

BC EST #D178/00
Reconsideration of BC EST #D308/99

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Calvary Publishing Corp.

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal ")

ADJUDICATOR: John M. Orr

FILE No.: 2000/058

DATE OF DECISION: May 4, 2000

DECISION

OVERVIEW

This is an application by Calvary Publishing Corp. ("Calvary") under Section 116 (2) of the *Employment Standards Act* (the "Act") for a reconsideration of a Decision #D308/99 (the "Original Decision") which was issued by the Tribunal on August 18, 1999.

The Director of Employment Standards ("the Director") issued a determination on February 10th, 1999 which found that Joseph Daou ("Daou") was employed by Calvary directly, or by Calvary as a successor pursuant to Section 97 of the *Act*, for 10 years until his dismissal in July 1997. The Director determined that Calvary owed Daou the sum of \$67,909.93 on account of unpaid wages. These wages were an accumulation of unpaid commission earnings, compensation for length of service, vacation pay, Statutory Holiday pay, interest and a repayment of improper deductions.

Calvary had submitted that Daou was an independent contractor or that he was dismissed for cause. The Director found that Daou was in fact an employee and that he had been employed from June 1, 1987 and that he was dismissed without notice and without just cause.

Calvary appealed the Determination to the Tribunal and submitted a detailed four page document setting out the bases for the appeal. Included in that document were allegations of impropriety or bias at the investigative level, denial of successorship, allegations of grounds for dismissal for cause, and concerns about the alleged amounts owing to Daou.

The appeal was considered by the Tribunal after a hearing and written submissions resulting in the original decision. It is this original decision which Calvary now wishes reconsidered by the Tribunal.

The request for reconsideration again raises issues of bias and impropriety. In addition the requests submits that there was no proof of wage loss and that the successorship could not have occurred because the assets allegedly transferred to Calvary were subject to a general security agreement. Copies of documents confirming the general security agreement are included. It is also alleged that the Tribunal had no jurisdiction because of various bankruptcy proceedings and that the proceedings did not occur expeditiously.

ANALYSIS

The current suggested approach to the exercise of the reconsideration discretion under section 116 of the *Act* was set out by the Tribunal in *Milan Holdings Ltd.*, BCEST #D313/98 (applied in decisions BCEST #D497/98, #D498/98, et al). In *Milan* the Tribunal sets 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 and weigh 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.

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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 that "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.

It is one of the defined purposes of the *Act* to provide a fair and efficient procedure for resolving disputes and it is consistent with such purposes that Tribunal's decisions should not be open to reconsideration unless there are compelling reasons: *Khalsa Diwan Society*, BCEST #D199/96.

The circumstances in which an application for reconsideration will be successful will be limited. In a Reconsideration decision dated October 23, 1998, *The Director of Employment Standards*, BCEST #D475/98, the Adjudicator sets out those limits as follows:

Those circumstances have been identified in several decisions of the Tribunal, commencing with Zoltan Kiss, BCEST #D122/96, and include:

- * failure to comply with the principles of natural justice;
- * mistake of law or fact;
- * significant new evidence that was not reasonably available to the original panel;
- * inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
- * misunderstanding or failure to deal with a serious issue; and
- * clerical error

In my opinion this is a case which does not warrant the exercise of the reconsideration discretion. The request does not raise any issues which were not dealt with on their merits either by the Director or the adjudicator in the original decision. I have read the original decision, the original file, and all the submissions on this request for reconsideration and can find no basis upon which it would be proper to substitute my opinion for that of the original adjudicator.

The original decision carefully analyses the submissions made by, and on behalf of, Calvary including whether Daou was an employee or an independent contractor, whether Section 97 was properly applied, and whether there was just cause for dismissal. The original decision also dealt with the assertions of impropriety and bias. The adjudicator in the original decision applied the proper tests for the weighing of evidence and the onus of proof and came to a carefully analyzed and reasoned decision.

There is nothing in the material supplied in support of the request for reconsideration that provides a prima facie basis to warrant reconsideration. The primary focus of the application is to have the reconsideration panel effectively "re-weigh" the evidence and submissions tendered

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before the adjudicator and effectively seek a second opinion. Having concluded that the matter was properly adjudicated I do not believe that it would be a proper exercise of the reconsideration discretion to further review the substance of the original decision.

I do note, however, that there is one typographical error in the original decision which does not affect the outcome of the decision but to avoid any misunderstandings should be corrected. On page 4 of the original decision it is stated that:

The delegate noted that Daou had been employed by the Tannis Group of Companies since June 1st, 1997 and that his employment continued uninterrupted when, in 1996, Calvary purchased the assets of the Tannis Group.

The reference to "June 1st, 1997" is clearly a typographical error and should have read June 1st, 1987. To this extent and this extent only the original decision will be varied. In all other respects the original decision is confirmed.

ORDER

This Tribunal orders that pursuant to Section 116 (1)(b) of the *Act* the original decision is varied to change the reference "June 1st, 1997" on page 4 of the decision to "June 1st, 1987". In all other respects the original decision is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal