An Application for Reconsideration

- by -

State of the Art Bookkeeping/Accounting Ltd.
(the "Employer")

- 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 Groves

FILE No.: 2009A/088

DATE OF DECISION: August 26, 2009

DECISION

OVERVIEW

1. This is an application brought by State of the Art Accounting Ltd. (the "Employer") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") seeking reconsideration of a decision of a member of the Tribunal (the "Member") dated May 22, 2009 under BC EST # D052/09 (the "Original Decision").

2. The matter came on before the Member by way of an appeal filed by the Employer pursuant to section 112 of the *Act* in which the Employer challenged a determination of a delegate (the "Delegate") of the Director of Employment Standards (the "Director") dated January 26, 2009 (the "Determination"). The Determination resulted from a complaint filed by a Rebecca Chapman ("Chapman"), alleging that the Employer had failed to pay her regular wages, overtime wages, annual vacation pay, and compensation for length of service as required. The Delegate decided that the Employer had contravened sections 18, 40, 58 and 63 of the *Act*, with the result that the Employer was liable to pay, with accrued interest, the sum of $2,116.82, together with administrative penalties of $1,000.00 imposed pursuant to the *Employment Standards Regulation*, for a total of $3,116.82.

3. In her Original Decision, the Member varied the Determination by reducing the sum owed by $10.13, on account of the Delegate's incorrectly calculating the sum owed to Ms. Chapman for vacation pay having regard to a figure for wages that included GST. In all other respects, the Determination was confirmed.

4. I have before me the contents of the Tribunal file relating to the Employer's original appeal, the Original Decision, the Employer's application for reconsideration together with a submission and attached documents in support, a response from the Delegate, and a submission from Ms. Chapman.

5. There is no issue as to the timeliness of the application for reconsideration.

6. Pursuant to section 36 of the *Administrative Tribunals Act*, which is incorporated into these proceedings by section 103 of the *Act*, and Rule 26 of the Tribunal's *Rules of Practice and Procedure*, the Tribunal may hold any combination of written, electronic and oral hearings. I have concluded that this application shall be decided having regard to the written materials I have received, without an oral hearing.

FACTS

7. Ms. Chapman performed work as a bookkeeper for the Employer over a period of months in 2008. She and the Employer disagreed as to her status. The Employer said she was an independent contractor. Ms. Chapman alleged that she was at all times an employee.

8. The Delegate conducted a hearing on December 17, 2008, after which he concluded that the evidence supported a finding that the Employer had engaged Ms. Chapman as an employee, and not as an independent contractor, for the purposes of the *Act*.

9. The Employer appealed the Determination on grounds which engaged all three points of the Tribunal's jurisdiction identified in section 112(1). They are:

    a) the director erred in law;

    b) the director failed to observe the principles of natural justice in making the determination;

c) evidence has become available that was not available at the time the determination was being made.

10. The Employer alleged that the Delegate erred in law in deciding that Ms. Chapman was an employee. It asserted that the Delegate acted in breach of the principles of natural justice in the manner he conducted the December 17, 2008, hearing. It also submitted that new evidence would show that Ms. Chapman's status was in truth an independent contractor, and not an employee.

11. On the issue of new evidence, the Member applied the standard tests identified in previous decisions of the Tribunal, and concluded that the evidence the Employer sought to have considered was with one exception either not relevant to the issues raised in the complaint, or was not "new" in the sense contemplated by section 112(1)(c) in that it had not been shown that it was not available to the Employer in the proceedings leading to the making of the Determination.

12. In her discussion relating to section 112(1)(c), the Member made special reference to a ruling of the Appeals Division of the Canada Revenue Agency, issued after the making of the Determination, to the effect that Ms. Chapman's work for the Employer during the period in question was not pensionable or insurable because she was engaged in a "contract for service" and was not an employee. The Member decided the evidence of the ruling was also irrelevant, and therefore of no probative value for the purposes of section 112(1)(c), because decisions of other administrative tribunals, interpreting different statutes, containing different wording, cannot be binding for the purposes of determining the status of a person to make a claim under the *Act*.

13. The natural justice concern arose out of the way the Employer was represented at the hearing the Delegate conducted on December 17, 2008. The principal of the Employer, Margit Ehlers ("Ehlers"), was out of town on the day of the hearing. Another of the Employer's employees, Natalie Stewart ("Stewart"), appeared at the hearing via telephone, but the Employer asserted on appeal that she was ill-prepared, as she had less than complete knowledge of the Employer's case, and she had expected the hearing to occur on another day. It said also that Ms. Stewart felt pressured by the Delegate and Ms. Chapman to participate in the hearing when she was called.

