Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Grab Bag Emporium Ltd. operating as The Grab Bag
("Grab Bag")

- 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

TRIBUNAL PANEL: Carol L. Roberts

FILE No.: 2004A/85

DATE OF DECISION: July 28, 2004

DECISION

SUBMISSIONS:

On behalf of Grab Bag Emporium Ltd:	Liama M. Pakstas, Barrister & Solicitor Newcomb & Company
On behalf of the Director of Employment Standards:	Terri Walowina
On their own behalf:	Chris Bell and Esther Jack

OVERVIEW

The *Employment Standards Act,* R.S.B.C. 1996 c. 113 ("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.

This is an application by Grab Bag Emporium Ltd. ("Grab Bag") for a reconsideration of Decision #D057/04 (the "Original Decision"), issued by the Tribunal on March 30, 2004.

The relevant factual background is as follows.

Grab Bag is a company incorporated in British Columbia. It operated a "mom and pop" convenience store in Lake Cowichan. The store was originally operated by Marie Peters, a client of Kenneth R. Newcomb, a lawyer in Duncan. Mr. Newcomb had made substantial loans to Ms. Peters, and, when the store was at risk of foreclosure, Ms. Peters transferred the store to Grab Bag Holdings Ltd.. Mr. Newcomb and his wife were the directors of both Grab Bag Holdings Ltd, the land on which Grab Bag was situated, as well as Grab Bag, the operating company. Mr. Newcomb's law office is also the registered and records office of Grab Bag.

Mr. Newcomb knew Chris Bell through Mr. Bell's work on his campaign for Duncan City Council. Mr. Bell and his spouse, Esther Jack, lived in an apartment located in the same building as Mr. Newcomb's law office.

Mr. Newcomb, on behalf of Grab Bag, entered into a management services agreement with Mr. Bell to operate the store. Mr. Bell's spouse, Esther Jack, assisted him in the operation of the store. According to the agreement, Mr. Bell was to be paid by way of a commission at the end of one year's operations. Mr. Bell was also entitled to a food advance of $200 per month, which was to be credited against his commission.

Mr. Bell sustained a serious injury in August, 2002, and ceased working in September, 2002. Mr. Bell and Ms. Jack both filed complaints with the Employment Standards Branch contending that they were entitled to wages for the period December 1, 2001 until September 2002. Mr. Bell and Ms. Jack initially made their complaints against Mr. Newcomb personally. However, following an investigation by the delegate, the delegate determined that Grab Bag was the proper employer, and continued the investigation on that basis.

The delegate also determined that Mr. Bell and Ms. Jack were employees. The delegate also determined that Mr. Bell was entitled to wages in the amount of $17,688, and that Ms. Jack was entitled to wages in the amount of $18,712.43, both of which were inclusive of statutory holiday pay, vacation pay and interest.

Grab Bag advanced a number of arguments on appeal. Those included that the director was without jurisdiction to investigate the complaints since Grab Bag was not correctly named on the complaint form and the complaint was out of time, that Mr. Bell and Ms. Jack were not employees, or in the alternative, if Ms. Jack was an employee, she was an employee of Mr. Bell not Grab Bag, and that Mr. Bell was a manager.

Grab Bag also contended that the delegate failed to act in a fair and impartial manner during the investigation of the complaint, and, finally, that the delegate erred in calculating Mr. Bell and Ms. Jack's wage entitlement.

The Tribunal held a hearing on January 27 and March 9, 2004. Following the hearing at which Grab Bag was represented by counsel, the adjudicator issued an 18 page decision that set out the factual background, the course of the investigation, the arguments of both Grab Bag and Mr. Bell and Ms. Jack, and the delegate's conduct during the course of the investigation of the complaint.

The adjudicator found that the delegate gave Grab Bag a reasonable opportunity to participate in the investigation, and dismissed Grab Bag's argument that the delegate failed to act in a fair and impartial manner in conducting the investigation and making the Determination.

The adjudicator also found that Mr. Bell and Ms. Jack filed their complaints within the time frame provided in the Act, and that the delegate had the jurisdiction to investigate the complaint.

