

An application for Reconsideration

- by -

Joyce Middleton operating as Reflexology and Stress Clinic

- 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: John M. Orr

FILE No.: 2006A/116

DATE OF DECISION: December 28, 2006

DECISION

SUBMISSIONS

Joyce Middleton	on behalf of Reflexology and Stress Clinic
Dena Mora	on her own behalf
Amanda Welch	on behalf of the Director of Employment Standards

OVERVIEW

1. This decision responds to an application by Joyce Middleton (“Middleton”) pursuant to Section 116 (2) of the *Employment Standards Act* (the “*Act*”) for reconsideration of a Tribunal decision #D096/06 (the “Original Decision”) issued by the Tribunal on September 20, 2006.
2. Middleton operates a business known as the Reflexology and Stress Clinic (“RSC”). Melissa Banman and Dena Mora (“the claimants”) attended at RSC in some capacity between July 26, 2004 and April 6, 2005. They paid a tuition fee and worked “hands-on” with customers. They filed separate claims that they were owed wages and claimed the return of “tuition” fees paid to Middleton claiming the fee was actually a charge for hiring in contravention of the *Act*.
3. Following an investigation, a delegate of the Director of Employment Standards (“the Director”) determined that Middleton was in contravention of the *Act* in failing to pay regular wages, annual vacation pay and compensation for length of service.
4. The fundamental issue was whether the claimants were really students, employees or independent contractors. The delegate found that the claimants were employees, that their employment was terminated without just cause and that the tuition fee Middleton charged the employees was a charge for hire, in contravention of section 10 of the *Act*. The Director also imposed penalties for contraventions of the *Act*.
5. Middleton appealed the Determination to the Tribunal. The appeal was decided on the basis of written submissions. The Tribunal Member (“the Member”) reviewed the record provided by the Director and a lengthy appeal document containing copies of Middleton’s certificates, professional memberships, a background of her history in the business and the rational behind her charging “tuition”.
6. The Member in considering Middleton’s appeal noted that Section 112 of the *Act* provides that a person served with a Determination may appeal the Determination to the Tribunal on the following three grounds:
 - (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was being made.

7. The Member considered all of the possible grounds. She noted that questions of fact alone are not reviewable unless they were based on no evidence or on a view of the facts that could not reasonably be entertained. She also noted that the Tribunal should defer to the factual findings of the delegate unless the appellant can demonstrate that the delegate made a palpable or overriding error of fact. The Member could find no basis to interfere with the delegate's findings of fact.
8. The Member found that there was no evidence of a denial of natural justice or any error in law and then considered whether Middleton's submission amounted to such new evidence that was not available at the time the Determination was made. The Member considered the jurisprudence developed by the Tribunal and found that there was no information in Middleton's written submission as to why the information in question would not have been available, or could not have been submitted to the delegate prior to the hearing. She also noted that there was not a high probative value to the written submission that would have led the delegate to a different conclusion on any material issue.
9. The Member concluded in the original decision that there was no basis for setting aside the Determination and the appeal was dismissed.
10. Middleton has now applied to the Tribunal for reconsideration of the Member's decision.

ANALYSIS

11. The Tribunal reconsiders a decision only in exceptional circumstances 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* provided in Section 2 "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act."
12. In the application for reconsideration Middleton asserts that the Member's decision was not a just decision. She takes objection to the "facts" found by the delegate and posits that because those facts were not accurate the subsequent decision by the Member was wrong also.
13. I have read the whole of the record provided by the Director, the original decision and all of the submissions made by Ms. Middleton and the other parties. In doing so it is evident that all of the evidentiary issues put forward in this request for reconsideration were presented to both the Director's delegate and to the Member who addressed the appeal. While there are some relatively minor changes in emphasis or language the submissions have been consistent throughout.
14. Middleton has provided many pages of submissions dealing with the quality and nature of her business but these matters are irrelevant to the fundamental issue of the nature of the employment relationship between the claimants and Ms. Middleton. There is nothing in the material provided that sheds any new light upon the working status of the claimants when they were at RSC.
15. The test for the exercise of the reconsideration power under section 116 of the *Act* is set out in *Milan Holdings Ltd.*, BCEST #D313/98. The Tribunal has 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. In deciding this question the Tribunal should consider 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.

16. 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.
17. In my opinion there are not compelling reasons to warrant the exercise of the reconsideration discretion. There is no doubt that the primary focus of this application is to ask the Tribunal to make a different decision based on the same evidence that was before both the delegate and the original Tribunal Member.
18. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and in this case Middleton has had every opportunity at both of the previous levels to fully present her case. Accordingly, I am not persuaded that there is any substantial reason for me to vary or cancel the original decision or to refer the matter back for further consideration. Accordingly the application for reconsideration is dismissed.

ORDER

19. The application to reconsider the decision of the Tribunal Member in this matter is dismissed and the original decision is confirmed.

John M. Orr
Member
Employment Standards Tribunal