Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Bonnie Holmes

- 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 MEMBER: Alison H. Narod

FILE No.: 2004A/94

DATE OF DECISION: August 11, 2004

DECISION

OVERVIEW

This Decision concerns a request for reconsideration of a Decision of an Adjudicator dated July 15, 2003 (the Adjudicator's "Decision") respecting an appeal made by Bonnie Holmes ("Holmes") of a Determination made by a Delegate of the Director (the "Delegate"), dated March 25, 2003.

In his Decision, the Adjudicator dismissed Holmes' appeal of the Determination, in which the Delegate concluded that Holmes was not an "employee" within the meaning of the *Employment Standards Act* (the "*Act*") and therefore not entitled to unpaid wages under the *Act*.

Holmes seeks reconsideration of the Decision on the basis of "new evidence". The Delegate says the application is untimely. Additionally, the Respondent, Ralph Wiley operating as Your Time Saved Laudromat and Wiley Coyote Trucking ("Wiley") and the Delegate contest the allegation that the evidence is "new".

ISSUE

The issue is whether or not the application for reconsideration is timely, and if so, whether or not the Decision of the Adjudicator ought to be reconsidered and set aside on the basis of the new evidence supplied by Holmes.

FACTS

The Adjudicator held an oral hearing of the appeal and found the following facts:

> Bonnie Holmes and Ralph Wiley ("Wiley") lived together in a common-law relationship. Wiley operated a trucking business and spent much time 'on the road' in 1997. They bought a home together and in 1999, they decided to open a Laundromat. Subsequently the spousal relationship was terminated and a separation agreement was signed in July 2002. In the separation agreement Ms. Holmes received full ownership of the family home and Wiley received full ownership of the Laundromat business.
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> Holmes claimed that she was an employee of the business and entitled to wages in accordance with the provisions of the *Act.* She had been the frontline worker in the Laundromat and had accrued a substantial number of unpaid hours of work. She concedes that she would be considered a manager for the purpose of hours of work and overtime but claims that she was never paid even minimum wages for the hours she worked. Wiley asserted that the Laundromat was a joint venture partnership and that Holmes was not an employee but an owner of the business only entitled to a share of the profits, if any.
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> The Directors' delegate assigned to the investigation of the matter determined that it was indeed a joint venture and that Holmes was a partner in the business and not an employee.

The Adjudicator said that, on appeal, Holmes asserted that the Delegate did not consider all the evidence that was submitted and accordingly came to the wrong conclusion. She submitted some new evidence that was not available at the time of the investigation.

The Adjudicator noted that he had reviewed all the written submissions and heard the evidence of Holmes and her witness who provided the "new evidence". The Adjudicator concluded that the Delegate had considered all of the issues raised by Holmes. Moreover, the new evidence provided no new information that had not been considered by the Delegate. The witness, however, had confirmed that Holmes and Wiley started the business as a partnership and it was when Holmes realized how many hours she was working that she felt the partnership was not fair and she should be entitled to wages. The Adjudicator said:

> Although the partnership may not have been a fair arrangement, it cannot be unilaterally converted to an employment arrangement by one of the parties. In my opinion, the Director's delegate considered all of the submitted evidence carefully and fairly. She analyzed the credibility of the evidence appropriately and came to a reasoned and reasonable conclusion.
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> The delegate noted that Wiley was very much involved in signing the leases and borrowing money for the business but he was not the sole operating mind of the business. It was clear to the delegate and it was clear at the hearing that Holmes and Wiley started the Laundromat as a joint venture. There was no intent to form an employer/employee relationship. There was no persuasive evidence before the delegate or at the hearing to establish that the relationship was subsequently changed by mutual consent.

RELEVANT STATUTORY PROVISIONS

Section 116 of the *Act* states:

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) confirm, vary or cancel the order or decision or refer the matter back to the original panel.

