

An Application for Reconsideration

- by -

Nacel Properties Ltd.
("Nacel")

- 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: David B. Stevenson

FILE No.: 2003/30

DATE OF DECISION: July 10, 2003

DECISION

OVERVIEW

Nacel Properties Ltd. (“Nacel”) purports to seek reconsideration under Section 116 of the *Employment Standards Act* (the “Act”) of a decision of the Tribunal, BC EST #D121/03 (“Nacel #3”), dated April 8, 2003. In fact, Nacel seeks by this application to affect the result of three decisions issued by an Adjudicator of the Tribunal: BC EST #D279/02, dated May 7, 2002 (“Nacel #1”), which confirmed that Guy Norman (“Norman”) was an employee of Nacel under the Act; BC EST #D523/02, dated December 2, 2002 (“Nacel #2”), which rejected an attempt by Nacel to re-argue Norman’s status as an employee under the Act; and Nacel #3, which confirmed the Director’s finding that Norman was an employee of Nacel as of March 1, 1997 and, subject to confirmation from the Director that he was not recovering wages for work performed as a relief caretaker or in any other capacity, was entitled to wages in the amount of \$80,684.35.

Nacel says the Adjudicator erred in confirming Norman was an employee under the Act, rather than an independent contractor. Nacel also says the Director failed to comply with principles of natural justice by not properly assessing the available evidence.

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 is whether Norman was an employee of Nacel under the Act and whether the Director failed to comply with principles of natural justice.

ANALYSIS OF THRESHOLD 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. 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.

A reconsideration application is not an opportunity to revisit the facts or re-argue the merits of the Determination or original decision.

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.

I am not satisfied this is a case that warrants reconsideration. In my view, this application is nothing more than an attempt by Nacel to have another panel of the Tribunal review and re-weigh the facts which lead the Director and the Adjudicator of the appeal decisions to the conclusion that Norman was an employee under the *Act* and was entitled to wages.

Nacel argues that the conclusion of the Director, confirmed by the Adjudicator, that Norman was an employee under the *Act*, is inconsistent with a previous decision of the Tribunal, *Re Kokan*, BC EST #D425/97, that was indistinguishable on its facts from the present case.

The Adjudicator addressed the issue of whether Norman was an employee under the *Act* in Nacel #1 and in doing so considered the applicability of the facts and reasoning of *Re Kokan* to that issue. In Nacel #1, the Adjudicator made a finding that Nacel had "allowed Mr. Norman to perform work on its behalf", distinguishing *Re Kokan*, where there was a finding that the complainant's activities were "not authorized by the landlord".

Nacel also says the Director failed to comply with principles of natural justice. Their submission on this aspect of the application states:

In the face of a decision on indistinguishable facts, and in face of strong evidence to the contrary, the delegate found that Mr. Norman was an employee, and the Adjudicator did not overturn that finding. That finding is essentially based on the purported records of Mr. Norman, which were in fact prepared by his wife and which were never provided to Nacel during the course of Mr. Norman's purported employment. The result is manifestly unfair to Nacel, and the failure to properly assess the evidence, even when the Adjudicator had earlier found the failure by Mr.

Norman to seek full payment from Nacel until after the end of his alleged employment “impact[ed] on his credibility” (Decision June 25, 2002), p. 8) amounts to a breach of natural justice.

There is no basis for asserting the Adjudicator was not alert to the concerns about the credibility of Norman’s evidence when reviewing the findings made by the Director in relation to both his status under the *Act* and to the calculation of the amount owed to him for wages. In this application, Nacel has not sought to introduce any new evidence that was not reasonably available to the Adjudicator. In the absence of some indication that the findings of fact made or confirmed in the decisions were perverse, in the sense that they had no evidentiary basis, were inconsistent with other conclusions of fact in the decisions or inconsistent with reasonable inferences drawn from the conclusions of fact made in the decisions, this is no basis for reconsideration. It is apparent from the decisions that the conclusions reached by the Director, and confirmed by the Adjudicator, were well grounded in evidence from a variety of sources, including sources independent of Norman. In Nacel #3, the Adjudicator stated:

. . . I noted that she [the delegate] had interviewed a number of witnesses and reviewed many documents including Mr. Norman’s time records, and his signature on documents such as bank deposits, purchase and work orders and store invoices. There was also evidence that Mr. Norman appeared at Residential Tenancy Branch (“RTB”) hearings on Nacel’s behalf. . . .

. . . Although Nacel challenged the reliability of Mr. Norman’s records, it never denied that Mr. Norman’s signature appeared on bank deposits, RTB decisions, work orders, or denied that its general manager or a property manager had provided letters of reference, attesting to Mr. Norman’s work efficiency.

From a natural justice perspective, Nacel does not contend that it was denied a full and fair opportunity to know the nature of the complaint made by Norman, to respond to that complaint, to participate in the investigation process, to appeal the result of that process and to participate in the appeal process, including participating in an oral hearing, where they were represented by counsel, presented evidence and argument and cross-examined Norman in respect of his claim, and to make submissions on the matters referred back to the Director by the Adjudicator.

This application is denied; the Tribunal will not exercise its discretion under Section 116 to reconsider the original decision.

ORDER

Pursuant to Section 116 of the *Act*, I order the decision, BC EST #D121/03 be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal