

An Application for Reconsideration

- by -

Raif Holdings Ltd. operating as Airport Inn Lakeside
("Raif Holdings")

- 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/162

DATE OF DECISION: December 2, 2004

- (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 before the member making the original decision (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 made of the merits of the original 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.

Raif Holdings alleges the Tribunal failed to comply with principles of natural justice by failing to hold a hearing on the appeal. The application for reconsideration says:

It is submitted that an oral hearing is necessary because the credibility of the parties is an issue in this matter. The contentious issues include:

1. Whether or not there was an agreement between Raif Holdings Ltd. and MG Consulting regarding a guarantee by Raif Holdings Ltd. to pay MG Consulting a minimum monthly amount.

2. Work conducted by Ms. Oliver prior to the opening of the motel.
3. The contents and accuracy of the journal prepared by Gwen Oliver recording her work hours.

In respect of the above points, I make the following observations. First, all of the “contentious matters” arise from findings of fact made by the Delegate based on evidence and submissions provided by the parties during the investigation. The Delegate heard the positions of both parties on these matters and her reasons for accepting the position submitted by Oliver are set out in the Determination. The Determination sets out the evidence supporting the findings on each of the “contentious matters”. Neither the appeal nor the reconsideration application indicate how the Tribunal would have any authority to alter the findings of fact made by the Delegate in this case. In fact, there was nothing in the appeal which would have justified intervention by the Tribunal under Section 112(1) of the *Act* relating to those findings of fact.

Second, the appeal did not raise any issue that the Delegate failed to comply with principles of natural justice in making the Determination. Raif Holdings raised only two grounds for appeal under Section 112(1): error of law and new, or additional, evidence. In examining the appeal, there is a complete absence of any basis for questioning the credibility of Oliver. Similarly, this application contains nothing that satisfies me there is an issue of credibility or that an oral hearing was the only way of ensuring a fair hearing on the appeal.

Third, in respect of the discussion about a monthly guarantee, the Delegate indicated in the Determination that even if there was no discussion about a monthly guarantee, it would not have affected her decision that Oliver was an employee under the *Act*.

In sum, Raif Holdings has failed to show the decision of the Tribunal to decide the appeal on the basis of written submissions constituted a denial of fair hearing or failure to comply with principles of natural justice.

On the second issue, 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. In my view this application represents nothing more than an attempt by Raif Holdings to have this panel of the Tribunal review the arguments made and re-weigh the evidence considered by the Delegate in making the Determination and by the member in making the original decision and reach a different conclusion.

ARGUMENT AND ANALYSIS

The argument made by Raif Holdings on the substantive issue may be stated as follows: there was a partnership between Oliver and Michael Danaf; the partnership contracted with Raif Holdings to perform services; the partnership cannot be an employee, therefore Oliver cannot be an employee. This argument incorrectly presumes that, for the purpose of deciding an individual’s status under the *Act*, form governs substance.

The fundamental question raised by the position taken by Raif Holdings in response to the complaint made by Oliver was whether Oliver was an employee under the *Act*, not whether Oliver was a partner with Michael Danaf or what effect the partnership may have had for purposes outside the *Act*.

That question was quite properly decided on an analysis of the relationship between the complainant and the putative employer, Raif Holdings, applied against relevant provisions of the *Act* and its objects and purposes. Primarily, that analysis involved applying findings of fact to provisions of the *Act* with some reference to traditional common law tests used to assist in determining whether a person is an employee or an independent contractor. Both the Delegate involved in the Determination and the author of the original decision performed that analysis, with the former deciding Oliver was an employee under the *Act* and the latter finding no error in that decision. As well, the original decision appropriately notes the impact of Section 4 of the *Act* on the agreements involving Oliver, Michael Danaf and Raif Holdings.

No error of law in has been shown.

Raif Holdings submits the ruling by Canada Customs and Revenue Agency (“CCRA”), should have been given “significant weight”. The ruling was rejected in the original decision as being of “no assistance” to the question of the status of Oliver under the *Act* and reasons were provided for that decision.

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. 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*. Raif Holdings has shown no error in the decision of the author of the original decision to reject the CCRA ruling as having any relevance to the issue being considered in the appeal.

The 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