14. Neither Ms. Ehlers nor Ms. Stewart requested an adjournment of the hearing. The Employer's appeal alleged that, in the circumstances, it was incumbent on the Delegate in order to avoid running afoul of the obligation to apply natural justice that he adjourn the hearing on his own motion.

15. The Member disagreed, deciding that as the Employer had full knowledge of the substance of Ms. Chapman's complaint, and a representative of the Employer attended at the hearing, led evidence, cross-examined Ms. Chapman, and submitted arguments, no discernible unfairness could be detected. The Member went on to say that it is for a corporate party like the Employer to choose its representative, and here it had chosen Ms. Stewart. If the Employer, or its representative Ms. Stewart, had thought it wise to request an adjournment, either could have done so but, in the event, that did not occur. It is implicit in the comments of the Member that she agreed with the submission of the Delegate to the effect that it is not for the delegate in such a situation to suggest an adjournment, nor is it a breach of natural justice should the delegate fail to do so.

16. The appeal alleged that the Delegate erred in law in deciding that Ms. Chapman was an employee. In rejecting this submission, the Member alluded to the Delegate's careful review of the evidence relating to the work Ms. Chapman actually performed, and affirmed the Delegate's conclusion that since the Employer had significant control over Ms. Chapman's work, and the work Ms. Chapman performed was work of a type that was also performed by another person whom the Employer admitted was clearly an employee, the statutory elements supporting a finding that Ms. Chapman was an employee for the purposes of the *Act* had been met.

17. On this application for reconsideration, the Employer re-visits the Determination and seeks, once again, to convince the Tribunal that the conclusions contained within it are flawed. To this end, the Employer makes several arguments.

18. First, the Employer says that Ms. Chapman should have been determined to have been an independent contractor, and not an employee, because her relationship with the Employer was one of "contract," as opposed, I infer the Employer is suggesting, to a relationship of "employment." It also submits that Ms. Chapman's failure to provide notice of a departure during the time she worked for the Employer, or to request a Record of Employment, or vacation pay, "as any ordinary employee would" in such circumstances, as well as the fact that Ms. Chapman was permitted to pursue other clients, and to work long hours in order to complete her work without the necessity of having to make repeated visits to the Employer's premises during normal business hours, must all mean that she was a contractor.

19. The Employer further avers that Ms. Chapman's timesheets show she did "review," "train," and that she "cleaned up" other bookkeepers' work. The Employer says this reflects that Ms. Chapman was "not doing work commonly done by employees." Instead, the Employer says, Ms. Chapman was paid at a "business to business" rate "to allow for profit when work is either subcontracted or of a more supervisory nature."

20. Second, the Employer asserts, I infer, that Ms. Chapman's initially seeking to pursue remedies against the Employer in the Small Claims Division of the Provincial Court of British Columbia, the way the Employer says "business people look for remedies to their disputes," before deciding instead to file a complaint with the Director under the *Act*, must again mean that Ms. Chapman was a contractor, and not an employee.

21. Third, the Employer alleges that Ms. Stewart, a "junior employee" who was "unprepared" and "unfamiliar" with the evidence, took it upon herself to represent the Employer at the December 17, 2008, hearing in an attempt "to be helpful." However, the Employer never delegated this task to Ms. Stewart, she had no authority to speak on the Employer's behalf, and it was inappropriate for the Delegate "to accept any one who happened to speak on the phone" when he telephoned the Employer's premises on the day of the hearing. The Employer says that Ms. Ehlers was unable to attend the hearing herself because she was out of the province. She had delegated the responsibility to attend at the hearing to another employee, one Joanne Gaudreault ("Gaudreault"). However, Ms. Gaudreault resigned her employment the day before the hearing was to occur, without advising Ms. Ehlers, with the result that when the Delegate telephoned the Employer on the day of the hearing it was Ms. Stewart who participated in the call.

22. Fourth, the Employer presents documentary "audit trail" evidence purporting to demonstrate that Ms. Chapman "did senior and specialized work not commonly done by employees," and invoiced the Employer for work done that she did not, in fact, perform.

23. The Delegate submits that the Employer's application for reconsideration should be dismissed on the basis that it largely repeats arguments delivered on the appeal, the Member rejected those arguments, and she was correct in doing so.

