An Application for Reconsideration

- by -

Kim Geluk
(“Geluk”)

- 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: David B. Stevenson

FILE No.: 2000/853

DATE OF DECISION: March 14, 2001

DECISION

OVERVIEW

Kim Geluk ("Geluk") seeks reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision of the Employment Standards Tribunal (the "original decision"), BC EST #D488/00, dated November 9, 2000. The original decision cancelled a Determination dated March 8, 2000, that had found Geluk was owed an amount $13,656.18 in unpaid wages from her former employer Karen Eakin, ("Eakin"), on the basis that the delegate was wrong to have included housecleaning services that were independently contracted by the complainant with Eakin in reaching a conclusion about whether Geluk fell within the definition of "sitter" in the *Employment Standards Regulation* (the *"Regulation"*).

Geluk gives two reasons for seeking reconsideration of the original decision:

1. Mr. Orr took a very different approach to the interpretation of the definition of "sitter" than that taken in previous decisions of the Tribunal; and

2. Mr. Orr made significant errors of fact in his decision, and neglected to consider evidence provided by Ms. Geluk, thus acting outside his jurisdiction.

The Director of Employment Standards (the "Director") joins Geluk in contending the Adjudicator erred in his approach to the definition of "sitter" and in some of his factual conclusions. The Director also says the adjudicator erred by allowing new issues to be raised at the appeal hearing, did not place any onus on the employer to provide cogent evidence demonstrating an error in the Determination and has misstated the basis for the appeal. There is an allegation of a denial of natural justice by the Adjudicator in the Director's submission.

These applications for reconsideration have been filed in a timely way.

ISSUE

In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case is appropriate for reconsideration, the issues raised in the reconsideration are framed by the above reasons supporting the application for reconsideration found in the application and in the submission of the Director.

ANALYSIS

Section 116 of the *Act* confers reconsideration powers on the Tribunal:

116. (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.

(2) The director or a person named in a decision or order of the tribunal may make an application under this section.

(3) An application may be made only once with respect to the same order or decision.

Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is *"to provide fair and efficient procedures for resolving disputes over the interpretation and application"* of its provisions. Another stated purpose, found in subsection 2(b), is to *"promote the fair treatment of employees and employers"*. In *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97), the Tribunal noted:

> To realize these purposes in the context of its reconsideration power, the Tribunal has attempted to strike a balance between two extremes. On the one hand, failing to exercise the reconsideration power where important questions of fact, law, principle or fairness are at stake, would defeat the purpose of allowing such questions to be fully and correctly decided within the specialized regime created by the *Act* and the Regulations for the final and conclusive resolution of employment standards disputes: *Act*, s. 110. On the other hand, to accept all applications for reconsideration, regardless of the nature of the issue or the arguments made, would undermine the integrity of the appeal process which is intended to be the primary forum for the final resolution of disputes regarding Determinations. An "automatic reconsideration" approach would be contrary to the objectives of finality and efficiency for a Tribunal designed to provide fair and efficient outcomes for large volumes of appeals. It would delay justice for parties waiting to have their disputes heard, and would likely advantage parties with the resources to "litigate".

Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. In *Milan Holdings Ltd., supra*, the Tribunal outlined that analysis:

At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration: *Re British Columbia (Director of Employment Standards)*, BC EST #D122/98. In deciding the question, the Tribunal will consider and weigh a number of factors. For example, the following factors have been held to weigh against a reconsideration:

(a) where the application has not been filed in a timely fashion and there is no valid cause for the delay: see *Re British Columbia (Director of Employment Standards)*, BC EST #D122/98. In this context, the Tribunal will consider the prejudice to either party in proceeding with or refusing the reconsideration: *Re Rescan Environmental Services Ltd.*, BC EST #D522/97 (Reconsideration of BC EST #D007/97).

(b) where the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the Adjudicator (as distinct from tendering new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): *Re Image House Inc.*, BC EST #D075/98 (Reconsideration of BC EST #D418/97); *Alexander (Perequine Consulting*, BC EST #D095/98 (Reconsideration of BC EST #D574/97); *32353 BC Ltd., (c.o.b. Saltair Neighbourhood Pub)*, BC EST #D478/97 (Reconsideration of BC EST #D186/97).

(c) Where the application arises out of a preliminary ruling made in the course of an appeal. "The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid a multiplicity of proceedings, confusion or delay": *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.

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. This analysis was summarized in a previous Tribunal decision by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": *Zoltan Kiss, supra*. "The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons": *Khalsa Diwan Society*, BC EST #D199/96 (Reconsideration of BC EST #D114/96). . .

The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the tribunal as including:

- 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.

Consistent with the approach outlined above, I will first assess whether the applicants have established any matters that warrant reconsideration.

The first ground for reconsideration alleges that the Adjudicator took a very different approach to the definition of "sitter" in the *Regulation* than taken in previous decisions of the Tribunal. I do not agree. There is nothing in the original decision that indicates a departure from the way the definition of "sitter" has been interpreted and applied in other decisions. The unique feature of the original decision does not lie in its treatment of the definition of "sitter", but in its view that Geluk had two separate and distinct relationships with Eakin, the first being an employment relationship and the second being an independent contractual relationship.

The references by the Director to *Re Mike Renaud*, BC EST #436/99 and *Re Tammy Wood*, BC EST #D176/00 miss the point. The original decision did not flow from an analysis of whether the house cleaning performed by Geluk went beyond what might normally be associated with duties of a sitter. It was based on a conclusion that the house cleaning done by Geluk was performed by her as an independent contractor, not an employee under the *Act*.

