An application for Reconsideration

- by -

Zone Construction Inc.
("Zone")

- 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: Carol L. Roberts

FILE No.: 2006A/31

DATE OF DECISION: April 24, 2006

DECISION

SUBMISSIONS

Jeff Pasechnik: on behalf of Zone Construction Inc.

M. Elaine Phillips: on behalf of the Director of Employment Standards

OVERVIEW

1. This is an application by Zone Construction Inc.("Zone") for a reconsideration of Decision #D003/06 (the "Original Decision"), issued by the Tribunal on January 6, 2006.

2. Darcy Carruthers filed a complaint alleging that Zone owed him wages, including overtime wages, statutory holiday pay and annual vacation pay. The delegate held a hearing into Mr. Carruthers' complaint on July 5, 2005. Although Zone had knowledge of the date and time of the hearing, no one represented Zone at the hearing. An Employment Standards Branch employee contacted Mr. Pasechnik after the time set for the hearing to determine whether he would be attending. Mr. Pasechnik indicated that, although he had notice of the hearing, he had other, more important, meetings to attend to.

3. The delegate held the hearing in Zone's absence, and determined that Mr. Carruthers was entitled to wages in the amount of $2,154.69. The delegate also imposed on Zone administrative penalties in the amount of $2,500.00.

4. Zone appealed the Determination, alleging that the delegate erred in law. Zone also contended that new evidence had become available that was not available at the time the Determination was being made.

5. The Tribunal Member found that the appeal submission did not particularize the error of law; rather, it centred on whether Mr. Carruthers was an employee. The Member determined that the delegate was only required to consider evidence that might not have been before her if there was a breach of natural justice or the "new evidence" fell within the test for new evidence under s. 112 of the Act.

6. The Member determined that there had not been a breach of natural justice, and that Zone's failure to attend the hearing did not give rise to an appeal on that ground.

7. The Member also reviewed the Tribunal's tests for the admission of new evidence and concluded that Zone had not satisfied the tests for an appeal on that ground. The Member dismissed Zone's appeal.

ARGUMENT

8. Zone seeks a reconsideration of the Decision on the basis that it only addressed the issue of Zone's failure to participate in the appeal hearing, not the question of whether Mr. Carruthers was an employee.

9. The delegate says that there is nothing in Zone's application that is significantly different from the reasons on appeal.

ISSUES

10. There are two issues on reconsideration.

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?

ANALYSIS

11. The *Employment Standards Act*, R.S.B.C. 1996 c. 113 ("Act") confers an express reconsideration power on the Tribunal. Section 116 provides

(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.

The Threshold Test

12. The Tribunal reconsiders a Decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order 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."

13. In *Milan Holdings (BCEST # D313/98)* the Tribunal set 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. 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. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

14. The Tribunal may agree to reconsider a Decision for a number of reasons, including:

- The adjudicator fails 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 a serious clerical error.

(*Zoltan Kiss* BC EST#D122/96*)*

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

16. After weighing these and other factors, the Tribunal may determine that the application is not appropriate for reconsideration. Should the Tribunal determine that one or more of the issues raised in the application is appropriate for reconsideration, the Tribunal will then review the matter and make a decision. The focus of the reconsideration member will in general be with the correctness of the decision being reconsidered.

17. In *Voloroso* (BC EST #RD046/01*),* the Tribunal emphasized that restraint is necessary in the exercise of the reconsideration power:

> .. the Act creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute…
>
> There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the "winner" is not deprived of the benefit of an adjudicator's decision without good reason. A third is to avoid the spectre of a tribunal process skewed in favor of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

18. Having reviewed the material, I am not persuaded that a reconsideration of the matter is warranted.

19. The reasons for the reconsideration application are, in all essential respects, identical to those advanced before the Tribunal at the first instance. The member acknowledged that the appeal submission raised the question of whether Mr. Carruthers was an employee.

20. I might further note that at no time did Zone advise the delegate of its view that Mr. Carruthers was not an employee, even though the delegate had issued a Demand for Employer Records. There was sufficient evidence before the delegate upon which she could conclude that he was. Even had Zone appeared at the hearing, I am not persuaded that the delegate would have arrived at a different conclusion.

21. Zone has not raised significant questions of law, fact, principle or procedure that should be reviewed because of their importance to the parties and/or their implications for future cases.

ORDER

22. Pursuant to Section 116 of the *Act*, I deny the application for reconsideration.

Carol L. Roberts
Member
Employment Standards Tribunal