Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Anne Elizabeth Lowan and Timothy James Lowan operating as Corner House
(the “Lowans” or the “Employer(s)”)

- 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: Ib S. Petersen

FILE No.: 2001/75

DATE OF DECISION: May 18, 2001

DECISION

SUBMISSIONS

Mr. Timothy Lowan Ms. Anne Lowan	on behalf of the Employer
Ms. Adele Adamic	on behalf of the Director

OVERVIEW

This is an application by the Employer pursuant to Section 116 of the *Employment Standards Act* (the "*Act*"), with respect to a Decision of the Employment Standards Tribunal (the "Tribunal") issued on September 28, 2000: *Anne Elizabeth Lowan and Timothy James Lowan operating as "Corner House"*, BCEST #D434/00 (the "Decision"). Both appeals were heard together in Victoria on September 28, 2000. The Decision confirmed two determinations issued by a delegate of the Director issued on April 14 and 18, 2000 under which the Lowans were ordered to pay Michelle DesChenes and Kelly Walker $18,622.47 and $15,664.01, respectively, on account of unpaid wages and interest (the "Determinations").

FACTS AND BACKGROUND

The Lowans operated the Corner House, under an operator's agreement between themselves and the provincial government, a licensed respite care home for mentally challenged children.

In 1997, an employee of Corner House filed a complaint with the Branch alleging a failure to pay overtime wages. In September 1997, a determination issued in favour of the employee. On appeal, in a June 1998 decision, the Tribunal upheld the determination (BCEST#D254/98), a decision that was upheld on reconsideration in August 1998 (BCEST #D269/98) (the "Richards Decisions"). The principal issue in these decisions was whether or not the employee was a "residential care worker." In the course of the appeal, the question of whether the Lowans were the employers was raised. The adjudicator did not allow the Lowans to raise the issue on appeal because they had failed to raise it with the delegate in the course of his investigation. That aspect of the decision was also upheld on reconsideration.

The complaint triggered a more general investigation, as a result of which determinations were issued with respect to DesChenes and Walker. In the course of the investigation the Lowans, who were represented by counsel and, at least up to a point, by the B.C. Government and Service Employees' Union (the "Union"), argued that they were not the "true employers" of the employees of Corner House and pointed to the provincial

government, the Ministry of Children and Family Services ("MCFS"), as the "true employer."

The (somewhat) different issue of whether or not the Lowans were employees or independent contractors of the MCFS was addressed by Arbitrator Jim Dorsey in a lengthy award (*Government of British Columbia* (*Public Service Employee Relations Commission*), unreported, November 12, 1999) (the "Dorsey Award"). Briefly, the arbitrator rejected the grievance that the Lowans were employees of the MCFS under the collective agreement between the Union and the provincial government and *Public Service Labour Relations Act*. In the extract of the award, *appended* to the Determinations, Arbitrator Dorsey recognized that the government excised considerable control over the contract providers, including the Lowans, among others in the context of the services provided and the clients served. He also found (p. 91):

- "The burden to pay remuneration to their employees for the services they contract to provide rests with the contract caregivers."

- "With the requirement on them as public sector employers, they have limited ability to set the wages and benefits for those employees they require."

- "The contract caregivers hire. Like others, they seek out and welcome recommendations for prospective employees.... They establish probation periods and evaluate new employees to decide if they pass probation."

- "They direct and discipline those who work for them. They will not hesitate, and have not hesitated, to dismiss an employee if they believe they have cause to do so."

- "They ... would not readily dismiss an employee because they were asked to if they believed it to be unfair."

The Adjudicator specifically mentioned these findings in his Decision.

It appears that the Director--while opposing the request, in effect, anyway--held the DesChenes and Walker complaints in abeyance pending the Dorsey award. As well, it appears that the delegate did not disburse funds collected under the Richards Decisions until after Arbitrator Dorsey had issued his award. In any event, some five months after the arbitration award had been issued, the delegate issued the Determinations. The Determinations, issued in April 1999, with substantial attachments, including the Richards Decisions, relevant extracts from Dorsey award, and miscellaneous correspondence between the delegate and the Employers, dealt with the relationship between the Lowans and the complainant DesChenes and Walker on the premise that there was an employment relationship at the material time(s) and that the Lowans were the Employers.

The Lowans took issue with the Determinations and appealed to the Tribunal. The grounds of appeal were, as noted in the Decision, whether MCFS was the "true employer" of DesChens and Walker; whether, in the alternative, MCFS and the Lowans were associated employers under Section 95 of the *Act*; and whether the delegate failed to give the Lowans a reasonable opportunity to make submissions on the issue of employer status. At the hearing, however, counsel for the Lowans stated that he was only seeking an order referring the issue of employer status back to the Director for further investigation on the basis that the delegate had failed to investigate that issue. At the conclusion of the hearing, the Adjudicator advised the parties that he did accept the position advanced by the Lowans, that the delegate did not address the question of whether or not DesChenes and Walker were their employees. The Adjudicator did, however, indicate that he was prepared to hear further evidence on the issue of employer status and tentatively set aside a further date for hearing evidence on that issue. The Lowans subsequently advised the adjudicator that they had decided not to proceed with further evidence and requested that the adjudicator issue his reasons for the decision that the delegate had adequately addressed the "true employer" status. It is that Decision that is now before me in this application for reconsideration.

