Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Kimberley Dawn Kopchuk
("Kopchuk")

- 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: Carol L. Roberts

FILE No.: 2005A/99

DATE OF DECISION: July 27, 2005

DECISION

SUMBISSIONS

Kimberley Kopchuk	on her own behalf
Erin Benoit	on her own behalf

OVERVIEW

1. This is an application by Kimberley Dawn Kopchuk under Section 116 (2) of the *Employment Standards Act* (the "*Act*") for a reconsideration of Decision #D049/05 (the "Original Decision"), issued by the Tribunal on April 11, 2005.

2. 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) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

3. Ms. Benoit worked as a live-in child care attendant for Ms. Kopchuk and Guy Dinoto. In February 2003, Ms. Benoit filed a complaint with the Director alleging that Ms. Kopchuk had not paid, among other things, wages and holiday pay. The delegate held a hearing into Ms. Benoit's complaint in April, 2004, and in September 2004, issued a Determination finding that Ms. Kopchuk and Mr. Dinoto had failed to pay Ms. Benoit wages, vacation pay and statutory holiday pay.

4. Ms. Kopchuk appealed the Determination to the Tribunal under section 112(1) of the *Act*. On her appeal form, Ms. Kopchuk checked of the following grounds of appeal: the Director erred in law, and the Direector failed to observe the principles of natural justice in making the Determination.

5. Ms. Kopchuk argued that the delegate contravened the principles of natural justice in arriving at decision in preferring Ms. Benoit's evidence regarding her hours of work and duties to that of Ms. Kopchuk and Mr. Dinoto. The Member found that Ms. Kopchuk had been afforded the opportunity to appear at a hearing and respond to the evidence, and was thus not denied natural justice. With respect to Ms. Kopchuk's assertion that the delegate was wrong in preferring Ms. Benoit's evidence over hers, the Member decided as follows:

> …Although Benoit's having made an unsubstantiated complaint to the Ministry alleging the neglect of Kopchuk and Dinoto's children's (sic) is certainly troubling, and raises legitimate concerns about her credibility, it does not render her other evidence incapable of belief. The delegate conducted an oral hearing and was able to hear and observe the witnesses' evidence. Further, he was entitled to reject Benoit's evidence on one issue, and accept it on others. Since there was an evidentiary basis for the Delegate's finding that Benoit had worked 35 hours per week, I am not prepared to interfere with it.

6. Ms. Kopchuk also contended that the delegate erred in law in finding that Ms. Benoit was an employee rather than an independent contractor or a sitter to whom the Act did not apply. The Member found that the delegate had not considered the common law tests for distinguishing between employees and independent contractors. After applying those tests himself, he determined that Ms. Kopchuk had not met the appellant's burden of establishing that the Delegate erred in law in his conclusion. The Member also found that Ms. Kopchuk had not discharged this burden of establishing that the delegate had erred in his conclusion on the issue of whether Ms. Benoit was a sitter.

7. Ms. Kopchuk further argued that the delegate erred in imposing three administrative penalties. After a full consideration of Ms. Kopchuk's argument, the Member upheld the imposition of the administrative penalties.

8. Although not identified on the appeal form, Ms. Kopchuk also argued in her written submissions that new evidence had become available that was not available at the time the Determination was being made. The Member did not address this issue in his reasons for decision.

9. Ms. Kopchuk seeks reconsideration on the grounds that

1. the member failed to comply with the principles of natural justice;

2. potential evidence was not obtained for the purpose of assisting in this case; and

3. administrative penalties were addressed, noted to be tainted with unfairness, yet the decision was unchanged. [reproduced as written]

10. Ms. Benoit opposes the application, and contends that Ms. Kopchuk has failed to present any grounds worthy of reconsideration.

11. As communicated to the parties by the Vice Chair in her letter of July 18, 2005, this application is being conducted on the written submissions of the parties. I also have before me the complete record that was before the Tribunal member as well as his written reasons.

ISSUES

12. There are two issues on reconsideration.

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 adjudicator?

ANALYSIS

The Threshold Test

13. The Tribunal reconsiders a Decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *Act*

detailed in Section 2 "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act."