24. On the question whether there was a failure to observe the principles of natural justice, the Delegate points out that there was nothing in Ms. Stewart's conduct during the December 17, 2008, hearing that lends weight to the assertion she acted as the Employer's representative on her own initiative, and without the requisite authority. The Delegate says that requests for adjournments normally come from the parties themselves, and while a delegate has the power to order adjournments on his or her own motion if the delegate thinks it proper, there was nothing before the Delegate in this case to suggest that he should have exercised his discretion to order an adjournment. This is so because the Delegate was not made aware of the steps Ms.

Ehlers or others in authority at the Employer had taken to delegate responsibility for appearing at the hearing on the Employer's behalf.

25. Furthermore, the Delegate asserts that even if no one had been available to represent the Employer at the hearing, the Delegate would likely have conducted the hearing in any event, as the Employer was made aware when it would take place and had indicated that it was prepared to proceed. The Delegate also suggests that if it can be said Ms. Stewart's presence resulted in a less desirable outcome for the Employer than if no one had appeared on its behalf, any natural justice issues which are raised as a result may be cured by the Tribunal.

26. Regarding the "audit trail" documentation presented by the Employer on this application, the Delegate submits that none of this information was presented to him in the proceedings leading to the making of the Determination nor to the Member deciding the appeal, as it should have been, and so it is too late for the Employer to attempt to rely upon it now.

27. Ms. Chapman has also delivered a submission regarding this application. While I have reviewed it in its entirety, the part to which I will refer relates to Ms. Stewart's participation on behalf of the Employer at the December 17, 2008, hearing. Ms. Chapman says that Ms. Stewart advised the Delegate at the commencement of the hearing that Ms. Ehlers' daughter, Sylvia Soderstrom, was a shareholder in the Employer and that Ms. Soderstrom had given Ms. Stewart authority to represent the Employer at the hearing in Ms. Ehlers' absence.

28. Upon receipt of the submissions from the Delegate and Ms. Chapman to which I have referred, the Tribunal wrote to the Employer, enclosing the submissions, and inviting a final reply. The record does not reveal that any such reply was received from the Employer.

ISSUE

29. 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 cancelled or varied or sent back to the original panel, or another panel of the Tribunal?

ANALYSIS

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

> 116(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, cancel or vary the order or decision or refer the matter back to the original panel or another panel.

31. In *LS Labour Solutions* BC EST # RD006/09, I said this regarding section 116:

> Previous decisions of the Tribunal, taking their lead from *Milan Holdings* BC EST # D313/98, have consistently held that the reconsideration power is discretionary, and must be exercised with restraint. This attitude 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 legitimate desire to preserve the integrity of the appeal process described in section 112 of the *Act*. A losing party should not easily have available to it an avenue for avoiding the consequences of a Tribunal decision emanating from that process. Nor should it be entitled to an opportunity to re-argue a case that failed to persuade the Tribunal at first instance. In giving voice to these principles 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 original decision overturned.
>
> The Tribunal has adopted a two-stage analysis when considering applications for reconsideration. In the first stage, the Tribunal asks whether the matters raised in the application warrant reconsideration at all. In order for the answer to be "yes" the applicant must raise questions of fact, law, principle or procedure flowing from the original decision which are so important that they demand intervention. If the applicant satisfies this requirement the Tribunal will go on to the second stage of the inquiry, which focuses on the merits of the original decision. When considering the original decision at this second stage, the standard applied is one of correctness: *Zone Construction Inc.* BC EST # RD053/06.

32. An important point to remember is that an application under section 116, properly framed, requests reconsideration of an order or decision of the Tribunal, and not, at least directly, the determination which preceded it. Much of what the Employer has presented by way of submissions on this application consists of additional arguments designed to convince the Tribunal that the Delegate was wrong when he decided that Ms. Chapman was an employee and not an independent contractor. Rather than limiting its focus in this way, the Employer should, I think, have directed its attention to an examination of the Original Decision, and set out how, in its view, the Member mis-applied her appellate jurisdiction under section 112. The Employer's submissions on this application do not mention the Original Decision, or the analysis contained within it, at all.

33. Notwithstanding this shortcoming, I have reviewed the submissions of the Employer to discern if it can be said they raise questions of fact, law, principle or procedure flowing from the Original Decision which are so important that they demand reconsideration. I have concluded that none of the grounds for challenge identified by the Employer to which I have referred earlier raise matters that would warrant a reconsideration of the Original Decision on the merits.

34. The Employer's argument that its relationship with Ms. Chapman was one of "contract," and therefore Ms. Chapman must have been an independent contractor, ignores the fact that employment relationships are also contractual in the eyes of the law. The fact that there is a contract in place in no way defines the substance of the relationship. It is the nature of that contract, and the conduct that arises from it, which will establish whether the person retained pursuant to it is an employee or an independent contractor.

