



An Application for Reconsideration

- by -

Dale Hampshire
("Hampshire")

- 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: John Orr

FILE No.: 2001/116

DATE OF DECISION: May 16, 2001

DECISION

OVERVIEW

This is an application by, or on behalf of, Dale Hampshire ("Hampshire") under Section 116 (2) of the *Employment Standards Act* (the "Act") for a reconsideration of Decision BC EST # D044/01 (the "Original Decision") which was issued by the Tribunal on January 23, 2001.

Hampshire is quadriplegic and hires staff to assist him to live independently in an apartment under a government support program. The complainant worked for Hampshire for approximately two months in the Spring 2000. A dispute arose about the nature of her employment and whether she was entitled to overtime pay in relation to an overnight shift that she worked on one occasion.

In a determination issued October 3 2000 the director found that the complainant was entitled to be paid overtime because the nature of her work did not fall within any of the exclusions in the *Act* or *Regulation*. Specifically the director considered whether the complainant could be a "sitter", a "live-in home support worker", a "residential care worker", or a "night attendant". All of the foregoing are specifically defined in the legislation and are exempt from some or all of the provisions relating to hours of work and overtime. Having reviewed the definitions carefully the director concluded that the complainant was entitled to be paid overtime.

Hampshire appealed the determination and in a written decision dated January 23 2001 an adjudicator decided in the original decision that she could not find any error in the determination and ordered that it should be confirmed.

Hampshire has now applied for reconsideration of the original decision on the basis that the complainant should have been considered a "live-in home support worker". He says that the original decision is inconsistent with a decision made by another adjudicator in BC EST # D023/01.

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. 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.

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* 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:

- * 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 not a case that warrants the exercise of the reconsideration discretion. The submission made by Hampshire on this reconsideration application only reiterates the argument that has already been decided by the director and by the adjudicator in the original decision. The only significant new submission is that the original decision is inconsistent with the decision made in relation to Tribunal file no. 2000/720. I have reviewed the decision in that case and find that it is not inconsistent.

The decision referred to is *Re: Clifford Leblanc*, BC EST #D023/01. Mr. Leblanc also worked for a person who was quadriplegic and he worked one 24-hour shift per week. The director found that he was a "live-in home support worker". It was argued on appeal that he should have been considered a "residential care worker". The adjudicator rejected the notion that Leblanc "resided" at the client's home and found that he was not a "residential care worker". However, the adjudicator specifically did not address whether or not Leblanc was a "live-in home support worker" because that issue was not before him on the appeal.

While the director's finding in the Leblanc case may seem inconsistent with her determination in this case, the director's finding is not a ruling of this Tribunal that could be considered inconsistent with the original decision in this case. I cannot tell whether the Leblanc decision was presented to the adjudicator but it is clear that the adjudicator considered a number of similar decisions of this Tribunal in reaching her conclusion.

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 decision. The adjudicator clearly was cognisant of the argument put forward by, or on behalf of, Mr. Hampshire. She analysed the provisions of the legislation carefully and obviously rejected the notion that the complainant became a "live in" worker because she worked one 23 hour shift.

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

ORDER

The application to reconsider the decision of the adjudicator in this matter is refused.

John M. Orr
Adjudicator
Employment Standards Tribunal