

An Application for Reconsideration

- by -

John Ruffolo, a Director or Officer of V.I. Renter's Centre Ltd.

- 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: Fern Jeffries

FILE No.: 2001/874

DATE OF DECISION: February 11, 2002

DECISION

OVERVIEW

This is a request to reconsider a decision pursuant to Section 116 of the *Employment Standards Act* (the “*Act*”) that 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) cancel or vary the order or decision or refer the matter back to the original panel.

John Ruffolo, applies as a director of V.I. Renter’s Centre Ltd. for a reconsideration of Decision BC EST#D546/01 that varied the determination dated October 02, 2000 to find \$476.73 owing to the employee. The original determination also found that the employee was due compensation for length of service, however, this portion of the determination was not upheld at appeal. The adjudicator found that there was an employee/employer relationship: “I am not satisfied that the onus has been met to persuade me that Ms Miller was not an employee. I therefore accept that the cheque [\$476.73] represented commissions paid by an employer to an employee for work and as such constituted wages as defined in the *Act*.” The decision confirmed that the \$475.73 was earned while John Ruffolo was a director or officer.

This request for reconsideration alleges that the adjudicator did not consider whether Ms Miller was an employee or a contractor and seeks to present “full evidence” on this matter. I find however that this issue was addressed at appeal and that no error in law was made. This request for reconsideration is therefore denied.

FACTS

V. I. Renter’s Centre Ltd. provides a service that links landlords with prospective tenants. Employees are paid a commission based on the fee paid by the landlords for locating a tenant for a vacancy.

Barbara Miller worked for V.I. Renter’s Centre Ltd. John Ruffolo was a director or officer of this company during the employment of Ms Miller, however, he sold the company on June 30, 1999. In April 1999, the company issued the employee a cheque in the amount of \$476.73. Ms. Miller misplaced the cheque and it was not tendered for payment. The employee also alleged that she was dismissed without cause and was entitled to 2 weeks wages as compensation. However this was successfully appealed as it was found that even if compensation for length of service were owing, Mr. Ruffolo was not an officer or director at the relevant time. The amount at issue for this reconsideration request is solely the \$476.73.

ISSUE

Does this request meet the threshold for reconsideration, i.e. has the adjudicator committed a serious error of law or has there been a violation of the principles of natural justice in deciding that the employer was an officer or director at the relevant time.

ANALYSIS

The *Act* intends that the Adjudicator's Appeal Decision be "final and binding". Therefore, the Tribunal only agrees to reconsider a Decision 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 reflects the purposes of the *Act* detailed in Section 2.

As established in *Milan Holdings* (BCEST # D313/98) the Tribunal has developed 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.

Reasons the Tribunal may agree to reconsider a Decision are detailed in previous Tribunal cases. For example, BC EST#D122/96 describes these as:

- 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 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 very exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case. As outlined in the above-cited case:

"It would be both unfair and inefficient if the Tribunal were to allow, in effect, two hearings of each appeal where the appeal hearing becomes nothing more than a discovery process for a reconsideration application."

In this request the employer believes that he was not fully heard on the issue of whether Ms Miller was an employee or a contractor. In his submission the delegate quotes extracts from the decision and argues that: “ It is clear from the above extracts that the adjudicator had ample opportunity consider, and did consider, the matter of the complainant’s status as an employee”. I agree with the delegate.

The employer seeks to re-argue the case and submits two references in support of his position that Ms Miller was a contractor. One reference is a letter from Revenue Canada and the other is a reference to a decision of the Tax Court on a case in Alberta of a company offering services allegedly similar to those offered by V.I. Renter’s Centre Ltd. The application of other legislative schemes on the *Employment Standards Act* is an issue that has previously been dealt with by the Tribunal. For example, in BC EST # D137/97, *B.J. Heatsavers Glass and Sunrooms Inc.*, the adjudicator states that:

“It should be noted that when one is dealing with statutory definitions, a particular individual may well be an employee for the purposes of one statute but not for another. For example, the definition of “employee” contained in the B.C. Labour Relations Code excludes certain managerial and “confidential” personnel who are nonetheless employees for purposes of the Employment Standards Act.”

Further, in BC EST # D055/97, the adjudicator states “...the Revenue Canada ruling makes a determination for income tax purposes and this has nothing to do with the employee’s status under this legislation [i.e. the Employment Standards Act].”

I concur with these decisions and find that the employer’s attempts to re-argue the case using information about tax issues bears no relevance on whether the delegate was correct in his assessment of the employment status or whether the adjudicator was correct in confirming the finding that there was an employer-employee relationship for purposes of the *Employment Standards Act*.

I do not find that this application meets the threshold for reconsideration established by the Tribunal. The adjudicator has not committed any error of law nor has he prevented the employer from fully presenting the case on the status of Ms Miller.

ORDER

I deny the application for reconsideration and confirm the decision.

Fern Jeffries, Chair
Adjudicator
Employment Standards Tribunal