35. Ms. Chapman's failure to provide notice of her departure during her relationship with the Employer, or to request a Record of Employment or vacation pay at the time, are in my opinion of very limited assistance in resolving the issue of Ms. Chapman's employment status. I suppose one might say they imply that Ms. Chapman may have thought she was a contractor, and not an employee, but that seems little more than speculation, and in any event it is insufficient to establish a contractor relationship that the parties themselves may have believed that was the type of relationship they were creating. Again, it is the substance of the relationship, objectively determined, and not the subjective views of the parties as to the proper characterization of that relationship which must necessarily prevail. The intent of the parties is but one factor

to be considered (see *Truoung v. British Columbia* 1999 BCCA 513, especially at paragraph 35; *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* 2001 SCC 59 at paragraphs 46-48).

36. It is also of no moment, I think, that while Ms. Chapman performed duties identical to those performed by another employee, some of Ms. Chapman's duties also involved the reviewing and rehabilitation of other employees' work, or training other members of the Employer's staff. The fact that Ms. Chapman may have exercised some supervisory responsibilities, and perhaps received a premium rate of pay, does not make her a contractor. Nor does it mean that Ms. Chapman was not doing work commonly done by employees. Supervisory work is often performed by employees. It would be an error to conclude that Ms. Chapman was not an employee of the Employer merely because she performed some duties that other employees of the Employer did not perform. Moreover, the Member recognized, correctly, that the Delegate's determination concerning Ms. Chapman's status was also based on the level of control exercised by the Employer over her, whatever her duties.

37. Ms. Chapman's first electing to initiate a civil claim against the Employer in the Small Claims Division is of no probative value in resolving the question of her employment status. I repeat, the fact that Ms. Chapman may have thought she was an independent contractor, and therefore prevented from seeking the remedies available to employees under the *Act*, at least for a time, means very little in the circumstances of this case.

38. This is sufficient to dispose of the Employer's submissions relating to the question of Ms. Chapman's employment status. The matters of fact alluded to by the Employer do not raise questions of sufficient importance to warrant reconsideration of the Original Decision on this point. There is nothing before me, and indeed the Employer nowhere argues, that the Member, or for that matter the Delegate, ignored the relevant law. It merely asserts that the effect of the Original Decision was to apply it in error. The Employer has not persuaded me that is so. Accordingly, I have concluded that the Member's conclusions as to Ms. Chapman's status do not warrant reconsideration.

39. The material submitted by the Employer on this application suggesting that Ms. Chapman invoiced the Employer for work done that she did not perform is troubling. Apart from providing what the Employer must have thought would be further clarity as to the type of work performed by Ms. Chapman, I infer that the Employer has delivered this material to undermine Ms. Chapman's credibility as a witness, and the Delegate's conclusions as to the sums properly owed to Ms. Chapman under the *Act*. In *Re Faqiri* BC EST # RD180/05 the Tribunal said this:

> In my opinion, if a party intends to question the credibility of the evidence of the other party it is incumbent on them to do so in the forum provided for that purpose, by providing their evidence to the Delegate in the first instance. That was not done. It is far too late to provide such evidence on appeal or, worse yet, for the first time on an application for reconsideration.

40. I concur with these comments. I see in the Delegate's Reasons for the Determination that some of the documents submitted by the Employer to the Delegate during his investigation alluded to the fact that Ms. Chapman was misrepresenting her hours, but no argument was made at the December 17, 2008, hearing to that effect. It appeared to the Delegate, therefore, that the Employer's allusions were mere assertions, that there was no direct evidence Ms. Chapman was overbilling, and as Ms. Chapman presented as a forthright witness, her evidence as to her hours worked should be accepted.

41. On appeal, the Employer again made reference to the issue of Ms. Chapman's billings, stating that it had had to pay a third party to "redo" work that Ms. Chapman "billed us for but did not complete." The Employer said that copies of invoices could be provided, and evidence tendered from the third party to corroborate, but no further particulars were ever provided.

42. The Original Decision did not make mention of the Employer's claim regarding Ms. Chapman's hours. I surmise this was because the Employer's comments, being again mere assertions, did not constitute new evidence for the purposes of consideration under section 112(1)(c), and challenged a specific finding of fact it was not the Tribunal's, but the Delegate's, right to decide in the Determination.

