

An Application for Reconsideration

- by -

Arbutus Custom Cabinets Ltd.
("Arbutus")

- of Decisions 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: John M. Orr

FILE No.: 2002/031

DATE OF DECISION: May 30, 2002

DECISION

OVERVIEW

This is an application by Arbutus Custom Cabinets Ltd. ("Arbutus") pursuant to Section 116 (2) of the *Employment Standards Act* (the "*Act*") for a reconsideration of two Tribunal decisions # D521/01 and # D662/01 (the "Original Decisions") which were issued by the Tribunal on September 28, 2001 and December 7, 2001 respectively.

Arbutus operated a business installing custom cabinets. Arbutus engaged the services of two men to help install cabinets for them. The issue arose as to whether these two men were employees or subcontractors. The Director investigated and determined that the men were employees. Arbutus appealed that Determination and in Decision # D521/01 a Tribunal Adjudicator confirmed the Director's finding that the men were employees. The matter was referred back to the Director to re-calculate certain wages owing. In the second Tribunal Decision the same Adjudicator reconfirmed his initial finding that the two men were employees and confirmed the Director's revised wage calculations.

Arbutus has now applied for reconsideration of the original Decision and by implication the second Decision as well. The stated grounds for the application for reconsideration are the same issues that were addressed by the adjudicator. Arbutus maintains strongly that the workers were independent contractors.

The Director complains that the request for reconsideration is not timely and therefore should be dismissed on this basis alone. However the Director also submits that the matter has been adjudicated and there is no basis to warrant reconsideration.

ANALYSIS

The test for the exercise of the reconsideration power under section 116 of the *Act* is set out in *Milan Holdings Ltd.*, BC EST # D313/98. 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 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.

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, "*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 the Tribunal's decisions should not be open to reconsideration unless there are compelling reasons: *Khalsa Diwan Society* BC EST # D199/96.

The first matter to be considered is whether the application for reconsideration was filed within a reasonable time. I am satisfied that it was. The first adjudication sent the matter back to the Director for recalculation of wages. The confirmation of the Director's recalculation was not issued until December 7, 2001. The Tribunal received the application for reconsideration on January 31, 2002. In my opinion that is not an unreasonable delay considering that the Director's applications are often not filed for many months after the Decision is issued.

However, in my opinion this is not a case that warrants the exercise of the reconsideration discretion. The submissions made by Arbutus on this reconsideration application only reiterate the arguments that have already been decided by the Director and by the adjudicator in the original Decision and reviewed again in the second Decision.

The argument that the workers were independent contractors was presented fully to the Adjudicator and was considered carefully by him. The Director and the Adjudicator considered the relevant jurisprudence. There is no suggestion in the application that the Adjudicator failed to understand the argument or failed to give the appellant's submissions due consideration. The appellant simply submits that the Decision is wrong. The Adjudicator clearly was cognisant of the arguments put forward by Arbutus. He analysed the material presented carefully and obviously decided that he agreed with the Determination that the workers were 'employees'.

It is fully within the intent and purposes of the *Act* that there be some finality to the decisions of the Tribunal. As stated above, reconsideration should be used sparingly and should not be used to substitute my analysis and my opinion for that of the Adjudicator who wrote the original decisions.

I am not persuaded that there is a sufficient basis in fact or in law to warrant any interference in the decisions made by the Adjudicator in the original Decisions. Therefore I am not prepared to exercise my discretion to reconsider the original Decisions.

ORDER

The application to reconsider the original Decisions of the Adjudicator in this matter is dismissed.

John M. Orr
Adjudicator
Employment Standards Tribunal