An Application for Reconsideration

- by -

Automation One Business Systems Inc.

- 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: Yuki Matsuno

FILE No.: 2009A/114

DATE OF DECISION: October 30, 2009

DECISION

SUBMISSIONS

Neil Achtem	on behalf of Automation One Business Systems Inc.
Gerry J. Brainard	on his own behalf
Andres Barker	on behalf of the Director of Employment Standards

OVERVIEW

1. On behalf of Automation One Business Systems Inc. ("Automation" or the "Appellant"), Neil Achtem applies for reconsideration of Decision BC EST # D082/09, issued by the Tribunal on July 29, 2009 (the "Decision"). The Decision was issued with respect to an appeal by Automation of a determination issued by a delegate of the Director of Employment Standards (the "Director") dated April 28, 2009 (the "Determination"). The Determination concerned Gerry Brainard's complaint against Automation, where he worked as a sales representative starting September 25, 2000. Mr. Brainard filed the complaint on July 23, 2008.

The Determination

2. The delegate held a hearing into Mr. Brainard's complaint on February 17, 2009. In addition to Mr. Brainard, Mr. Neil Achtem, Mr. John Achtem (both principals and general managers of Automation), and Mr. Steve Ellison (controller for Automation) gave information at the hearing. After the hearing, the delegate also requested, and received, additional payroll information from Automation. The issues that the delegate had to decide in the Determination were (1) whether Mr. Brainard was an employee of Automation during the relevant time; (2) whether Mr. Brainard was entitled to compensation for length of service; (2) whether Mr. Brainard was entitled to regular wages; and (4) whether Mr. Brainard was entitled to vacation pay.

3. The delegate determined that Mr. Brainard was an employee during the relevant time. In coming to that conclusion, the delegate reviewed the evidence before him, as well as the relevant portions of the *Act*. He pointed out that it was agreed by all before him that during the relevant time period, Mr. Brainard continued to perform work that he had been engaged in prior to the formal termination of his employment, albeit with the difference that Mr. Brainard's attendance at the office was no longer regulated by Automation and he was paid on straight commission with a higher commission rate. The delegate found that Automation continued to have control and direction over Mr. Brainard. The delegate concluded Mr. Brainard was an employee of Automation during the relevant time and that the provision of the *Act* therefore applied.

4. The delegate went on to find that Mr. Brainard was not entitled to compensation for length of service because he quit his employment; nor was he entitled to regular wages. However, the delegate found that Mr. Brainard was entitled to vacation pay in accordance with section 58 of the *Act* at the rate of 4% on all wages earned from February 6, 2008 to the end of his employment. The delegate noted that Mr. Brainard received payment from Automation in excess of what he had earned, but found that those funds did not constitute wages as defined under the *Act* because they are not tied to actual work performed by Mr. Brainard for the employer. The delegate also imposed two administrative penalties totalling $1000.00 on Automation.

The Decision

5. Automation appealed the Determination, and the appeal was decided by a member of the Tribunal (the "Member"). The sole ground of appeal put forward by Automation was that the Director erred in law in finding Brainard was an employee of Automation for the purposes of the *Act*. In the Decision, the Member reviewed the conclusion in the Determination that Mr. Brainard was an employee. He then summarized Automation's arguments on appeal, noting that the appeal adopts the general premise that the Director was wrong because Mr. Brainard's role was very different from their regular salaried employees. The Member notes that the Determination recognized the differences between Mr. Brainard and the other employees, and noted that the delegate found that Mr. Brainard "continued to perform the same work he had normally performed as an employee of Automation and that Automation continued to "control" that work in several keys [*sic*] respects".

6. The Member pointed out that it is the Appellant's burden to show there is an error of law in the Determination. He laid out section 112 of the *Act*, which limits the grounds of appeal of a determination to three, one of them being error of law. He correctly pointed out that the *Act* does not provide for appeals based on errors of findings of fact unless they raise an error of law. The Member said that the Appellant raised no error of law and that although the Appellant clearly did not agree with the finding of the Determination regarding Mr. Brainard's status as an employee, that finding "is consistent with the provisions, purpose and intent of the *Act* and was reasonably ground in an assessment of the particulars of the relationship between Automation and Brainard."

The Request for Reconsideration

7. I have before me the submissions of the parties with respect to the Appellant's request for reconsideration; the Original Decision and the submissions of the parties with respect to the Original Decision; and the Record submitted by the Director pursuant to section 112(5). It is my view that this Reconsideration can be adjudicated solely on the basis of written submissions. I have read and considered all of the submissions and documents; however, I will only outline and address the submissions and arguments that are pertinent to the reconsideration decision.

