An Application for Reconsideration

\- by -

Robin Burne carrying on business as Agent 99 Express Services
(the "Applicant")

\- 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: Robert E. Groves

FILE No.: 2016A/48

DATE OF DECISION: May 13, 2016

DECISION

SUBMISSIONS

Robin Burne	on his own behalf carrying on business as Agent 99 Express Services

OVERVIEW

1. This is an application for reconsideration brought pursuant to section 116 of the *Employment Standards Act* (the "*Act*").

2. Robin Burne (the "Applicant"), carrying on business as Agent 99 Express Services, asks that I cancel appeal decision BC EST # D044/16 of the Tribunal dated March 9, 2016 (the "Appeal Decision").

3. The matter originated with a complaint of unpaid wages filed by Joanna Juffermans (the "Complainant"), a former employee of the Applicant.

4. Following a hearing of the complaint, a delegate (the "Delegate") of the Director of Employment Standards (the "Director") issued a Determination, dated November 3, 2015, ordering that the Applicant pay the Complainant statutory holiday pay, annual vacation pay, compensation for length of service, and accrued interest in the amount of $7,484.07. The Delegate also ordered the Applicant to pay three administrative penalties of $500.00, for a total found to be owed of $8,984.07.

5. The Applicant appealed. In the Appeal Decision, the Tribunal confirmed the Determination.

6. I have before me the Applicant's Reconsideration Application Form and attached submission, his Appeal Form and submission, the Determination and the Delegate's Reasons for it, the record the Director delivered to the Tribunal pursuant to section 112(5) of the *Act*, submissions from the Applicant and the Director pertaining to the completeness of the Record, as well as the Appeal Decision I have been asked to reconsider.

7. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 8 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings on applications for reconsideration. Having reviewed the materials before me, I find I can decide this application based on the written materials filed, without an oral or electronic hearing.

FACTS

8. The Applicant operates a delivery service within the Sea to Sky corridor north of Vancouver, pursuant to a contract he has negotiated with FedEx.

9. He hired the Complainant to deliver packages, at a set rate per delivery. The Complainant was required to use her own vehicle when performing her work.

10. The principal contention of the Applicant before the Delegate was that the Complainant was an independent contractor, and so their working relationship was not subject to scrutiny pursuant to the *Act*. Alternatively, if she were found to be an employee, the Applicant asserted that he had cause to terminate the relationship.

11. After considering the relevant facts, and applying the definitions of "employee" and "employer" found in the *Act*, as well as the relevant common law tests, the Delegate determined that the Complainant was the Applicant's employee, and not a contractor. The Delegate also concluded that the Applicant had failed to establish cause for the Complainant's dismissal.

12. In his appeal, the Applicant contended that the Delegate had failed to observe the principles of natural justice. He argued that the Delegate committed a procedural error because there was a 228 day delay between the date of the complaint hearing and the issuance of the Determination. He also asserted that the Delegate neglected to specifically refer in her Reasons to what the Applicant considered to be key pieces of evidence. He submitted that the Delegate must, therefore, have discounted that evidence, without providing reasons for doing so. In aid of the latter argument, the Applicant sought production of the Delegate's hearing notes.

13. The Tribunal decided that while an eight months' wait for a decision "ought to be discouraged", there was no evidence the delay caused actual prejudice to the parties, and so the Applicant had failed to demonstrate a natural justice breach flowing from the mere passage of time between the hearing date and the date of the Determination.

14. As for the Applicant's concern that the Delegate's Reasons for the Determination were wanting because she did not specifically address all the evidence, the Tribunal stated that a failure to refer to every piece of evidence in a determination does not lead inexorably to a finding that there was a failure to observe the principles of natural justice. The Tribunal noted that the Delegate's Reasons referred to the key elements of the evidence the Applicant offered on the issues of substance before her, and that it was clear from several statements in the Reasons that the Delegate had considered the evidence of the Applicant's witnesses. In the result, the Tribunal was not disposed to accept that a failure of natural justice on this ground had occurred.

15. The Applicant's appeal also questioned how, in light of the evidence tendered at the hearing, the Delegate could decide that the Complainant was an employee. The Applicant's argument on this point alluded to the evidence of his witnesses, and the Complainant herself, to the effect that she believed she had been retained to work for the Applicant as an independent contractor, and that she was paid at a rate that exceeded what an employee would have earned when performing similar work. The Tribunal rejected this avenue of attack, stating that the Complainant's status was a question of law, which no one but the Delegate was in a position to decide. As for the matter of the Complainant's rate of pay, the Tribunal was of the view that it was not a factual circumstance which was of significant probative value when deciding whether the Complainant was an employee or an independent contractor.