43. Now, on reconsideration, the Employer has attempted to delve further into the issues of Ms. Chapman's hours and her billing, providing what it refers to as an "audit trail" summary of hours worked for certain of the Employer's clients, and other source documents. In my view, none of this material is properly reviewable on this application for reconsideration. It is material that should have been provided to the Delegate at first instance, prior to his issuing the Determination. It is not material that should have been presented for the first time on an appeal, or even more remotely on an application for reconsideration. It is clear from the record that the proper recording of Ms. Chapman's hours was a live issue for the Employer from the outset. There is nothing to suggest that the material submitted now was unavailable to the Employer before the Determination was issued. An appeal, and a fortiori an application for reconsideration, are not provided for the purpose of providing opportunities for the losing party in proceedings before a delegate to attempt to bolster or rehabilitate a case that was inadequate to convince at first instance. That is precisely what I discern the Employer is attempting to do here. I conclude, therefore, that no reconsideration is warranted regarding the issue of the recording of Ms. Chapman's time and the invoices she submitted to the Employer.

44. On the natural justice issue, arising from Ms. Stewart's participation at the December 17, 2008, hearing, I am also of the view that the Employer has not demonstrated that the conclusions reached in the Original Decision ought to be reconsidered on the merits. An allegation that there has been a failure to observe the principles of natural justice raises a concern that the procedure followed in proceedings under the *Act* was unfair, often in the sense that a party was deprived of the opportunity to know the case it is required to meet, and an opportunity to be heard in reply. The *Act* makes specific reference to this principle in section 77, which requires that if an investigation is conducted, the Director must make reasonable efforts to give a person under investigation an opportunity to respond.

45. A review of the record here reveals that the Employer had adequate notice of Ms. Chapman's complaint, and ample opportunity to respond. The Employer provided written material to the Delegate, and was made aware of the hearing date scheduled. Ms. Ehlers submits that she should have been provided with the opportunity to appear at the hearing personally, as the principal of the Employer. If that had been her desire, it would seem to have been but a small matter for her to have advised the Delegate of this fact in advance, and requested another date for the hearing. This she did not do. Instead, as was her right, she delegated the task of appearing on the Employer's behalf at the hearing to Ms. Gaudreault. Again, Ms. Ehlers could have advised the Delegate in advance of this decision, but she did not do so. Ms. Ehlers' failure to request another hearing date, and her decision to delegate the role of Employer representative at the hearing means it is untenable for her to argue that there was a breach of natural justice because she was unable to appear at the hearing personally.

46. As a result of Ms. Ehlers' failure to communicate with the Delegate regarding representation for the Employer at the hearing, it appears that the Delegate did not know for certain who would be representing the Employer when he commenced the hearing on December 17, 2008. However, Ms. Stewart, another employee of the Employer, responded to the Delegate's call, and participated in the hearing, giving evidence on behalf of the Employer, cross-examining Ms. Chapman, and making submissions. At no time did Ms. Stewart give the impression that she was not a proper representative of the Employer, or that she did not have authority to speak on the Employer's behalf. Importantly, Ms. Stewart informed the Delegate that she had marked a different date down for the hearing, from which statement I believe the Delegate was entitled to conclude, in the absence of information to the contrary, that it was Ms. Stewart who had been delegated

the task of appearing for the Employer – why else would she mark the date down in her calendar? This, coupled with the fact that Ms. Stewart requested no adjournment herself, appeared to have knowledge of the complaint, and participated actively in the hearing process, was sufficient in my view to justify the Delegate's concluding, reasonably, that Ms. Stewart had actual authority to speak on the Employer's behalf at the hearing.

47. Even if Ms. Stewart had no actual authority to do so, the conduct of Ms. Ehlers' in failing to give notice to the Delegate before the hearing that she would not be attending, and that Ms. Gaudreault was her chosen delegate, created the circumstances as a result of which the hearing proceeded in the manner that it did. If Ms. Stewart's authority was not actual, then it was certainly apparent, in my view. Absent any information suggesting that Ms. Stewart was not a proper representative, and with both parties seemingly ready to proceed with the hearing, there was no obligation on the Delegate to suggest that perhaps there should be an adjournment.

48. On these facts, I have decided that the Employer has failed to raise a natural justice issue sufficient to warrant a reconsideration of the conclusions in the Original Decision.

ORDER

49. Pursuant to section 116(1)(b) of the *Act*, I order that the Original Decision of the Tribunal dated May 22, 2009 under BC EST # D052/09 be confirmed.

Robert Groves
Member
Employment Standards Tribunal