In a recent case of *Norman (Re)* (2004) B.C.E.S.T.D. No. 36, which is a reconsideration of BC EST #121/03, Adjudicator M.G. Taylor set out the Tribunal's approach on reconsideration as follows (at paragraphs 9 to 16):

> 9. Section 116 does not set out the grounds on which the Tribunal may reconsider a decision. The Tribunal uses its discretion to reconsider with caution, 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."
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> 10. In *Milan Holdings* (BC EST # D313/98) the Tribunal set out a principled approach in determining when to exercise its discretion to reconsider:
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> 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 this 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: 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 application's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the adjudicator (as distinct from tendering compelling 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 (c.o.b. Pereguine Consulting) BC EST # D095/98 (Reconsideration of BC EST # D574/97); 323573 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 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.

11. If the Tribunal finds that the request for reconsideration passes those threshold tests, the second stage is a consideration of whether to grant the request to vary or cancel the adjudicator's decision. The primary factor weighing in favour of varying or cancelling 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.

12. In *Zoltan Kiss* (BC EST # D122/96), the Tribunal set out a number of grounds for varying or cancelling a decision:

- The adjudicator failed 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 some serious clerical error.

13. While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.

14. The Tribunal has advised the public through publications and website that

- reconsideration is not a right, but is at the discretion of the Tribunal,
- the Tribunal will not normally reconsider a Decision if the applicant's intent is simply to have the Tribunal "re-weigh" evidence previously considered or dismissed by the Adjudicator or to seek a "second opinion" when a party simply does not agree with the Adjudicator's Decision.
- the reconsideration process was not meant to allow parties another opportunity to re-argue their case.
- the Tribunal may reconsider a Decision if the Adjudicator failed to comply with the principles of natural justice or made a serious mistake in applying the law, or some significant new evidence has become available that would have led the Adjudicator to a different decision.
- while there is no specific time limit for making a reconsideration request, the Tribunal expects that a request will be made in a timely manner following the Adjudicator's Decision.
- unless there is a compelling explanation for the delay, the Tribunal is unlikely to reconsider its Decision.

ARGUMENT

I will summarize the submissions of the parties, and not set them out in detail. I have, however, considered the details of those submissions.

In her application for reconsideration, dated May 31, 2004, Holmes sought reconsideration on the basis of new evidence. The new evidence was a letter from Wiley's former accountant, dated May 26, 2004, essentially stating that it was his understanding that Holmes was an employee of the Laundromat and not a partner or owner of the business. Holmes explained that she had not previously been able to "show" this new evidence because she had been awaiting a return phone call from Gerry Omstead, the Regional Manager of Vancouver Island, Employment Standards Branch. In the interim, Mr. Omstead passed away.

In response, the Delegate objects to the application for reconsideration on the basis that the application is untimely and there does not appear to be a valid reason for the delay. The Delegate notes that Holmes did not apply for reconsideration for some 10 months after the Adjudicator's Decision. The Delegate says she is aware that Holmes met with Ms. Omstead in late fall of 2003. It is the Delegate's understanding that he advised Holmes of her right to apply for reconsideration.

The Delegate points out that it was unlikely Mr. Omstead would have directed Holmes to provide evidence to him, as it was not his role to make findings or investigate this matter. Additionally, the Delegate says that Holmes has not brought forward any compelling new evidence. The Delegate notes that she had already considered the accountant's evidence as referenced at page 3 of her Determination.

Wiley objects to the application for reconsideration. He queries the length of time the matter has carried on. He asserts that he has proved that Holmes was a partner of the Laundromat business and was not its employee. He notes that he and his witnesses took time off work to attend the appeal hearing and he would have to remuster his evidence and witnesses again if this matter proceeded. He notes that the

accountant's evidence is not new evidence, as the accountant had already supplied evidence in the case. He challenges the credibility of the accountant.

Holmes filed a detailed reply to the Delegate's and Wiley's submissions. In it, Holmes continues to argue that the original Determination was wrong. She challenges the sufficiency of the evidence submitted to the Delegate by Wiley, arguing that it was inadequate to support the conclusion that she was not an employee.

Additionally, Holmes makes further arguments which she says were not previously available. Certain of those arguments relate to an opinion issued by the Canada Revenue Agency on March 22, 2002 that she is an employee for that agency's purposes and tax forms issued and filings made as a result of that opinion. She relies on this opinion and documentation in support of an argument that she was an employee of Wiley under the *Act* because she is not an employer or a partner as defined by the Canada Revenue Agency.