ISSUE

8. When faced with an application for reconsideration, the Tribunal must consider two questions:

    1. Does this 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 member?

ARGUMENT AND ANALYSIS

9. In his application for reconsideration, Mr. Neil Achtem on behalf of Automation says the Director erred in law and failed to observe the principles of natural justice in making the Determination. He further says that:

- Automation entered into an agreement with Mr. Brainard to be a contractor not in order to avoid labour laws, but because Mr. Brainard "begged" Automation to "at least keep him on as a contractor";

- Automation had no control over Mr. Brainard and Mr. Brainard came and went as he pleased; further, Automation did not keep track of Mr. Brainard as it did its employees and from one week to another the company was not sure that Mr. Brainard would be back;

- It has recently come to Automation's attention that Mr. Brainard sold a business machine to one of Automation's customers and Mr. Brainard asked the customer to make the cheque out to a party other than Automation; and

- No one at Automation, including Mr. Brainard, would have thought Mr. Brainard to be an employee.

10. Mr. Neil Achtem also attaches two letters to the application for reconsideration, each of them from a member of Automation's sales staff. One is dated June 29, 2009 while the other is dated June 30, 2009; both letters appear to have been initially submitted by Automation in its original appeal and outline the letter writers' views and opinions of the relationship between Mr. Brainard and Automation.

11. In his reply submissions, Mr. Brainard says that the issue raised by Automation regarding the selling of a business machine to a customer took place in 2005 and is irrelevant to the current proceedings. Mr. Brainard then provides particulars regarding that issue.

12. The Director in reply says that the Appellant's application for reconsideration is without merit and should be dismissed. The Director argues that Automation's submissions repeat the arguments that were delivered to the Tribunal at appeal, and that this application is an attempt to have the Tribunal reweigh the evidence and come to a different conclusion.

13. Section 116 of the *Act* provides the Tribunal with the power to reconsider decisions:

> (1) On application under subsection (2) or on its own motion, the tribunal may
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> (a) reconsider any order or decision of the tribunal, and
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> (b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

14. The Tribunal reconsiders decisions only in very limited and exceptional circumstances; reconsideration is not meant as an opportunity for parties to have their case re-heard. In *Milan Holdings Inc.* (BC EST # D313/98, reconsideration of BC EST # D559/97), the Tribunal outlined a two-stage analysis in determining whether a decision should be reconsidered. The first stage is to determine whether the matters raised by the appellant in the application in fact merit reconsideration. In this regard, as stated in *Milan*:

> 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. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

15. In addition, the Tribunal also held in *Milan* that one of the factors that weighs against reconsideration is where the primary focus of the application is to have the reconsideration panel re-weigh the evidence that was before the original panel. The Tribunal's decision in *Zoltan Kiss*, BC EST # D122/96 noted a number of grounds on which a Tribunal ought to reconsider a decision (note that this is not an exhaustive list):

- a failure by the Adjudicator to comply with the principles of natural justice;
- there is some mistake in stating the facts;
- a failure to be consistent with other decisions which are not distinguishable on the facts;

- some significant and serious new evidence has become available that would have led to the Adjudicator to a different decision;
- some serious mistake in applying the law;
- some misunderstandings of or a failure to deal with a significant issue in the appeal; and
- some clerical error exists in the decision.

16. After weighing the relevant factors, the reconsideration panel may decide that the application is not appropriate for reconsideration, in which case it will usually give the reasons for its decision. On the other hand, if the panel determines that one or more of the issues raised in the application is appropriate for reconsideration, it will proceed to review the merits of the application and make a decision.

17. In this case, it is my view that reconsideration is not warranted.

18. The two main relevant arguments contained in the Appellant's application for reconsideration are (1) neither Automation nor Mr. Brainard intended the relationship to be an employment relationship, but rather, one of an independent contractor; further, Automation entered into the arrangement at the request of Mr. Brainard; and (2) Automation had no control over Mr. Brainard and did not tell him what to do or expect anything of him as they would an employee. The problem with these arguments is that the Appellant has already made them – before the delegate prior to the issuance of the Determination, and more importantly, before the Member prior to the issuance of the Decision. The only argument that does not appear to have been raised in previous proceedings is that Mr. Brainard arranged for a customer to make a payment for equipment to someone other than Automation. This argument, which is objected to by Mr. Brainard, is in any case irrelevant to the main issue that the Appellant seeks to have reconsidered, namely the finding by the delegate that Mr. Brainard was an employee of the Appellant, which was subsequently confirmed by the Member in the Decision.

19. It is clear from the submissions that the Appellant is looking to have his case re-heard by another panel. However, as outlined in *Milan*, above, this focus of the Appellant weighs *against* the granting of its application. Reconsideration is not another "kick at the can" for a party who is not satisfied with the results he or she has received so far. There must be a significant question of law, fact, principle, or procedure in order for a decision to merit reconsideration. The Appellant's application does not raise any such significant question; in fact, I find that it repeats the issues and arguments raised on appeal, which were correctly addressed by the Member in the Decision. The Appellant has not shown any cause for the Decision to be reconsidered, and no analysis of the Decision on the merits is therefore necessary.

20. Based on the result of this reconsideration application, the suspension order is no longer in effect.

ORDER

21. Pursuant to Section 115 of the *Act*, I order that the Decision dated July 29, 2009 be confirmed. I also order the Determination dated April 28, 2009 be confirmed, together with any interest that has accrued under the *Act*.

Yuki Matsuno
Member
Employment Standards Tribunal