

An application for Reconsideration

- by -

Leslie Johnson
("Johnson")

- 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: David B. Stevenson

FILE No.: 2008A/81

DATE OF DECISION: September 22, 2008

DECISION

SUBMISSIONS

Leslie Johnson	on his own behalf
Sharel Siarkiewicz Perkins	on her own behalf
Joe LeBlanc	on behalf of the Director

OVERVIEW

1. Leslie Johnson (“Johnson”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of a decision, BC EST #D059/08, made by the Tribunal on 28 May, 2008 (the “original decision”). The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards on February 1, 2008. The Determination considered a complaint filed by Johnson alleging Sharel Siarkiewicz Perkins carrying on business as Nillerahs Day Spa (“Siarkiewicz”) had contravened several provisions and requirements of the *Act* in respect of his employment.
2. The Determination found that Johnson was not an employee of Siarkiewicz, but rather was an independent contractor.
3. The appeal raised the following issues:
 1. Did the Director err in law in finding Johnson was not an employee for the purposes of the *Act*?
 2. Did the Director fail to observe principles of natural justice in making the Determination?
4. The original decision canvassed each of the grounds of appeal, finding no evidence the director had erred in finding Johnson was not an employee and had not failed to observe principles of natural justice. The original decision noted that Johnson had provided some additional material with his appeal, but that the material provided “no relevant new information” or impacted on the Determination.
5. Johnson has asked the Tribunal to reconsider the decision finding he was not an employee of Siarkiewicz under the *Act*.
6. The reasons for seeking reconsideration are set out on the Reconsideration Application Form, and state:

Because I’m an employee and not a [sic] independent contractor or a lawyer I didn’t know I couldn’t submit new info or ask for a trial de novo, I was trying to inform you of things I failed to include at the hearing due to improper knowledge of preparing my case and time allowance.
7. Nothing more than the above statement has been provided with the reconsideration application.

ISSUE

8. In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case is appropriate for reconsideration, the substantive issue raised in this application, as it was in the appeal, is whether the Director erred in finding Johnson was not an employee of Siarkiewicz under the *Act*.

ANALYSIS OF THE PRELIMINARY ISSUE

9. The legislature has conferred a reconsideration power on the Tribunal under Section 116 of the *Act*, 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, vary or cancel the order or decision or refer the matter back to the original panel or another panel.*
- (2) *The director or a person named in a decision or order of the tribunal may make an application under this section*
- (3) *An application may be made only once with respect to the same order or decision.*

10. Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is "*to provide fair and efficient procedures for resolving disputes over the interpretation and application*" of its provisions. Another stated purpose, found in subsection 2(b), is to "*promote the fair treatment of employees and employers*". The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. An assessment is also made of the merits of the original decision. The focus of a reconsideration application is the original decision.

11. Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the tribunal as including:

- failure to comply with the principles of natural justice;
- mistake of law or fact;
- significant new evidence that was not reasonably available to the original panel;
- inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

12. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively re-visit the original decision and come to a different conclusion.

13. If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration.
14. After review of the Determination, the original decision and the submissions of the parties on this application, I have decided this application does not warrant reconsideration.
15. There were two observations made in the original decision on the grounds of appeal advanced by Johnson.
16. First, that there were no specific arguments addressing either the alleged error of law or the claim that the Director had failed to observe principles of natural justice in making the Determination.
17. Second, that the appeal was, in substance, simply a re-arguing of the central issue decided in the Determination, which was that Johnson was not an employee of Siarkiewicz under the *Act*.
18. In respect of the central issue, the original decision noted that the Determination had been made on the facts provided by the parties at a complaint hearing attended by Johnson and at which he gave his own evidence, called a witness in support of his claim, was given the opportunity to cross-examine witnesses called by Siarkiewicz and made submissions on all of the information before the Director.
19. There is nothing in the facts and circumstances of this case which suggests Johnson felt himself to be incapable of advancing his claim in either the complaint or the appeal processes. His claim of “improper knowledge of preparing [his] case” is not borne out on the facts and is not therefore a matter that I need to address.
20. The original decision found that the additional material provided by Johnson in the appeal process added no relevant new information on the central issue and had no impact on the Determination. In the result, the Tribunal Member found that Johnson had provided no evidence on the appeal that justified interfering with the findings of fact made by the Director in the Determination.
21. Essentially, this application asks the Tribunal to revisit once again the issue of Johnson’s status under the *Act* and to reach a different conclusion from that made by the Director and reviewed and confirmed in the appeal.
22. This application adds nothing new to the appeal, in which Tribunal Member found no basis to interfere with the decision of the Director that Johnson was not an employee under the *Act*. Johnson has not identified any error in the original decision that would warrant reconsideration and I can find none. No additional relevant information beyond that which was provided to the Director and to the Tribunal in the appeal process has been submitted. Findings of fact and conclusions of law were made on that information and formed the basis for the Determination. The Determination was reviewed by the Tribunal in the original decision and no error of law was found in the Determination. Johnson has not shown there was any error in the original decision. He disagrees with the Determination and the result of the appeal. That is insufficient to warrant reconsideration.
23. The application is denied.

ORDER

24. Pursuant to Section 116 of the *Act*, I order the original decision be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal