

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the
Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

Image House Inc.

(“Image House”)

-of a Decision issued by-

The Employment Standards Tribunal

(the “Tribunal”)

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 97/907

DATE OF DECISION: March 3, 1998

BC EST # D075/98
Reconsideration of BC EST # D418/97

DECISION

OVERVIEW

This is an application filed by Image House Inc. (“Image House”) pursuant to section 116 of the Employment Standards Act (the “Act”) for reconsideration of an adjudicator’s decision to vary a Determination issued by the Director of Employment Standards (the “Director”) on June 13th, 1997 under file number 78-410 (the “Determination”).

The Director determined that the complainant, Denise McConachie (“McConachie”), was an Image House employee and, as such, was owed \$2,038.10 on account of unpaid wages. Image House appealed this Determination to the Tribunal. On October 22nd, 1997, following a two-day hearing, Adjudicator Hans Suhr confirmed the Director’s Determination that McConachie was an Image House employee but varied the amount of the Determination to \$1,992.80 reflecting a concession by the Director’s delegate as to the proper amount of wages due.

Image House’s request for reconsideration is contained in a two-page letter to the Tribunal, under the signature of “Vince Carl, Cheryl Saxon & Associates” (a firm styled as “Employment Relations Consultants”), dated December 4th, 1997. Image House’s agent advanced two particular grounds in support of its request for reconsideration, namely:

- i) “Denial of Natural Justice”; and
- ii) “Error in Law”.

I propose to deal with each ground in turn.

ANALYSIS

The Tribunal has issued several decisions regarding the permissible scope of review under section 116 of the Act (the “reconsideration” provision). In essence, the Tribunal has consistently held that applications for reconsideration should succeed only when there has been a demonstrable breach of the rules of natural justice, or where there is compelling new evidence that was not available at the time of the appeal hearing, or where the adjudicator has made a fundamental error of law. The reconsideration provision of the Act is not to be used as a second opportunity to challenge findings of fact made by the adjudicator, unless such findings can be characterized as lacking any evidentiary foundation whatsoever.

Denial of Natural Justice

Image House’s claim that there was a denial of natural justice is completely without foundation. The appellant was, during the course of a two-day oral hearing, given a full and fair opportunity to present its case and to challenge the contrary position advanced by Ms. McConachie.

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The nub of Image House's argument on this point appears to be not that it was denied natural justice--for example, the adjudicator refused to hear the testimony of material witnesses, or refused to allow their representative to make submissions--but that it disagrees with certain findings of fact made by the adjudicator (especially with respect to his calculation of monies found to be owing to McConachie).

As noted above, the reconsideration provision cannot be used to challenge findings of fact unless such findings could be said to be perverse in the sense that there was absolutely *no evidence* upon which a particular finding of fact could have been grounded. Having reviewed the entire file in this matter, it is clear that certain facts were in dispute between the parties but it cannot be said that there was *no* evidentiary foundation for the findings of fact that were made by the adjudicator. In the face of conflicting evidence, the adjudicator preferred the evidence of the complainant; while Image House takes issue with that position, this disagreement does not constitute a legally sufficient ground for reconsideration.

Error of Law

Image House says that the adjudicator erred in finding that Ms. McConachie was an employee rather than an independent contractor. Both the adjudicator and the Director's delegate reviewed the governing legal principles, including the provisions of the *Act* and the common law, and endeavoured to apply those legal principles to the, admittedly, disputed facts of this case.

Given the findings of fact made by the adjudicator, I cannot say that his conclusion that Ms. McConachie was an employee is erroneous; indeed, having reviewed the file, including the submissions of all parties that were before the adjudicator, I am in full agreement with his conclusion on this point.

ORDER

The application to vary or cancel the decision of the adjudicator in this matter is refused.

Kenneth Wm. Thornicroft, Adjudicator
Employment Standards Tribunal