16. The Tribunal also declined to accept the Applicant's submission that the Delegate should produce her hearing notes. There was no transcript of the oral evidence tendered at the hearing. The notes taken by the Delegate were not intended to constitute a complete record of everything that was said. Instead, they were to act as an *aide-memoire* for the Delegate. As such, the Tribunal decided, they were protected by deliberative privilege, and absent exceptional circumstances, which had not been proven to exist, there should be no requirement that they be produced.

ISSUES

17. There are two issues which arise on an application for reconsideration of a decision of the Tribunal:

    1. Does the request meet the threshold established by the Tribunal for reconsidering a decision?
    2. If so, should the decision be confirmed, cancelled, varied or referred back to the original panel, or another panel of the Tribunal?

DISCUSSION

18. The power of the Tribunal to reconsider one of its decisions arises pursuant to section 116 of the *Act*, the relevant portion of which reads as follows:

> 116 (1) On application under subsection (2) or on its own motion, the tribunal may
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> (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.

19. The reconsideration power is discretionary, and must be exercised with restraint. Reconsideration is not an automatic right bestowed on a party who disagrees with an order or decision of the Tribunal in an appeal.

20. The attitude of the Tribunal towards applications under section 116 is derived in part from section 2 of the *Act*, which identifies as purposes of the legislation the promotion of fair treatment of employees and employers, and the provision of fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. It is also derived from a desire to preserve the integrity of the appeal process mandated in section 112 of the *Act*.

21. With these principles in mind, the Tribunal has repeatedly asserted that an application for reconsideration will be unsuccessful absent exceptional circumstances, the existence of which must be clearly established by the party seeking to have the Tribunal's appeal decision overturned.

22. The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal considers the applicant's submissions, the record that was before the Tribunal in the appeal proceedings, and the decision the applicant seeks to have reconsidered. The Tribunal then asks whether the matters raised in the application warrant a reconsideration of the decision at all. In order for the answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the appeal decision which are so important that they warrant reconsideration.

23. In general, the Tribunal will be disinclined to reconsider if the primary focus of the application is to have the reconsideration panel re-weigh arguments that failed in the appeal. It has been said that reconsideration is not an opportunity to get a "second opinion" when a party simply does not agree with an original decision (see *Re Middleton*, BC EST # RD126/06).

24. If the applicant satisfies the requirements in the first stage, the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the Tribunal's decision in the appeal. When considering that decision at this second stage, the standard applied is one of correctness.

25. In my opinion, the Applicant has failed to demonstrate that the Appeal Decision should be reconsidered.

26. In substance, the Applicant's submissions repeat several of the arguments that were unsuccessful in the appeal proceedings.

27. The Applicant submits that the Determination is flawed because the Delegate did not accept as conclusive the testimony given at the hearing which alleged that the Complainant had been hired as a contractor, and not as an employee.

28. In fact, the Delegate was acutely aware that the principal issue in the complaint related to the Complainant's status. She referred in detail to the evidence of the parties regarding this question, and to the sworn testimony of their witnesses. She analyzed, at length, the statutory and common law tests that are applicable in cases of this sort.

29. The Applicant's position appears to be that since the parties indicated they thought the Complainant had been retained as an independent contractor, that understanding determines the legal result. However, that is not the law. The definitions of "employee" and "employer" in the *Act* say nothing about the intentions of the parties when someone is hired to perform work. This is not to say that the intentions of the parties to an agreement for work are never relevant. Intent can be a factor, but there are several other objective criteria which are also to be considered. In many cases, and probably most, it is these objective criteria which will be the most useful in determining the employment status of the person who is hired.

30. The common law test for employment in Canada remains as stated in the oft-cited decision of the Supreme Court of Canada in *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* [2001] 2 SCR 983. Major J., for the court, said this, at paragraphs 47 and 48:

> … The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.
>
> It bears repeating that the above factors constitute a non-exhaustive list, and there is no set formula as to their application. The relative weight of each will depend on the particular facts and circumstances of the case.

31. The statutory scheme set out in the *Act* contemplates that the net capturing employment relationships will be cast broadly. The section 1 definition of "employee" includes, *inter alia*, a person "receiving or entitled to wages for work performed for another" and "a person an employer allows, directly or indirectly, to perform work normally performed by an employee". An "employer" is defined to include a person "who has or had control or direction of an employee" or "who is or was responsible, directly or indirectly, for the employment of an employee". The Tribunal has stated on several occasions that the common law tests, while useful, must yield to the statutory definitions (see, for example, *North Delta Real Hot Yoga Ltd. (c.o.b. Bikram Yoga Delta)*, BC EST # D026/12).

32. Another factor informing the discussion relating to the scope of the protections available to persons under the *Act* is reflected in the decision in *Rizzo & Rizzo Shoes Ltd.* [1998] 1 SCR 27. That was a case where a plausible reading of the words in the Ontario employment standards legislation restricted the obligation to pay termination and severance pay to circumstances where employers had actively terminated the employment of their employees. The legislation therefore appeared to relieve employers from that obligation in the circumstances of that case, where the failure to make the payments resulted instead from a bankruptcy. In rejecting that narrow interpretation of the Ontario statute the court held that with benefits-conferring legislation a broad and generous approach to interpretation is more appropriate.