Holmes also seeks to rely on a Statement of Claim attached to a Writ of Summons dated March 8, 2004, a card given her by Wiley about the first year of the Laundromat's operations, and a letter dated June 30, 1999 from Cherry Point Developments Ltd. to Wiley.

Moreover, Holmes supplies a summary of her pursuit of information on how to "address" the Adjudicator's Decision.

THRESHOLD ISSUES

I have decided that Holmes' application for reconsideration is untimely and it does not warrant consideration because it does not meet the threshold tests for consideration at the first stage of the required analysis described above.

Timeliness

As noted above, although there is no specific time limit for making a reconsideration request, the Tribunal expects that such a request will be made in a timely manner following an adjudicator's decision. In the absence of a compelling explanation for the delay, the Tribunal is reluctant to reconsider its decision. In making its determination, the Tribunal will consider the prejudice to either party in proceeding with other issues in the reconsideration.

In my view, Holmes has not made out a compelling case explaining the delay in filing her application for reconsideration. As noted, the Tribunal publicizes the facts that reconsiderations are discretionary, that applications for reconsideration must be made in a timely manner, and that there must be compelling reasons explaining a delay in filing them.

Holmes was not unfamiliar with the Employment Standards Branch or the Tribunal, having prosecuted an appeal previously. She was sufficiently aware that she could obtain information from either of those sources and that she contacted the Regional Manager and his office, as well as staff at the Tribunal on more than one occasion within months of the Adjudicator's Decision. She does not allege that they failed to provide her with information about filing an application for reconsideration. She merely says she could not "show" a particular document because she was awaiting a call from the now-deceased Regional Manager of Vancouver Island, Employment Standards Branch.

The Delegate asserts that the Regional Manager apprised Holmes of her right to file for reconsideration.

Obviously, Holmes found out at some point in time between the date the Adjudicator's Decision was issued and the date she filed her application for reconsideration that she had a right to file an application for reconsideration. She has not said when she became aware of this right. She does not contend that she was unaware of this right until some later date falling within a reasonable proximity of the date she filed her application for reconsideration. It appears from her submission that the reason she did not file the application at a sooner date was because she was awaiting for additional evidence to support her application.

With respect to the letter from the accountant itself, there is no explanation as to why it took so long (7 ½ months) for Ms. Holmes to seek the letter. She was clearly aware of the existence of that evidence once the Determination was issued. As noted by the Delegate, the letter from the accountant is not truly "new evidence". Rather, it is merely old evidence provided in a new form. The evidence contained in the accountant's letter was substantially the same as the evidence the accountant gave directly to the Delegate over the phone, as the Delegate described in the Determination. The fact that the accountant committed this evidence to writing in a later letter does not convert it into "new evidence".

Accordingly, in my view, it is insufficient to delay the filing of an application for reconsideration until old evidence can be converted into a new form in order to be used as "new evidence" in support of the application.

As noted, Holmes also supplies a Statement of Claim dated March 8, 2004, a card given to her by Wiley about the first year of the Laundromat's operations and a letter dated June 30, 1999 from Cherry Point Developments Ltd. to Wiley.

Each of these documents, except the Statement of Claim, pre-existed both the Determination and the Adjudicator's Decision. There is no explanation for why they were not supplied to the Delegate or the Adjudicator. Accordingly, there is not a compelling explanation of the delay in supplying these documents. The Statement of Claim must have been produced on Holmes' instructions and, to that extent, is self-serving. The facts set out in the Statement of Claim are allegations only and not proof of those facts. It is not evidence that she was Wiley's employee. The filing of that document by itself does not justify the delay in filing Holmes' reconsideration request.

With respect to Holmes' summary of her search for assistance, it is clear that she was dissatisfied with the Determination and the Adjudicator's Decision and contacted a number of people and agencies about it. However, it is not clear from this that she ever advised the Tribunal of her intention to appeal.