The second ground for reconsideration is no more than a request that the Tribunal review the evidentiary basis for the factual conclusions reached in the original decision. As the Director has put it in her submission:

> . . . the finding of the adjudicator that the complainant operated under an independent contract was a significant error of fact and one which neglected to consider evidence provided by the complainant.

This is not an appropriate ground for reconsideration. The hearing of the appeal took two days and, based on the comments of the Adjudicator in the original decision, from several witnesses were called by the parties. The Adjudicator in the original decision stated:

> There is no doubt in my mind that when [Geluk] was performing these services she was doing so as an independent contractor. She was in the business for herself and all the profit or loss from that business was hers and hers alone. She did not work under the direction or control of anyone when she was performing he housecleaning work.

The burden on an applicant for reconsideration in the context of challenging conclusions of fact is, as noted above, to demonstrate there was no rational basis for such a finding. Neither Geluk nor the Director have met this burden.

As stated above, the Director has added three grounds for reconsideration that were not raised by Geluk. Without deciding the propriety of this kind of "me too" submission, I will nevertheless address these arguments in the context of determining whether they raise any mattes that warrant reconsideration.

The Director says the Adjudicator erred by raising the question of whether Geluk was an independent contractor in respect of the housecleaning work at the hearing against the objections of the Director and, as a consequence, acted in a manner inconsistent with the rules of natural justice. Geluk does not allege she was denied a fair hearing. The Director refers to the Tribunal's decisions in *Re Tri-West Tractor Ltd.*, BC EST #D268/96 and *Re Kaiser Stables Ltd*., BC EST #D058/97 among others. There are two responses to this argument. First, it ignores that the test in *Re Tri-West Tractor Ltd.* and *Re Kaiser Stables Ltd*. is procedural, not substantive. There is no absolute bar to the introduction of "new" evidence at an appeal hearing. It is a matter of discretion for the Adjudicator. The statutory objective expressed in those decisions, and in other decisions which have adopted the same approach, is to respect the integrity of the statutory scheme, particularly as it relates to the investigative authority of the Director, and to ensure the statutory objective of providing fair and efficient procedures for resolving disputes arising under the *Act*. The argument of the Director does not advance that objective in the circumstances. This case was not like those in *Re Tri-West Tractor Ltd.* and *Re Kaiser Stables Ltd*. where the appellant had refused to participate in the investigation, ignoring the requests and demands of the Director. In fact, a key allegation in the appeal was that Eakin had tried unsuccessfully to have greater input during the investigative process but was not able to do so. Second, the argument ignores the comments of the Tribunal in *Re BWI Business World Incorporated*, BC EST #D050/96, that the role of Tribunal in an appeal includes ensuring the relevant issues are identified for the parties and all evidence relevant to that issue is placed before the Tribunal.

In her reply, Eakin says the Adjudicator, in considering an objection from the Director, asked Geluk's representative whether there would be a problem addressing the question and was told there was none, that she understood this question was an issue. Neither Geluk nor the Director have denied that assertion. All parties were allowed to call evidence and make argument on that question. I cannot see how any of the parties were denied a fair hearing in this case.

The Director also says that the Adjudicator ignored the decision of the Tribunal in *Re Benecken*, BC EST #D101/99, the inference being the Adjudicator, in considering whether Geluk was a "sitter" under the *Act*, was exercising an originating authority over that question because the

Director had not yet had an opportunity to investigate and consider it. My reading of the material on file would suggest that inference is not correct. The Determination plainly identifies the first issue considered by the Director as: "whether the complainant was excluded from the *Employment Standards Act* because she was a sitter". That was the issue considered by the Director in the Determination, who decided Geluk was not a "sitter", and that was the question considered by the Adjudicator in the appeal, who decided Geluk was a "sitter". I fail to see how the appeal procedure could be characterized as having denied the Director an opportunity to investigate this issue or to consider and decide it.

The Director argues the Adjudicator ignored the burden of proof on Eakin. This argument is really only a back-handed way of expressing the above argument. It pre-supposes the Adjudicator should not have considered evidence and argument on the question of whether Geluk was a "sitter". Even if the Adjudicator could have expressed it more completely, there is no doubt he found that Eakin had proven what she needed in order to demonstrate to the Adjudicator that the Determination was wrong. Specifically, he was convinced that the part of the relationship between Geluk and Eakin relating to the housecleaning work done by Geluk was an independent business arrangement and, because the remaining elements of the relationship met the definition of "sitter", Geluk was excluded from the *Act*.

Finally, the Director says the Adjudicator made a mistake in framing the issue in the original decision. The Director says the appeal was based on an alleged error in the hours of work claimed to have been worked by Geluk and the Adjudicator made a mistake by framing the issue in the appeal as whether Geluk was a "sitter" and excluded from the *Act*. There is no "mistake". This point has already been considered above. Even if the appeal is unclear[1] on whether Eakin was appealing the conclusion in the Determination that Geluk was not a "sitter", the parties knew at the hearing that was an issue in the appeal and that the Adjudicator intended to hear evidence and argument on that issue.

In sum, this application does not raise any matter that warrants reconsideration and is, accordingly, denied.

DAVID B. STEVENSON

David B. Stevenson
Adjudicator
Employment Standards Tribunal

[1]The appeal identified the following as one of the issues in dispute:

> The description given pertaining to [the] initial employment relationship by Kim Geluk . . . , in the circumstances is unreliable.