

An Application for Reconsideration

- by -

Michael Charles McKee and Alexander James Boyce Wardle,
operating as Valhalla Services

- 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: John M. Orr

FILE No.: 2003/4

DATE OF DECISION: March 11, 2003

DECISION

OVERVIEW

This is an application by Michael Charles McKee and Alexander James Boyce Wardle operating as Valhalla Services (hereinafter collectively referred to as “Valhalla”) pursuant to Section 116 (2) of the *Employment Standards Act* (the “Act”) for a reconsideration of a Tribunal decision #D522/02 (the “Original Decision”) which was issued by the Tribunal on December 2, 2002.

Valhalla operates a call centre for rubbish removal. Gary Wong (“Wong”) was employed from October 2, 2002 to May 17, 2002. He worked as an accountant. Valhalla gave Wong at least three weeks oral notice of termination but did not provide written notice.

Subsequent to the termination Wong applied to the Director of Employment Standards for compensation for length of service. The Director’s delegate who investigated the claim determined that oral notice did not discharge the employer’s liability for compensation and ordered Valhalla to pay compensation to Wong. Valhalla appealed and in a written decision dated December 2, 2002 the Tribunal confirmed the Determination.

Valhalla now seeks reconsideration of that decision.

ANALYSIS

The test for the exercise of the reconsideration power under section 116 of the *Act* is set out in *Milan Holdings Ltd.*, BCEST #D313/98. The Tribunal sets 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. In deciding this question the Tribunal should consider a number of factors such as whether the application is timely, whether it is an interlocutory matter, and whether its primary focus is to have the reconsideration panel effectively “re-weigh” evidence tendered before the adjudicator.

The Tribunal in *Milan* went on to state that the primary factor weighing in favour of reconsideration is whether the applicant has raised significant questions of law, fact, principle or procedure of sufficient merit to warrant the reconsideration. The decision states, “at this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general”. Although most decisions would be seen as serious to the parties this latter consideration will not be used to allow for a “re-weighing” of evidence or the seeking of a “second opinion” when a party simply does not agree with the original decision.

It is one of the defined purposes of the *Act* to provide a fair and efficient procedure for resolving disputes and it is consistent with such purposes that the Tribunal’s decisions should not be open to reconsideration unless there are compelling reasons: *Khalsa Diwan Society* BCEST #D199/96.

In my opinion this is not a case that warrants the exercise of the reconsideration discretion. The submissions made by Valhalla in regard to actual notice on this reconsideration application only reiterate the arguments that have already been decided by the delegate and by the adjudicator in the original decision.

The argument that actual oral notice should suffice was presented fully to the adjudicator and was considered by her carefully. The delegate and the adjudicator considered the relevant jurisprudence. There is no suggestion in the application that the adjudicator failed to understand the argument or failed to give the appellant's submissions due consideration.

There is however an added element in the submission for reconsideration that may not have been presented to the delegate or the adjudicator. To the extent that it was not presented earlier in the process it cannot be argued at this stage in the process. If it was argued previously and not addressed in the determination or the original decision then it may be worthy of some consideration.

Valhalla alleges that Wong, as an accountant, had a fiduciary duty to advise the employer that written notice was required rather than to "lie in the weeds" and subsequently claim that the notice was inadequate. While there is perhaps some moral force behind this argument it cannot be sustained on reconsideration. This argument is dependant upon establishing a factual or evidentiary basis to demonstrate that Wong held such a position in the employer's operations that would require him to give that advice. Even if established factually it would not remove the statutory liability for the employer to comply with the notice provisions. A breach of that fiduciary duty may only establish a cause of action for the employer to recover from the employee for breach of that duty. It is unlikely that such a breach of employment responsibility alone, even if established, would warrant summary dismissal to discharge the requirement to pay compensation for length of service.

At any rate this additional argument should have been made to the delegate or at the least on appeal to the adjudicator. Even if I were to consider it at this stage I would dismiss the argument on the basis that the duty has not been factually established.

I am not persuaded that there is a sufficient basis in fact or in law to warrant any interference in the decision made by the adjudicator in the original decision. Therefore I am not prepared to exercise my discretion to reconsider the original decision.

ORDER

The application to reconsider the decision of the adjudicator in this matter is dismissed.

John M. Orr
Adjudicator
Employment Standards Tribunal