In my view, it is simply insufficient for an applicant for reconsideration to say that her failure to advise the Tribunal of an intention to apply for reconsideration or to actually file that application in a timely fashion is justified because she sought advice from various sources about her concerns for a lengthy period of time. Seeking advice, without more, will not justify a delay in applying for reconsideration.

Moreover, in my view the prejudice to Holmes in not proceeding with the application does not outweigh the prejudice to Wiley if it proceeds. The scheme of the *Act* emphasizes expeditious resolution of disputes. Wiley has a legitimate interest in the finality of the decision-making process. As noted below, the issues and evidence raised by Holmes are not new and compelling. Holmes seeks to reargue her case

because she disagrees with the result below. Wiley ought not to be put to relitigating the issues yet again in these circumstances.

In view of the foregoing I find the application is not timely.

First Stage Considerations

As noted above, at the first stage of its consideration of an application for reconsideration, a reconsideration panel will decide whether or not the matters raised in the application in fact warrant reconsideration. I have decided that the following factors weigh against reconsideration.

As explained above, the application has not been filed in a timely fashion and there is no valid cause for the delay. Additionally, as described below, the application's primary focus is to have the reconsideration panel effectively re-weigh evidence already tendered and fails to disclose compelling new evidence.

Holmes makes additional arguments which she says were not previously available. Many of those arguments quarrel with the sufficiency of the evidence the Delegate relied on in dismissing Holmes' original claim for unpaid wages. It is my view that Holmes disagrees with the Delegate's assessment of the evidence and adjudication of the facts and endeavours to re-argue her case. This is not a proper basis for reconsideration.

Some of Holmes' arguments relate to evidence she now claims is "new". As noted above, none of the documents now supplied, except the Statement of Claim, are "new". They pre-existed the Determination and they do not constitute "compelling new evidence".

With respect to the Statement of Claim, as noted above, the facts set out in that document are allegations and not proof of the truth of those allegations. It must have been produced on Holmes' instructions and, to that extent, is self-serving and not evidence of an agreement that she was Wiley's employee. Accordingly, I find that it is not compelling new evidence which would justify proceeding beyond the first stage of the reconsideration analysis.

With respect to Holmes' argument based on the Canada Revenue Agency opinion and the tax documentation, I have additional concerns. The opinion by Canada Revenue Agency under the federal *Income Tax Act*, the *Employment Insurance Act* or the *Canada Pension Plan Act* as to whether a person is an "employee" for tax purposes are not determinative of whether or not a person is an "employee" within the meaning of the *Act* for employment standards purposes. The purposes of those enactments are not the same as those of the *Act* (see section 2 of the *Act*). For instance, one of the purposes of the *Act*, set out in Section 2(a) is to ensure that employers in British Columbia receive at least basic standards of compensation and conditions of employment. This is not the purpose of the federal acts administered by Canada Revenue Agency.

Moreover, it is not apparent from the opinion of Canada Revenue Agency what evidence and submissions were considered in determining whether or not Holmes was an employee and whether submissions from Wiley were entertained in that process. I am bound to apply the *Act* in determining whether or not Holmes was an employee for the purposes of that *Act.* I am not bound by the opinions of Canada Revenue Agency under the statutes it administers, particularly when I am unable to ascertain on the materials before me that the issues of fact and law were the same and that the parties were given full opportunity to be heard in a quasi-judicial hearing.

There are several problems with the letter from the accountant. Most importantly, the Delegate in the Determination says that she specifically spoke to the accountant on January 14, 2003 and that he said Holmes was an employee of the Laundromat, not an owner. Additionally, she records that the accountant said he would provide a written statement, but did not do so. Accordingly, this evidence cannot be said to be "new evidence" not previously available. Rather, it is substantially the same evidence as the accountant gave to the Delegate, but in a different form, the form of a letter. Therefore, it cannot be said to be compelling new evidence justifying reconsideration.

SUMMARY

I dismiss the application for reconsideration and confirm the Decision of the Adjudicator. The application is not timely. Additionally, it does not meet the threshold for consideration because it is untimely, it is an attempt to reargue the case and it is not based on compelling new evidence.

Alison H. Narod
Member
Employment Standards Tribunal