

An application for Reconsideration

- by -

Anna-Liisa Koivisto operating as Finn Custom Aluminum  
(“Finn”)

- 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/70

**DATE OF DECISION:** July 20, 2006

## DECISION

### SUBMISSIONS

Immo Koivisto

on behalf of Finn Custom Aluminum

### OVERVIEW

1. This is an application by Anna-Liisa Koivisoto operating as Finn Custom Aluminum (“Finn”) for a reconsideration of Decision #D006/05 (the "Original Decision"), issued by the Tribunal on January 7, 2005.
2. Cary Jarvis worked as a siding applicator for Finn, a siding business, until February 26, 2004. He filed a complaint alleging that Finn owed him wages. Finn took the position that Mr. Jarvis was an independent contractor.
3. Following a hearing into Mr. Jarvis’s complaint, the delegate concluded that Mr. Jarvis was an employee, and that he was entitled to wages.
4. Finn appealed the decision, alleging that it was wrong, and submitted new evidence with the appeal documentation.
5. The Tribunal member reviewed the submissions and found that Finn had not discharged the burden of establishing that the delegate had erred in law, or failed to observe the principles of natural justice. He also concluded that the “new” document should not be accepted, on the grounds that it was reasonably available to, and could have been provided by Finn during the hearing.
6. In addressing Finn’s argument that the delegate failed to take into consideration a ruling by the Canada Customs and Revenue Agency finding Mr. Jarvis was not an employee for the purposes of the Canada Pension Plan, the member concluded that while it would have been preferable for the delegate to have addressed the ruling, the delegate nevertheless had not erred in his conclusion based on the *Act* with reference to the traditional common law tests.
7. The member found the appeal to be without merit, and confirmed the Determination.

### ARGUMENT

8. Finn’s application for reconsideration was received at the Tribunal on June 13, 2006, 17 months after the Tribunal’s decision was issued. In that application, he says that the director’s delegate made a “wrong decision”. In the reconsideration letter, Mr. Koivisto repeats his argument that Mr. Jarvis is an independent contractor. He says that Mr. Jarvis issued invoices and that no time sheets were completed, that each paycheque was in a different amount, and all his workers are subcontractors so no T4’s were issued or deductions taken.
9. When advised by the Tribunal of Rule 22(3) of the Rules of Procedure which requires applicants seeking reconsideration to explain any delay over 30 days after the date of the decision, Mr. Koivisto noted that

his dispute with Mr. Jarvis had been going on for over 2 years, including court time. It appears that Mr. Jarvis appealed the Canada Customs and Revenue Agency decision, and the decision was reversed by the Deputy Attorney General. Finn then appealed that decision to the Tax Court of Canada, which vacated the Minister's decision. That decision was issued March 10, 2006.

10. Mr. Koivisto explained that the delay was due to his unfamiliarity with the law, as well as the length of time it had taken him to obtain the Tax Court of Canada's decision.

## ISSUES

11. 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

12. 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*

13. 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."
14. 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.

15. The Tribunal may agree to reconsider a Decision for a number of reasons, including:
- The member 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 member 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)
16. 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.
17. 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.
18. In *Director of Employment Standards (Valoroso)*, 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...
19. 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.
20. At issue in this case is whether the Tribunal should exercise its discretion to reconsider the decision in light of the significant time period that has elapsed between the decision and the application.
21. Although the *Act* does not set out a time limit for the bringing of an application, the Rules provide that applications should be brought within 30 days. As noted above, this application was made 17 months after the decision was issued.

22. In BCEST #RD046/01, the Tribunal set out the following principles to be considered relating to timeliness of applications:
1. The Tribunal will properly consider delay in deciding whether to exercise the reconsideration discretion
  2. Where delay is significant, an applicant should offer an explanation for the delay...
  3. Delay combined with demonstrated prejudice to a party will weigh even stronger against reconsideration. In some cases, the Tribunal may presume prejudice based on a lengthy unexplained delay alone.
  4. Even in cases of unreasonable delay, the Tribunal ought to consider the merits, and retains the discretion to entertain and grant a reconsideration remedy where a clear and compelling case on the merits is made out.
23. Having reviewed the material, I am not persuaded that a reconsideration of the matter is warranted. Not only is there a delay which is explained largely on unfamiliarity with the law, I am unable to find there is a clear and compelling case on the merits.
24. As noted in *The Director of Employment Standards (supra)* an untimely application may be considered prejudicial to the parties without actual evidence of that. It is likely that Mr. Jarvis wishes to put this matter behind him.
25. However, and more compellingly, I find the reconsideration application to constitute, in essence, an attempt to re-argue the merits of the decision. It appears that Finn has misunderstood the reconsideration process, as it seems that it is attempting to appeal the Determination rather than the Tribunal's decision upholding the correctness of that decision. The reconsideration application appears to be largely based on the March 2006 ruling by the Tax Court. As noted by the member in the original decision "rulings made by CCRA are not determinative of an individual's status under the *Act*". In other words, in deciding whether an individual is an employee, it is the *Employment Standards Act* that must be considered, not Canada Revenue tests.
26. I find the member's conclusion to be correct.
27. There is no basis to exercise the reconsideration power.

## **ORDER**

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

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**