The After setting out the provisions of section 74, the adjudicator addressed the issue of whether the complaint had been filed within the time frame, saying in part, as follows:

> Filing a complaint within six months is mandatory, and neither the Tribunal, nor the Delegate have any discretion to relieve against the failure to file a complaint within six months….
>
> [Section 74] must be read in conjunction with section 76(1) of the *Act,* which provides that the Director must accept and investigate a complaint made under section 74, with certain exceptions set out in 76(3). There is nothing in the Act, which requires the Director to commence, or conclude, an investigation within six months of the date of termination for an employee. There is no requirement for the Director to make demands for document production from a person under investigation within six months of the date of the termination of an employee.
>
> The *Act* does not require an employee to correctly name the employer, but only requires that the complaint must be in writing, and contain a complaint that "a person has contravened" the *Act.* I

> note that the *Act* is remedial legislation which out to be given a broad and liberal interpretation, in consonance with the purposes set out in section 2 of the *Act.*
>
> Counsel has attempted to characterize this as a matter where Bell and Jack filed a complaint against Newcomb as a lawyer. The argument presented by Grab Bag is highly technical, and is not based on viewing the Complaint form, as a whole. I do not agree that Bell and Jack raised the claim against Newcomb, as employees of Newcomb's law firm. I note that the complaint form does not raise a complaint against the law firm of Newcomb & Company. The form raised a compliant against Newcomb, who had an address at Station Street, in respect of work performed in Lake Cowichan. The details of the complaint clearly indicate work at a store.
>
> It is apparent that Newcomb wore many hats, and had a substantial connection to Bell, and Jack, and the Director's investigation. He practised law from the Station Street address. Newcomb is an officer for both the operating and the holding company. Newcomb approached Bell regarding taking over the store. Meetings related to "contract formation" took place at Newcomb's office. Newcomb had regular involvement in the Grab Bag's business, and documents, in connection with the operation of the convenience store, were delivered for faxed to his office. There is some suggestion in the Grab Bag's appeal book that Newcomb met on a weekly basis with Bell. The Station Street address is the place where Jack and Bell had contact with Newcomb for operation concerns for the Lake Cowichan Store.
>
> In my view, Bell and Jack did comply with the Act by filing a complaint against a person within six months of termination as required by the Act. In this case the complainants correctly identified the workplace in Lake Cowichan, and raised a complaint against Newcomb who was directly involved in the holding company which owned the land and buildings, and an operating company which operated the store. Newcomb is a person who had a substantial connection to the employment relationship of Bell and Jack. While he has a separate legal identity from Grab Bag, he was not unconnected to the complaint which commenced the Delegate's inquiry.

The adjudicator concluded that the word "person" in section 74 was broad enough to permit the delegate to commence an inquiry into who the "person" was, and stated that "given the objectives of the Act and the unsophisticated nature of many employees, the Director often spends substantial effort in determining the identity of the true employer is". The adjudicator determined that the delegate had received an allegation that was worthy of investigation, and was obliged to do so. He continued as follows:

> The assumption underlying the appellant's argument is that an employment standards complaint is like a pleading in a lawsuit. The appellant argues that the correct employer must be identified within the limitation period set out in the *Act*. I see no useful purpose in comparing an employment standards complaint to a legal pleading in a lawsuit. The process under the *Act,* is an administrative process, and is an investigatory process. There were sufficient details given by Bell and Jack to raise a complaint that the Act was violated by a person. Newcomb, as a director of Grab Bag, has certain obligations under section 96 of the Act, and can be held liable as a director under section 96 of the *Act*. Given that the complaint was filed within six months, the Delegate was obliged to investigate the complaint filed. One of the investigations made by the Delegate, in addition to other issues, was "who" violated the Act. Grab Bag ultimately was determined by the delegate to be the "correctly named party", and a person liable to pay the Determination. That is precisely one of the facts for the Delegate, to determine, in the ordinary course, during any investigation under the Act. I dismiss the Employer's argument that the complaint was not filed in time. I find that the Delegate did have the "jurisdiction" to investigate the complaint filed by Bell and Jack.

With respect to the issue of whether Mr. Bell and Ms. Jack were employees, the adjudicator reviewed the management services contract, the purposes of the *Act*, the statutory definition of employee, and the common law test of employee in light of their duties, and concluded that the delegate had correctly determined that Grab Bag was Mr. Bell and Ms. Jack's employer.

The adjudicator reviewed s. 16 of the *Act,* and, in light of the parties' submissions, determined that Mr. Bell was entitled to $10,628.66 inclusive of statutory holiday pay and vacation pay, and that Ms. Jack was entitled to $13,770.92, also inclusive of statutory holiday pay and vacation pay.

