



An Application for Reconsideration

- by -

Heather Stewart

- 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

TRIBUNAL MEMBER: Carol L. Roberts

FILE No.: 2004A/56

DATE OF DECISION: June 8, 2004

DECISION

SUBMISSIONS:

On her own behalf: Heather Stewart

On behalf of the Director of Employment Standards: Ruth Atterton

On her own behalf: Imelda Cardinal

OVERVIEW

In a Determination dated May 30, 2003, a delegate of the Director of Employment Standards (“the delegate”) concluded that Heather and Travis Stewart had contravened the Act in failing to pay Imelda Cardinal regular wages, overtime, annual vacation pay, statutory holiday pay and compensation for length of service. The delegate determined that Ms. Cardinal was entitled to a total of \$5,422.04 less room and board and airfare, for a total of \$2,572.04 (“the Determination”). Mr. and Mrs. Stewart appealed the Determination to the Employment Standards Tribunal (“the Tribunal”). In a Decision (BC EST #D001/04) dated January 7, 2004 (“the Decision”), the Tribunal confirmed the Determination.

This is Mr. and Mrs. Stewart’s application pursuant to section 116 of the *Employment Standards Act* (the Act), for reconsideration of the Decision. The grounds for the application are that she has new evidence that was not properly considered by the Adjudicator when the Decision was made, and that Ms. Cardinal was not credible.

RECONSIDERATION ISSUES

Section 116 of the Act 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) cancel or vary the order or decision or refer the matter back to the original panel.

Section 116 does not set out the grounds on which the Tribunal may reconsider a decision. The Tribunal uses its discretion to reconsider with caution, to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees, in keeping with the purpose of the Act "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act." (Section 2)

In *Milan Holdings* (BC EST # D313/98) the Tribunal set out a principled approach in determining when to exercise its discretion to reconsider. 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.

In *Zoltan Kiss* (BC EST # D122/96), the Tribunal set out a number of grounds for reconsidering a decision:

- The adjudicator failed 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 Adjudicator 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 some serious clerical error.

While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.

BACKGROUND

Mr. and Mrs. Stewart hired Ms. Cardinal to work as a nanny/domestic. Ms. Cardinal arrived in Canada on March 12, 2002, and the Stewarts paid her airfare from the Philippines. Ms. Cardinal alleged she worked as a nanny from March 18, 2002 until she was fired on September 2, 2002, and that she was not paid for her work. Although the Stewarts agreed that Ms. Cardinal worked for them as a nanny, they contended that Ms. Cardinal only began work on April 2, 2002 since Ms. Stewart was on sick leave until that time, and that she stopped working on May 3, 2002 when Ms. Stewart herself stopped working. The Stewarts contended that Ms. Cardinal stayed on and lived with them as a guest after that time, voluntarily assisting with the children and housework in return for room and board until early September 2002.

The delegate attempted to contact the Stewarts to respond to Ms. Cardinal's allegations. They did not reply to Ms. Cardinal's allegations. The Stewarts' response was provided by Ms. Stewart's mother, Mrs. Blundell.

The delegate determined that Ms. Cardinal was an employee, and that she was entitled to wages as noted above.

Ms. Stewart appealed the Determination on the grounds that Ms. Cardinal was not an employee from the period May 3, 2002 until September 2, 2002, and that no money was owed.

The appeal was conducted by way of an oral hearing. Ms. Stewart appeared at the hearing along with Mrs. Blundell.

At issue before the Tribunal was whether Ms. Cardinal was an employee. The Tribunal heard evidence and argument from Ms. Stewart, Ms. Blundell and Ms. Cardinal. The Tribunal also heard evidence from two witnesses on Ms. Cardinal's behalf.

The Tribunal found that Ms. Stewart had not discharged the burden of establishing that the delegate made a reviewable error, and dismissed the appeal.

As I understand her application for reconsideration, Ms. Stewart claims that she has new evidence that, if believed, could, on its own or when considered with other evidence, have led the Tribunal to a different conclusion on the issue of whether Ms. Cardinal was an employee.

Specifically, Ms. Stewart asserts that she had lost some T4 slips and receipts. While she says she found these documents and presented them at the Tribunal hearing, the effect of her doing so led the Tribunal to conclude that she was not truthful. Furthermore, Ms. Stewart asserts that "In the tape [Ms. Cardinal] agrees with [the Tribunal] that she agreed to repay TOTAL COST of Airfare which was far higher than originally put in."

The balance of Ms. Stewart's submission contains allegations about Ms. Cardinal's character and suggests that Ms. Stewart could have supplied evidence that would have put Ms. Cardinal's credibility at issue.

The delegate contends that Ms. Stewart had every opportunity to provide her with evidence and information during the investigation, and that all the evidence referred to by Ms. Stewart was taken into account both in the Determination and the Decision.

Ms. Cardinal submits that the evidence referred to by Ms. Stewart was either provided, or could have been provided, to the Tribunal at the time of the hearing. She further submits that the allegations about her character are not relevant, and, in any event, could have been made before the Tribunal.

Ms. Cardinal submits that the application for reconsideration amounts essentially to a request for a rehearing, and that it should be dismissed.

ANALYSIS

As set out above, the Tribunal will reconsider a Decision only in exceptional circumstances. In this case, I am not persuaded that Ms. Stewart has met the test for Reconsideration.

Ms. Stewart failed or refused to cooperate with the delegate's investigation of the complaint. She appeared before the Tribunal and gave sworn testimony. She presented new evidence to the Tribunal that was considered in the decision. She also made submissions regarding Ms. Cardinal's character and credibility that were considered by the Tribunal.

In my view, none of the *Kiss* criteria have been met. Ms. Stewart's application amounts, in essence, to an attempt to have the matter reheard. As noted above, this does not constitute grounds for reconsideration.

I find that Ms. Stewart's submission fails to disclose significant issues of fact, principle and procedure that warrant exercising the discretion to grant reconsideration.

ORDER

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

Carol L. Roberts
Member
Employment Standards Tribunal