ISSUES

From my reading of the reconsideration application, the issues appears to be, first, that the Adjudicator erred in failing to consider and apply a proper definition of "employer" and, second, that he failed to allow and/or consider evidence with respect to whether or not the Lowans were the "true employers" of DesChenes and Walker.

ARGUMENT

The Employer's application is based on the following. First, the Adjudicator failed to summarize the oral evidence of John Lowan. The Lowans contend that this is crucial to understanding their position. The Lowans state that Corner House was essentially a government owned and controlled operation: the government provided them with a budget, owned the building and its content, set standards, set wage levels etc. In the result, DesChenes and Walker were employees of the MCFS. Second, at the September 28 hearing, the adjudicator stated that he "would only consider or hear evidence that was restricted to Walker and DeChenes and to the 'narrow definition' in the Employment Standards Act. This restriction was "extremely" unfair. The adjudicator, says the Lowans, failed to consider a "much broader definition of employer" which takes into account the broader context of the government ownership and control with respect to Corner House. Third, the Lowans say that they provided the delegate and the Adjudicator--in the previous appeal, as well--"with significant indicators and oral and written evidence ... to substantiate their position that they are not the true employers..." There is no evidence that the delegate conducted "full and fair investigation" of that issue.

The Director opposes the application and says, first, that the application does not meet the threshold tests established by the Tribunal for reconsideration. The adjudicator did not make any fundamental error of law, complied with principles of administrative fairness, and his decision was not inconsistent with other decisions of the Tribunal. In particular, the Director notes, the Lowans were represented by counsel and were given every opportunity to present evidence and make submissions regarding the "true employer" issue and, in addition, were provided with the option of an additional day of hearing to explore this issue. Second, with respect to the merits of the application, the Director notes that the Lowans had contracted with the MCFS to operate Corner House. Prior to the initial complaint, mentioned above, the Lowans did not take the position that they were employees of the MCFS and raise the "true employer" issue. As well, the Director says that the delegate canvassed the issue and there is nothing to indicate that the matter merits further inquiry. Finally, the Director submits that the reconsideration application is largely based on the Lowans' perception of their relationship with the MCFS and there was no evidence to support a finding that the MCFS is the "true employer."

ANALYSIS AND DECISION

Section 116 of the *Act* provides for reconsideration of Tribunal decisions and orders. An application for reconsideration should succeed only where there has been a demonstrable breach of the principles of natural justice, where there is compelling new evidence not available at the original appeal, or where the adjudicator has made fundamental error of law. The Tribunal has emphasized that it will use the power to reconsider with caution in order to ensure finality of the Tribunal's decisions and efficiency and fairness of the system (*Zoltan Kiss* (BCEST #D122/96). Consistent with those principles, the Tribunal has adopted an approach which involves a two stage analysis (see *Milan Holdings Inc.*, BCEST D#313/98, reconsideration of BCEST #D559/97). At the first stage, the reconsideration panel decides "whether the matters raised in the application in fact warrant reconsideration" considering such factors as the timeliness of the application together with any valid reason for a delay; whether the primary focus is to have the reconsideration panel "re-weigh" the evidence; whether the application arises out of a preliminary ruling made in the course of an appeal; whether the application raises questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases; and whether the application raises an arguable case of sufficient merit to warrant reconsideration. The panel in *Milan Holdings* noted:

> "After weighing these and other factors relevant to the matter before it, the panel may determine that the application is not appropriate for reconsideration. If so, it will typically give reasons for its decision not to reconsider the adjudicator's decision. Should the panel determine that one or more of the issues raised in the application is appropriate for reconsideration, the panel will then review the matter and make a

> decision. The focus of the reconsideration panel "on the merits" will in general be the correctness of the decision being reconsidered."

I am of the view that the application for reconsideration has not met the threshold test set out in *Milan Holdings* and does not warrant reconsideration.

I will briefly address the Employer's arguments.

It is clear to me that the Lowans' application for reconsideration, as argued by the Director, is largely based on their perception of their relationship with the MCFS, namely that Corner House was--essentially--a government owned and controlled operation: the government provided them with a budget, owned the building and its content, set standards, set wage levels etc. The Lowans take issue with the Adjudicator's ruling stated that he "would only consider or hear evidence that was restricted to Walker and DeChenes and to the 'narrow definition' in the Employment Standards Act. The adjudicator, says the Lowans, failed to consider a "much broader definition of employer." There is little suggestion in the application for reconsideration how such a definition relates to the definition in the *Act*. It is difficult to see how the Adjudicator could dispose of the appeal other than with reference to the definition provided in the *Act*.

