arguments of the parties. STC contested the delegate's method of determining the time worked by the Complainants; alleged a number of "discrepancies" in the documents on which the delegate appeared to have relied; and set out several other disagreements with the Determination. The Complainants also disagreed with the delegate's conclusions and especially the way in which the delegate dealt with the evidence before her. The delegate argued that all of the arguments made on appeal had been made and considered at the time the Determination and referral back report was issued and urged that the appeal be dismissed.
7. The Tribunal Member then put forward the general principle that the parties must show clear and convincing reasons why the Tribunal should interfere with the conclusions of the delegate. She cited *Britco Structures Ltd.*, BC EST #D260/03, in which the Tribunal held that findings of fact may be reviewed as errors of law only if they are based on no evidence, or on a view of the facts that could not reasonably be entertained. The Tribunal Member noted, "The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error." She found that the delegate considered all of the relevant factors in coming to her conclusions regarding wage entitlement, in light of the acknowledged difficulty of the task given the lack of records of hours worked or set schedules. The delegate spent considerable time assessing the case put forward by each party, including the evidence put forward by each party to substantiate its claims. The Tribunal Member dismissed the appeals of both parties.

The Reconsideration Request

8. The Appellant, STC, now applies to have the Decision reconsidered by the Tribunal.

ISSUE

9. When considering an application for reconsideration, the Tribunal must answer two questions:
 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?

ARGUMENT AND ANALYSIS

Scope of the Reconsideration Power

10. Section 116 of the *Act* provides the Tribunal with the power to reconsider decisions:
- (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.*
11. As a fundamental principle, the Tribunal reconsiders decisions only in very limited and exceptional circumstances. Reconsideration is not meant to be used as an opportunity for a party to have its case re-heard where it is not satisfied with the outcome of an appeal. In *Milan Holdings Inc.* (BC EST #D313/98, reconsideration of BC EST #D559/97), the Tribunal outlined a two-stage analysis in determining whether a decision should be reconsidered. The first stage is to determine whether the matters raised by the appellant in the application merit reconsideration. As the Tribunal stated in *Milan*:
- 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. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.*
12. The Tribunal's decision in *Zoltan Kiss*, BC EST #D122/96 noted a number of grounds on which a Tribunal ought to reconsider a decision:
- *a failure by the Tribunal member to comply with the principles of natural justice;*
 - *some mistake in stating the facts;*
 - *a failure to be consistent with other decisions which are not distinguishable on the facts;*
 - *some significant and serious new evidence has become available that would have led to the Tribunal member to a different decision;*
 - *some serious mistake in applying the law;*
 - *some misunderstandings of or a failure to deal with a significant issue in the appeal; and*
 - *some clerical error exists in the decision.*
13. This is not an exhaustive list of the possible grounds for reconsidering a decision.
14. After weighing the factors relevant to the matter before it, the Tribunal may decide that the application is not appropriate for reconsideration, in which case it will usually give the reasons for its decision. On the other hand, if the Tribunal determines that one or more of the issues raised in the application is appropriate for reconsideration, it will proceed to review the merits of the application and decide on whether to confirm the decision, or to vary it, cancel it or send it back to the tribunal member.
15. It is important to note that in a reconsideration decision, the Tribunal's mandate is to reconsider only the decision written by the Tribunal Member. It is not an opportunity to reconsider the determination (including a referral back report) of the delegate of the Director. In other words, the Tribunal's mandate in the reconsideration process does not extend to a review of the merits of the determination itself.

Summary of Parties' Arguments

16. In its request for reconsideration STC argues the following:
- *The Decision is incorrect because it is based on findings of fact in the Determination which, in turn, are incorrect because they are based on assertions of the Complainants and their witnesses which are false and untested, according to STC;*
 - *STC has been denied the opportunity of cross-examining the witnesses, which would have revealed the material falseness of the Complainants' evidence. It requests an opportunity to cross-examine the witnesses for the Complainants;*
 - *It does not agree with the Delegate's determination with respect to the time it takes to carry out the tasks; and*
 - *It relies on the submissions it has previously submitted.*
17. Its final reply, STC adds more information regarding facts about the Campground and its operations, including graphs analysing data from various years from 2004 to 2008 regarding the campsite occupation on long weekends, profit from ice sales, and lawn gas use.
18. The Complainants in their submission assert that STC passed up opportunities to set a date to cross-examine witnesses. The Complainants disagree with STC's estimation of the amount of time it took to complete work tasks, as well as with other factual assertions by STC.
19. The Director's delegate says that in May she offered the parties an opportunity to participate in a fact finding hearing, and was informed by STC that its lawyer would not be available for an oral hearing until September. Recognizing the need as mandated by the *Act* to provide fair and efficient procedures for resolving disputes under the *Act*, the delegate decided to proceed with written submissions, and did not receive any objections from the parties at the time. The delegate points out that under the *Act*, there is no requirement to hold an oral hearing, and all parties had an opportunity to review and respond to witness statements.

Analysis

20. Upon considering the submissions of the parties, I conclude that the Appellant's application fails to meet the threshold for reconsideration.
21. As indicated above, the main question to be answered in a reconsideration application is whether the application raises "*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 this case, the Appellant's submissions fail to raise any such significant questions. The bulk of the Appellant's submissions concern themselves with the factual findings of the delegate as outlined in the Determination and the referral back report, which were subsequently confirmed by the Tribunal in both the Decision and the Interim Decision. As a result, these submissions are highly suggestive of an attempt by the Appellant to have this reconsideration panel hear the matter yet another time on their merits, in an effort to change the findings of fact made by the Director's delegate during the complaint investigation and determination process. This simply is not the role of a reconsideration panel.
22. On the other hand, the Appellant's submissions fail to reveal any potential errors by the Tribunal Member in the Decision and the Interim Decision. I can find no errors with respect to the confirmation by the Tribunal Member of the findings in the Determination and the referral back report, particularly (a) that the Complainants are employees of the Appellant and (b) that the wage entitlement of the Complainants is \$2,187.95 for Shellan Rigg and \$1,548.21 for Lucienne Winder. There is no error in the Tribunal Member's

interpretation and application of the test in *Britco Structures Ltd.*, BC EST #D260/03 to determine whether the factual findings of the delegate could be reviewed as errors of law: “The Tribunal must defer to the factual findings of a delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error . . . while both parties continue to take issue about the allocation of time spent on tasks as well as the tasks themselves, neither provides any evidence that the delegate’s findings are perverse or that her conclusions were unsustainable on the evidence before her.” Hence, the Tribunal Member dismissed, correctly, both appeals.

23. The Appellant also says it was denied an opportunity to cross-examine the witnesses and requests an opportunity to do so. Both the Complainants and the Director’s delegate say that opportunities for cross-examination of witnesses had been provided during the investigation and determination process. I agree with the delegate’s submission on this point that oral hearings are not mandatory under the *Act* and in any event, the parties all had ample opportunity to review and respond to witness statements. None of this, of course, is relevant to any potential error by the Tribunal Member with respect to the principles of natural justice. I can find no error along those lines.
24. None of the Appellant’s submissions leads to the conclusion that a reconsideration of the Decision and the Interim Decision is warranted. Therefore, no analysis of either Decision on the merits is necessary.

ORDER

25. Pursuant to Section 116(1)(b) of the *Act*, I order that Tribunal Decision Bcest #D018/09 dated January 30, 2009 be confirmed.

Yuki Matsuno
Member
Employment Standards Tribunal