

An Application for Reconsideration

- by -

Tom Dodsworth

- 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.: 2001/880

DATE OF DECISION: April 2, 2002

DECISION

OVERVIEW

This is an application by Tom Dodsworth ("Dodsworth") under Section 116 (2) of the *Employment Standards Act* (the "*Act*") for a reconsideration of a Decision #D280/01 (the "Original Decision") which was issued by the Tribunal on May 30th, 2001.

Dodsworth worked with two other men operating under a company known as DRGD Garage Door Doctor Ltd. and claimed for unpaid wages. The other principles submitted that Dodsworth was not an employee but a partner. The Director's delegate investigated the matter and decided to exercise the discretion of the Director pursuant to Section 76 of the *Act*. The delegate decided not to pursue the matter further.

Dodsworth appealed the determination and a hearing was held by a Tribunal adjudicator on April 27, 2001. On May 30th the Tribunal issued the adjudicator's decision in which he agreed with the Director's determination.

Dodsworth has applied for reconsideration of the original decision. The appeal was not filed until December 4th, 2001 some 6 months after the adjudication was issued. Dodsworth claims to have substantial new evidence to present.

ANALYSIS

The current approach to the exercise of the reconsideration discretion under section 116 of the *Act* was set out by the Tribunal in *Milan Holdings Ltd.*, BCEST #D313/98. In *Milan* 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 and weigh 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.

The circumstances in which an application for reconsideration will be successful will be limited. In a Reconsideration decision dated October 23, 1998, *The Director of Employment Standards*, BCEST #D475/98, the Adjudicator sets out those limits as follows:

- *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*

In my opinion this is not a case that warrants the exercise of the reconsideration discretion. The submission made by Dodsworth on this reconsideration application only reiterates the arguments that have already been decided by the director and by the adjudicator in the original decision.

The argument about whether he was an employee or a partner was presented fully to the adjudicator and was considered carefully by him. The alleged substantial new evidence is not new. It is an alleged retraction of sworn testimony. Such retraction would have little weight in any further proceedings, as it would simply mean that the witness had little or no credibility either way. The adjudicator considered the relevant provisions of the *Act* and the appropriate jurisprudence. The adjudicator clearly was cognizant of the arguments put forward by Dodsworth. He analyzed the material presented carefully and obviously decided that he agreed with the determination.

In addition, it is the stated purpose of the legislation that the dispute resolution process be both fair and efficient. It is simply not reasonable to allow this matter to continue further. The six-month delay in bringing forward this application for reconsideration remains unexplained. The witness that Dodsworth wishes to tender to present “new evidence” was always available and in fact attended the hearing in April 2001.

As stated above, reconsideration should be used sparingly. It is fully within the intent and purposes of the act that there be some finality to the decisions of the Tribunal.

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