

An Application for Reconsideration

- by -

Tammy Lynn Fraser carrying on business as Abbey Road Renovations
(“Ms. Fraser”)

- 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: Kenneth Wm. Thornicroft

FILE No.: 2011A/159

DATE OF DECISION: December 8, 2011

DECISION

SUBMISSIONS

Tammy Fraser	on her own behalf carrying on business as Abbey Road Renovations
Wayne W. Schmidt	on his own behalf
Kristine Booth	on behalf of the Director of Employment Standards

INTRODUCTION

1. Tammy Fraser (“Ms. Fraser”) has filed an application pursuant to section 116 of the *Employment Standards Act* (the “*Act*”) for reconsideration of Tribunal Decision # D104/11 issued on September 30, 2011, (the “Appeal Decision”). By way of the Appeal Decision, the Tribunal confirmed a Determination issued on July 8, 2011, ordering Jason John Piers (“Mr. Piers”) and Ms. Fraser to pay the total sum of \$1,631.32 (the “Determination”).
2. The present application consists of the Tribunal’s Reconsideration Form 2, an appended 1-page memorandum, as well as two supplementary, albeit very brief, e-mail communications. The respondent employee, Wayne W. Schmidt (“Mr. Schmidt”), and the delegate of the Director of Employment Standards (the “delegate”) both filed submissions opposing the reconsideration application. In adjudicating this matter, I have also reviewed the section 112(5) record that was before the Tribunal when the Appeal Decision was being made.

PRIOR PROCEEDINGS

3. According to the “Reasons for the Determination” appended to the Determination (the “delegate’s reasons”), Mr. Schmidt filed an unpaid wage complaint against Mr. Piers who was operating an unincorporated residential construction company known as “Abbey Road Renovations”. Mr. Schmidt alleged that he worked, for an agreed \$25 per hour wage, as a drywall installer during the period from March 3 to 11, 2010, but was not paid any wages whatsoever for this work. During the course of her investigation, the delegate concluded that, in fact, “Abbey Road Renovations” was a partnership between Mr. Piers and Ms. Fraser and that both were “employers” for purposes of the *Act*. Thus, they were equally liable for Mr. Schmidt’s unpaid wages. Although the delegate did not make a formal finding of “partnership”, or apparent partnership, as between Mr. Piers and Ms. Fraser, that is the legal effect of her Determination. The Determination included \$1,131.32 on account of unpaid wages and section 88 interest and a \$500 monetary penalty (see section 98).
4. Mr. Piers seemingly accepted his liability but Ms. Fraser appealed the Determination based on the overarching assertion that she was not a principal in the renovation business and thus could not be held liable as an “employer” of Mr. Schmidt. She formally appealed on the grounds that the delegate failed to observe the principles of natural justice in making the Determination (subsection 112(1)(b)) and on the “new evidence” ground (subsection 112(1)(c)). In addition, although not specifically raised in her appeal documents, the Appeal Decision addressed whether the delegate made an “error of law” (subsection 112(1)(a)). Ultimately, Ms. Fraser’s appeal was unsuccessful. As noted above, Ms. Fraser now applies for reconsideration of the Appeal Decision.