ARGUMENT

Grab Bag contends that the adjudicator erred in law, acted without jurisdiction or exceeded his jurisdiction

(a) by making a determination against Grab Bag, in that the claims of Mr. Bell and Ms. Jack were not made in accordance with section 74 of the *Act* and the Tribunal had no jurisdiction to make a finding against Grab Bag;

(b) in setting aside the provisions of a written Management Services Agreement, and in ruling that Mr. Bell and Ms. Jack were employees of Grab Bag;

(c) in ruling that Mr. Bell was an employee and not a manger of the business; and

(d) in finding that there was no reasonable apprehension of bias in [the] decision of the delegate of the Employment Standards Branch.

Grab Bag advances, in the reconsideration application, the same arguments advanced before the delegate at first instance, and before the adjudicator.

It submits that the delegate had no jurisdiction to investigate the claim because no complaint was issued against the Grab Bag within the six month limitation period as required pursuant to section 74(3) of the Act. It says that the adjudicator's findings are inconsistent with the law and with other provisions of the legislation. Grab Bag's arguments in this respect repeat those made to the adjudicator. It also contends that the adjudicator erred in referring to section 96 of the Act. It says that section 96 relates to a determination by the delegate that companies or individuals can only be held responsible as an employer if there has been a specific finding pursuant to that section of the Act, and that there had been no such finding. Grab Bag submits that the adjudicator erred in failing to consider the principles and findings set out in *Top Gun* (BC EST #D084/02).

Grab Bag also contends that the adjudicator failed to consider the effects of s. 80 in his conclusion that the complaint had been filed in time.

Further, Grab Bag says that the adjudicator accepted as law the Director's policy argument that many employees are unsophisticated and cannot be expected to identify correctly the name of the employer, and that the delegate often spends substantial effort in ascertaining the identity of the true employer.

Grab Bag says that the adjudicator failed to consider the fact that the delegate failed to address any issues of credibility on the part of the complainants, ignored written evidence that contradicted Mr. Bell's

allegations, made assumptions regarding Grab Bag's present business activities without obtaining complete information from Grab Bag, and refused to assist Grab Bag without fully investigating the credibility and veracity of the complaints, and failed to consider the delegate's actions at a meeting of July 2, 2003.

Finally, Grab Bag argues that the adjudicator erred in finding that Mr. Bell and Ms. Jack were employees.

The Director and Ms. Jack and Mr. Bell both seek to have the reconsideration application dismissed. Ms. Jack and Mr. Bell say they are entitled to be paid for their hours of work.

The Director's delegate contends that Grab Bag's arguments were advanced both before the delegate and the adjudicator and weighed thoroughly.

In reply, Grab Bag repeats arguments made about the delegate's jurisdiction, and contended that both the delegate and the adjudicator disregarded Grab Bag's contractual rights.

ISSUES

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

1. The Threshold Test

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."

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.

The Tribunal may agree to reconsider a Decision for a number of reasons, including:

- The adjudicator 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 Adjudicator 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*)*

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.

After weighing these and other factors, the panel may determine that the application is not appropriate for reconsideration. Should the panel determine that one or more of the issues raised in the application is appropriate for reconsideration, the 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.

In *Valoroso* (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…
>
> 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.

Having reviewed the material, I am not persuaded that a reconsideration of the matter is warranted. The sole basis for the reconsideration is an allegation that the adjudicator erred in law in his conclusion on all of the issues before him.

The grounds for the reconsideration application are, in all essential respects, identical to those advanced before the Tribunal at the original hearing. The adjudicator fully analyzed those arguments in light of the *Act*, the common law and Tribunal jurisprudence.

Although Grab Bag contends that the adjudicator erred in law, it advanced no clear and compelling argument about what those errors were. In my view, the application constitutes an attempt to re-argue the issues that were thoroughly considered by the adjudicator.

I am not persuaded, in reviewing the original determination, the arguments made to the adjudicator, the Tribunal's original decision, and the submissions on the application for review, that Grab Bag has raised significant questions of law, fact, principle or procedure that should be reviewed because of their importance to the parties and/or their implications for future cases. Furthermore, I am also not persuaded that Grab Bag has made out an arguable case of sufficient merit to warrant the reconsideration.

ORDER

Pursuant to Section 116 of the Act, I deny the application for reconsideration.

Carol L. Roberts
Member
Employment Standards Tribunal