An Application for Reconsideration

- by -

Old Yale Log Homes Ltd.
("Old Yale")

- 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: David B. Stevenson

FILE No.: 2004A/152

DATE OF DECISION: November 1, 2004

DECISION

SUBMISSIONS:

Coreen Jackson — on behalf of Old Yale Log Homes Ltd.

Richard Saunders — on behalf of the Director

OVERVIEW

Old Yale Homes Ltd. ("Old Yale") seeks reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision, BC EST #D035/04, made by the Tribunal on March 3, 2004 (the "original decision"). The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on December 3, 2003. The Determination had found Old Yale had contravened several provisions of the *Act* in respect of the employment of Robert Sampson ("Sampson") and ordered Old Yale to pay wages to Sampson in the amount of $2903.95 and imposed administrative penalties totaling $1500.00. The original decision confirmed the Determination.

This application was filed with the Tribunal on August 30, 2004, nearly six months after the original decision was issued. Old Yale has provided two reasons for requesting reconsideration:

1) new evidence has become available; and

2) the Director failed to apply principles of natural justice and made a serious mistake in applying the law.

ISSUE

In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case is appropriate for reconsideration, the substantive issue raised in this application, as it was in the appeal, is whether Sampson was an independent contractor or an employee under the *Act*.

ANALYSIS OF THE PRELIMINARY ISSUE

The legislature has conferred an express reconsideration power on the Tribunal in Section 116 which provides:

> *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.*
>
> *(2) The director or a person named in a decision or order of the tribunal may make an application under this section*

(3) An application may be made only once with respect to the same order or decision.

Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is *"to provide fair and efficient procedures for resolving disputes over the interpretation and application"* of its provisions. Another stated purpose, found in subsection 2(b), is to *"promote the fair treatment of employees and employers"*. The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the Adjudicator (as distinct from tendering new evidence or demonstrating an important finding of fact made without a basis in the evidence) and come to a different conclusion. An assessment is also be made of the merits of the Adjudicator's decision.

Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the tribunal as including:

- 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.

If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration.

After reviewing the original decision, the material on file and the arguments of the parties to this application, I have decided this is a case that does not warrant reconsideration.

ANALYSIS AND ARGUMENT

The Director submits this application has not been brought in a timely way and should be denied on that basis. A delay of almost six months in bringing this application strains the limits of what the Tribunal considers appropriate. While I do not deny this application exclusively on that basis, I do consider the failure of Old Yale to bring this application in timely way to be a factor weighing against the application.

The first reason for requesting reconsideration is grounded in new evidence that has become available. There are two elements to the "new evidence" provided.

The first is a decision of the Canada Custome and Revenue Agency ("CCRA"), finding that Sampson was "not providing services pursuant to a contract of service" and, for the purpose of the *Canada Pension Plan* and the *Employment Insurance Act*, was not considered an employee of Old Yale. The second is material acquired by Old Yale during the course of their appeal to the CCRA, including phone records from Sampson for March and April 2003, credit card statements and testimonies of fellow contractors. The testimonies of fellow contractors were apparently acquired for the purpose of the CCRA appeal and all speak to the period of time when Sampson was employed by Old Yale. In other words, all of that information was available to Old Yale and, with some due diligance by Old Yale, could have been provided to the Director at the time the Employment Standards complaint by Sampson was being investigated.

In any event, all of this "new evidence" goes to whether the Director was correct in finding Sampson to be an employee for the purposes of the *Act*. That question was considered in the original decision, with the adjudicator noting that Sampson's status under the *Act* was fully addressed in the reasons for the Determination, that no error could be found in the Director's analysis and stating that, "any suggestion that Sampson was a true independent contractor is rather fanciful". None of the "new evidence" even if accepted as such, shows either the Determination or, more critically, the original decision, was wrong on that question.

One final comment on this aspect of the reconsideration application is required. The Tribunal has consistently indicated that decisions made by CCRA under federal tax legislation have absolutely no bearing on an individual's status under the *Act*. The statutory definitions and purposes in the *Act* and the federal legislation are quite different and it is the application of the definitions and purposes of the *Act* which determines an individual's status for the purposes of a complaint under the *Act*.

The second reason for seeking reconsideration is based on natural justice arguments. Old Yale says the Tribunal breached principles of natural justice by considering submissions made by the Director on the appeal which Old Yale believes were improper. There are two responses to that position. First, no objection was ever made by Old Yale during the appeal process to the submission filed by the Director. It is too late to raise that objection now. Second, even if "advocacy" in an appeal submission is improper, it simply strains credulity to suggest the submission which was filed by the Director on the appeal was "advocacy" on behalf of Sampson. The reply of the Director to the appeal does nothing more than respond to the requirements of Section 112(5) of the *Act*, address the assertion that the Director failed to comply with principles of natural justice in making the Determination, comment on the absence of evidence to support an assertion made by Old Yale in their appeal submission and comment on the effect of the "new evidence" on the decision made by the Director.

The balance of the natural justice ground raises the same arguments that were made on the appeal of the Determination and which were considered and rejected in the original decision. The original decision indicates the appeal on this point was denied after consideration of the Determination and the facts. While it is apparent Old Yale disagrees with the original decision on the natural justice issue, this application does not indicate how the adjudicator of the original decision committed any error beyond not accepting the appeal argument made by Old Yale on this issue.

In effect, this application only seeks to have this reconsideration panel take a different view of the issue than the adjudicator of the original decision. In the absence of any indication the adjudicator in the

original decision made an error in law or on an important finding of fact, it is not an appropriate for a reconsideration panel to "second-guess" that decision.

For the above reasons, this application for reconsideration is denied.

ORDER

Pursuant to Section 116 of the *Act*, I order the original decision be confirmed.

David B. Stevenson
Member
Employment Standards Tribunal