FINDINGS AND ANALYSIS

5. The Tribunal evaluates reconsideration applications utilizing the two-stage analytical framework set out in *Director of Employment Standards (Milan Holdings Inc.)*, BC EST # D313/98. At the first stage, the Tribunal considers whether the application is timely, relates to a preliminary ruling, is obviously frivolous, or is simply a clear attempt to have the Tribunal re-weigh issues of fact that have already been determined. If the application can be so characterized, the Tribunal will summarily dismiss it without further consideration of the underlying merits. On the other hand, if the application raises a serious question of law, fact or principle, or suggests that the decision should be reviewed because of its importance to the parties and/or because of its potential implications for future cases, the Tribunal will proceed to the second stage at which point the underlying merits of the application are given full consideration.
6. In my view, this application does not pass the first stage of the two-stage *Milan Holdings* test. Ms. Fraser's memorandum appended to her Reconsideration Form raises a number of matters all of which were fully (and, in my view, correctly) addressed in the Appeal Decision. In essence, the application is nothing more than a statement of disagreement with the Appeal Decision.
7. Several of the points raised in Ms. Fraser's memorandum relate to the question of her status *vis-à-vis* "Abbey Road Renovations". In effect, there were three possible alternatives to be considered – Ms. Fraser had absolutely no relationship whatsoever with this firm; she was an employee of the firm (in effect, she would have been Mr. Piers' employee given the latter's status as a sole proprietor) or she was an actual or apparent partner with Mr. Piers in the firm. Ms. Fraser acknowledges that she was actively involved in the affairs of the firm (for example, she negotiated and signed business contracts on behalf of the firm; the firm's business address was her residence; the firm's telephone number was her private cellular telephone number; she identified herself on a business website as the firm's "owner"; she provided some working capital) and so the first possibility cannot apply.
8. The real contest in this case was between the second and third possibilities – Ms. Fraser maintains that she was a mere employee (earning \$15 per hour) whereas the delegate determined that Mr. Piers and Ms. Fraser actively operated the business in tandem. Ms. Fraser continues to assert that the delegate erred in making this latter finding and that the Tribunal should have corrected this error. However, there was ample evidence (indeed, I would say there was overwhelming evidence) that Ms. Fraser's role in the firm went well beyond that of a mere employee. Ms. Fraser maintained that she earned \$15 per hour but there is no record of her ever having been paid; she never received a T-4 Statement of Earnings for income tax purposes; and ordinary employees do not provide their residential address or personal cellular telephone number for exclusive use by their employer. She provided funds to the firm so that it could maintain some semblance of normal business operations. Section 16 of the B.C. *Partnership Act* states that persons who hold themselves out as a partner in a firm are liable for the firm's credit obligations. Ms. Fraser, who was in a romantic relationship with Mr. Piers, represented herself to be an "owner" of the firm and pledged her credit on the firm's behalf. There was evidence before the delegate that the firm's clients reasonably perceived Ms. Fraser to be a principal, along with Mr. Piers, in the firm. Ms. Fraser says that Mr. Schmidt acknowledged at some point that he did not understand that Ms. Fraser "owned" the firm but whether Mr. Schmidt was fully cognizant of Ms. Fraser's role in the firm is wholly irrelevant – the issue was her actual status, not Mr. Schmidt's perception of her status. Further, this alleged statement (which, incidentally, Mr. Schmidt denies making) apparently occurred during a settlement conference and thus, in any event, is probably privileged and thus inadmissible before the Tribunal.
9. The second aspect of Ms. Fraser's attack concerns the treatment of her "new evidence" in the Appeal Decision. This matter was fully addressed at paras. 39 to 41 of the Appeal Decision and I see absolutely no

basis for setting aside the Tribunal Decision on this score. Ms. Fraser simply says that her “new evidence” should not have been rejected but she has not provided any legal foundation for her position. I entirely agree with the reasoning set out in the Appeal Decision – this evidence clearly was not admissible on appeal. Further, even if the evidence were admissible, I concur with the observation set out in the Appeal Decision that the evidence was, as best, only marginally relevant and wholly lacking in any probative value.

10. Finally, Ms. Fraser says that the delegate’s investigation was incomplete and that she failed to interview certain individuals; however, the record before me shows that the delegate fully complied with section 77 of the *Act* and that Ms. Fraser was afforded a reasonable opportunity to present her evidence – and she did so – and to respond to all of the evidence the delegate uncovered during the course of her investigation. While it is true that some individuals were not interviewed, that is simply because they had no relevant evidence to offer regarding the issues in dispute.

ORDER

11. The application to reconsider the Appeal Decision is refused. Accordingly, pursuant to section 116(1)(b) of the *Act*, the Appeal Decision is confirmed.

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal