

An Application for Reconsideration

- by -

Attitudestudios Arts Ltd. carrying on business as atMusic - the Music Store of  
Burnaby  
("atMusic")

- 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.:** 2016A/111

**DATE OF DECISION:** September 14, 2016

## DECISION

### SUBMISSIONS

Ran Zhu on behalf of Attitudestudios Arts Ltd. carrying on business as atMusic – the Music Store of Burnaby

### OVERVIEW

1. This is an application by Attitudestudios Arts Ltd. carrying on business as atMusic - the Music Store of Burnaby (“atMusic”) for a reconsideration of Tribunal Decision BC EST # D092/16 (the “Original Decision”), issued by the Tribunal on July 13, 2016.
2. atMusic operates a music store and lessons studio. From December 2009 until August 2015, Peii Huang taught piano lessons primarily to children at atMusic’s studios. On October 24, 2015, Ms. Huang filed a complaint alleging that atMusic had contravened the Employment Standards Act (the “*Act*”) in failing to pay her regular wages. On April 14, 2016, the Director of Employment Standards (the “Director”) issued a decision concluding that atMusic had contravened sections 18, 40, 45, 58 and 63 of the *Act*, and ordered atMusic to pay wages of \$5,104.74 to Ms. Huang.
3. atMusic appealed the Determination to the Tribunal on the grounds that the Director erred in law and failed to observe the principles of natural justice in making the Determination. The Tribunal dismissed the appeal, concluding that atMusic had not demonstrated either an error of law or a failure to observe natural justice. (the “Original Decision”)
4. atMusic seeks reconsideration of the Original Decision, arguing that the Director “did not make his determination with both side of the evidence in a fair and neutral manner.” (*sic*)

### ISSUE

5. 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 Member?

### ARGUMENT

6. In atMusic’s three page reconsideration request, Mr. Zhu outlines what he asserts were errors in the Director’s analysis of the relationship between atMusic and Ms. Huang in concluding that Ms. Huang was an employee.

### THE FACTS AND ANALYSIS

7. The *Act* confers an express reconsideration power on the Tribunal. Section 116 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.

## 1. The Threshold Test

8. 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.”
  9. In *Milan Holdings Inc.* (BC EST # D313/98) the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the Tribunal 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.
  10. The Tribunal may agree to reconsider a Decision for a number of reasons, including:
    - The Member fails 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 Member 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 a serious clerical error.
- (*Zoltan Kiss*, BC EST # D122/96)
11. While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The reconsideration process was not meant to allow parties another opportunity to re-argue their case.
  12. After weighing these and other factors, the Tribunal may determine that the application is not appropriate for reconsideration. Should the Tribunal determine that one or more of the issues raised in the application is appropriate for reconsideration, the Tribunal will then review the matter and make a decision. The focus of the reconsideration member will in general be with the correctness of the decision being reconsidered.
  13. In *Voloroso* (BC EST # RD046/01), the Tribunal emphasized that restraint is necessary in the exercise of the reconsideration power:

*... the Act creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute...*

14. There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the “winner” is not deprived of the benefit of an adjudicator’s decision without good reason. A third is to avoid the spectre of a tribunal process skewed in favor of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.
15. atMusic’s reconsideration request is, in fact, not an application for reconsideration of the Original Decision but an attempt to re-argue the issues it advanced in its appeal of the Director’s Determination. Mr. Zhu’s arguments include assertions that he did not have the opportunity to cross-examine witnesses and addresses issues such as the direction and control over how Ms. Huang performed her work, all of which were analyzed by the delegate in determining that Ms. Huang was an employee.
16. The Tribunal Member in the Original Decision carefully reviewed the delegate’s analysis of Ms. Huang’s status (at paragraphs 25 through 37) and concluded that atMusic had not established an error of law (paragraph 60). The Member noted that Mr. Zhu’s arguments *were an attempt to re-argue his position at the hearing, “attempting to take the proverbial second kick at the can” before this Tribunal with a view to obtaining a favourable outcome this time.* atMusic’s reconsideration application constitutes what might be characterized as a ‘third kick’ at that can.
17. In my view all of atMusic’s arguments were fully addressed by the Tribunal Member on appeal and atMusic’s application is not appropriate for reconsideration. As noted above, the reconsideration process is not meant to allow parties another opportunity to re-argue their case. atMusic’s request does not raise any questions of law, fact, principle or procedure that were not fully and properly addressed by the Tribunal Member in the Original Decision. atMusic does not address any of the factors outlined in *Kiss, supra*, or establish any other exceptional circumstances in its application to warrant the exercise the reconsideration power.

## ORDER

18. Pursuant to section 116 of the *Act*, the request for reconsideration is denied.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**