14. In *Milan Holdings (BCEST # D313/98)* the Tribunal set 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. 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. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

15. The Tribunal uses the reconsideration power only in very exceptional circumstances. (*Zoltan Kiss* BC EST#D122/96*)* The Reconsideration process was not meant to allow parties another opportunity to re-argue their case. Should the Tribunal determine that one or more of the issues raised in the application is appropriate for reconsideration, the reconsideration panel will then review the matter and make a decision. The focus of the reconsideration panel will in general be with the correctness of the decision being reconsidered.

DECISION

16. I allow the application for reconsideration in part.

17. In support of her first argument for reconsideration, Ms. Kopchuk contends that "there was no reasonable basis for the Director to accept [Ms. Benoit's] evidence over mine". This argument was advanced in Ms. Kopchuk's appeal to the Tribunal in first instance, and was fully considered and disposed of by the Member. The arguments made by Ms. Kopchuk on this ground are virtually identical to those she advanced on appeal. A reconsideration application is not intended to allow parties another opportunity to re-argue their case, and I find no basis to exercise the reconsideration power in this regard.

18. The second argument advanced by Ms. Kopchuk is essentially one that the delegate did not require Ms. Benoit to produce her cell phone records.

19. As noted above, Ms. Kopchuk's written submissions advanced the argument that new evidence had become available that was not available at the time the Determination was being made even though she had not identified this as a ground of appeal on the face of the appeal form. As the Member did not address this argument in the Original Decision, likely because it was not specifically identified as a ground of appeal, I find it is appropriate for me to review the matter and make a decision.

20. In her submissions, Ms. Kopchuk indicated that she had mentioned the production of cellular phone records "when the file was being investigated and would have assumed that the investor would have follow (sic) up on this lead". It appears that Ms. Kopchuk was of the view that these records would have assisted her at the hearing: "Perhaps the production of these records would assist in discrediting her claim…"

New Evidence

21. In *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:

- the evidence could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made;
- the evidence must be relevant to a material issue arising from the complaint;
- the evidence must be credible in the sense that it is reasonably capable of belief; and
- the evidence must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue.

22. I am unable to find that Ms. Kopchuk has satisfied the test set out in *Bruce Davies* for new evidence.

23. Firstly, Ms. Kopchuk appeared at a hearing before the delegate, as did Ms. Benoit. It does not appear that Ms. Kopchuk asked Ms. Benoit to produce her cellular phone records at that hearing, nor does it appear that she made any submissions to the delegate on this issue. Had Ms. Kopchuk felt those records were necessary for her to either advance or defend her position, I infer she would have indicated as much to the delegate at the hearing.

24. Because the cellular phone records were available at the time the determination was being made, they do not constitute "new evidence".

25. Furthermore, it is purely speculative that the cell phone records would have either assisted Ms. Kopchuk in "discrediting" Ms. Benoit, or substantiated Ms. Kopchuk's assertion that the delegate erred in preferring Ms. Benoit's evidence in some respects. Therefore, there is no evidence that the cellular phone records, even if produced, would have led the Director to a different conclusion on a material issue.

26. Therefore, although Ms. Kopchuk has succeeded in her reconsideration request in this respect, I find that she has not met the burden of establishing the grounds for appeal.

27. Finally, Ms. Kopchuk submits that the administrative penalties imposed on her are overly harsh, and that they should be waived.

28. In the Original Decision, the Member spent considerable time addressing the issue of administrative penalties after seeking further submissions from the parties on a number of specific issues.

29. I find that this issue was fully addressed by the Member in the Original Decision, and there is no basis for the exercise of the reconsideration power. As with the first issue set out above, in my view, that the basis for this application is, in essence, an attempt to re-argue matters fully addressed by the Tribunal at first instance.

30. I am not persuaded that Ms. Kopchuk has made out an arguable case of sufficient merit to warrant the reconsideration on this issue.

ORDER

31. Pursuant to Section 116 of the Act, I allow the reconsideration request in part. I dismiss Ms. Kopchuk's appeal on the reconsidered matter.

Carol L. Roberts
Member
Employment Standards Tribunal