33. Similarly, in *Machtinger v. HOJ Industries Ltd.* [1992] 1 SCR 986, the court stated that an interpretation of the *Act* which encourages employers to comply with the minimum requirements contained within it, and so extends its protection to as many employees as possible, is favoured over one that does not.

34. The inference to be drawn from these authorities is that, in cases of doubt, the policy of the statute will tend to support a finding of employment, even in cases where the parties themselves think that no such relationship has been established.

35. It follows that the Delegate did not err when she declined to defer to the understanding of the parties that the Complainant was a contractor. Similarly, the Tribunal was entirely correct when it stated that the Complainant's status was a question of law that none of the parties or their witnesses were qualified to answer.

36. The Applicant also objects on fairness grounds to the fact that no transcript of the evidence at the complaint hearing was prepared and kept by the Delegate. This appears to be a slightly different assertion than the one the Applicant made on appeal. There, the Applicant argued that since no transcript had been prepared, the Delegate's notes of the complaint hearing should be produced as part of the subsection 112(5) record.

37. The simple answer to this objection is that there is no legislative prescription mandating that adjudicative proceedings involving a delegate be transcribed. The absence of such a prescription is consistent with the tenor of the statutory regime contemplated in the *Act*. Proceedings under it are meant to be summary in form. Indeed, subsection 2(d) states explicitly that a purpose of the statute is to foster procedures for resolving disputes that are efficient, as well as fair. It is not obvious to me that the imposition of a rule, purporting to be based on considerations of natural justice, and requiring that all oral complaint hearings be transcribed, would, of necessity, render the procedures under the *Act* any more efficient, or any more fair.

38. While it is somewhat unclear from the Applicant's submission, it seems that the concern regarding the absence of a transcript is related to the period of months that separated the complaint hearing from the issuance of the Determination. The Applicant implies that the absence of a proper record of the evidence taken at the complaint hearing resulted in the Delegate's forgetting the statements of the various witnesses to the effect that the Complainant was a contractor. If that is the Applicant's point, I reject it. As I have said, the Delegate's Reasons discuss the evidence relating to the Complainant's status, and the relevant legal tests, at great length. There is no indication in the Delegate's Reasons that important evidence was forgotten, or otherwise escaped consideration. The fact that the Delegate disagreed with the Applicant's characterization of the Complainant's status is a different thing entirely.

39. The Applicant again argues that the Complainant enjoyed a rate of pay that was in excess of what any courier could expect to receive. I infer from this submission that the Applicant believes the Tribunal should have concluded that the Complainant's rate of pay was consistent only with her providing services as an independent contractor. If so, I do not see the connection. It seems to me that if it is construed to be a bad business decision to pay someone too much to deliver packages, such a conclusion is equally true whether the person is retained as an independent contractor, or an employee. Put differently, overpaying someone is of limited, if any, significance in determining the person's employment status, at least in the factual circumstances presented here.

40. A final argument offered by the Applicant refers to an incident that occurred at the conclusion of the complaint hearing. The Applicant says that as he was leaving the Employment Standards Branch office another delegate stated to him "It looks like the determination will be in your favour." The Applicant found this comment "disturbing", and given the final outcome of the complaint, recorded in the Determination issued months later, it added weight to the Applicant's conclusion that the Delegate must have forgotten the evidence at the complaint hearing, and so her conclusion must have changed as time passed.

41. As I have not requested submissions from the other parties on this application, including the Director, I have no reason to doubt that the Applicant's recollection of this event is accurate. However, I am not persuaded that it should affect the validity of the Appeal Decision. Indeed, the Applicant does not appear to have raised this particular event with the Tribunal during the appeal proceedings. That fact, in itself, is enough to preclude my giving any effect to it on this application for reconsideration.

42. I have concluded, moreover, that the circumstances described by the Applicant are insufficient to undermine the validity of the Determination. The delegate who made the comment was not the Delegate who heard the complaint or issued the Determination. There is no suggestion of improper influence, or even an inappropriate comment from the Delegate suggesting a specific disposition of mind before a full consideration of all the evidence could occur. Apart from a suspicion the incident raised in the mind of the Applicant, there is no evidence suggesting a connection between what was said, and the ultimate outcome of the proceedings before the Delegate.

43. For these reasons, I am not persuaded that the Applicant has raised any matters supporting a conclusion that the Appeal Decision was wrongly decided, and should be reconsidered.

ORDER

44. Pursuant to section 116 of the *Act*, I order that Appeal Decision, BC EST # D044/16, be confirmed.

Robert E. Groves
Member
Employment Standards Tribunal