Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Madison Contracting Ltd. dba Madison Choice Flooring
("Madison")

- 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: Fern Jeffries

FILE No.: 2002/29

DATE OF DECISION: April 29, 2002

DECISION

OVERVIEW

This is a request from the employer, Madison Contracting Ltd. dba Madison Choice Flooring ("Madison"), to reconsider a decision pursuant to Section 116 of the *Employment Standards Act* (the *"Act"*) that 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) cancel or vary the order or decision or refer the matter back to the original panel.

Tribunal Decision #D696/01 issued on December 27, 2001 confirmed the Determination dated August 30, 2001. This Determination awarded the former employee, Sheila Bissonette ("Bissonette"), unpaid wages plus interest, for a total amount of $736.55.

FACTS:

Madison Contracting Ltd. sells and installs carpeting and flooring. The business is owned by Kevin and Petra Bahris. Bissonette was hired to maintain retail store hours, provide advice and information to prospective clients. Follow up on providing estimates and measuring the premises was the responsibility of Petra and Kevin Bahris respectively. Bissonette's contract of employment provided for a monthly rate of pay of $1000, plus 10% commission on sales in which she was the customer's "first contact".

ISSUE:

Does this request for reconsideration meet the threshold established by the Tribunal, i.e. is there an error of law, or a breach of the principles of natural justice, or other similarly serious problem with the first decision? If so, should the decision be cancelled, varied, or sent back to the adjudicator?

ANALYSIS:

Section 116 does not confer an automatic right of reconsideration. The Tribunal has established a principled approach to deciding whether or not to exercise the discretion to reconsider. This approach is outlined in *Zoltan Kiss* (BC EST D#122/96) which states:

Some of the more usual or typical grounds why the Tribunal ought to reconsider an order or a decision are:

- a failure by the Adjudicator to comply with the principles of natural justice;
- there is some mistake in stating the facts;
- a failure to be consistent with other decisions which are not distinguishable on the facts;

- some significant and serious new evidence has become available that would have led to the Adjudicator to a different decision;
- some serious mistake in applying the law;
- some misunderstandings of or a failure to deal with a significant issue in the appeal; and
- some clerical error exists in the decision.

This, of course, is not an exhaustive list of the possible grounds for reconsidering a decision or order.

There are also some important reasons why the Tribunal's statutory power to reconsider orders and decisions should be exercised with great caution, such as:

Section 2(d) of the *Act* establishes one of the purposes of the *Act* as providing fair and efficient procedures for resolving disputes over the application and interpretation of the *Ac*t. Employers and employees should expect that, under normal circumstances, one hearing by the Tribunal will resolve their dispute finally and conclusive. If it were otherwise it would be neither fair nor efficient.

Section 115 of the *Act* establishes the Tribunal's authority to consider an appeal and limits the Tribunal to confirming, varying or cancelling the determination under appeal or referring the matter back to the Director of Employment Standards (presumably, for further investigation or other action). These limited options (confirm vary or cancel a determination) imply a degree of finality to Tribunal decisions or orders which is desirable. 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 reason.

It would be both unfair and inefficient if the Tribunal were to allow, in effect, two hearings of each appeal where the appeal hearing becomes nothing more than a discovery process for a reconsideration application.

This application begins with "As stated in our original appeal" and proceeds to re-argue the case that was presented at appeal. In the material that the Tribunal distributes to applicants, the criteria for reconsideration are clearly articulated. The Tribunal exercises its discretion to reconsider only in very exceptional cases. Madison has not presented a case that meets that standard.

Clearly Madison believes that the delegate was biased, and the Determination was wrong, but they were not able to convince the Adjudicator of that. Information from a previous employee may or may not have been helpful to their cause at appeal. But bold assertions about what the previous employee did or didn't do with respect to a client is not helpful at this point.

Similarly, repeating allegations of bias does not satisfy the threshold test for reconsideration. Madison admits that they are not able to substantiate their charge that the delegate was predisposed against them. Based on the information presented, I cannot conclude that this applications meets the threshold for reconsideration.

ORDER:

The application for reconsideration is denied; the order is confirmed.

Fern Jeffries
Adjudicator
Employment Standards Tribunal