In their application for reconsideration, the Lowans state, *inter alia*:

> "...Anne and Tim Lowan were hired by the government as childcare workers who worked in, and supervised other staff at 'Corner House' a government owned resource. The government provided them with a budget, extensive standards, and training, as to staffing and paying at the resource.... Anne and Tim Lowan or any other staff at Corner House could be dismissed by the government. The government owned everything connected with the work at Corner House--the building, the appliances and furniture, the files, documents and records, equipment and vehicle. The government obtained and paid for liability insurance at Corner House. All the clients and 100% of the budget, including specified wages for the Lowans and other staff was provided by the government. The government exercised tremendous control over the management and staffing of Corner House."

Those submissions are consistent with those made to the delegate in the course of the investigation.

Curiously, the Lowans do not, in their application for reconsideration, deal with their contractual relationship with the MCFS. Essentially, the Lowans would have me ignore that relationship. Moreover, as noted by counsel for the Director, the Adjudicator correctly indicated that there was no evidence before him that they were not the employers:

> "There was nothing to indicate that the functions of hiring, firing, payment of salary, scheduling and other matters normally and usually within the responsibilities of [an] employer were not, in fact, part of their duties and activities with regard to DesChenes and Walker. There was no evidence that the employer was not properly named on the determination."

Essentially, the Lowans, advancing a "broader" definition of employer based on what I have broadly termed facts relating to ownership and control of the Corner House, as set out above, ignore indicia the Tribunal has traditionally considered in deciding employer status.

The Act defines "employer" broadly as follows:

> "Employer" includes a person
>
> (a) who has or had control or direction of an employee, or
>
> (b) who is or was responsible, directly or indirectly, for the employment of an employee;

This definition is cast in sufficiently broad terms to allow the purposes of the *Act* to be realized (*McPhee*, BCEST #D183/97). In *Cunningham*, BCEST #D241/97, for example, the adjudicator considered the "day to day direction and control," from whom the person received his or her wages, the hiring and selection of the person, intention to create and employer/employee relationship, and authority to dismiss. This is not a conclusive list of indicia to be considered. Arbitrator Dorsey referred to some of these, including the power to hire and fire, and payment of salary. Some of these indicia, most of which would appear not to be seriously in dispute, are set out in the Adjudicator's Decision. The fact that these factors are not even addressed in the application at hand, in my view, is telling and supports the Adjudicator's dismissal of the appeal. As the Adjudicator correctly noted, while Arbitrator Dorsey did not specifically deal with and address the true employer status as it pertains to DesChenes and Walker, I agree that his findings point in that direction, namely that they were the employers.

While the facts and assertions pertaining broadly to government control and ownership, raised by the Lowans in their submissions to the original panel and to the delegate *could* lend support to an argument that the provincial government was their employer--an argument that was thoroughly canvassed and rejected by Arbitrator Dorsey under the collective agreement and the *Public Service Labour Relations Act*--for the purposes of this *Act*, by themselves, in the present context, is not conclusive or determinative as to the issue of the "true employer." Government control and regulation over contract providers in that context includes, as noted in the extract from the Dorsey Award appended to the Determinations, the legal and policy framework, the services provided and the clients served. As argued by the Director, the

Lowans ignore functions of hiring, firing, payment of salary, scheduling and other matters normally and usually within the responsibilities of an employer.

Before the Adjudicator, the Lowans advanced the position that they were not the "true employers" and that the delegate had failed to investigate this. From my review of the file, it is correct, as stated by the Adjudicator, that the Lowans did not following the issuance of the Dorsey award make further representations to the delegate. That is curious given the position taken by the Lowans in the course of the investigation and the arbitration. While I would have preferred for the delegate to clearly and expressly set out his reasons for rejecting the Lowans' argument on the issue of employer status, in the particular circumstances, the delegate's references to the Richards Decisions, Dorsey Award, and correspondence with the Lowans, that the issue of employer status was, as the Adjudicator found, very much in the forefront of the delegate's investigation. The adjudicator notes in several places that the Lowans did not make any submission to the delegate after the arbitration award had been issued. The adjudicator concluded:

> "In my view, the only reasonable implication to be drawn from the two Determinations now before me is that the delegate concluded--and so far as I can gather, the delegate's conclusion appears to be correct based on the available evidence--that the Lowans were the "employer" of both DesChenes and Walker. While it is true that the delegate did not, in either Determination, embark upon a detailed analysis of the definition of "employer" and the governing legal principles, one can hardly criticize the delegate for not setting out such an analysis when the Lowans did not make *any* submission, or provide *any* evidence, to the delegate on that point even though the Lowans were very much aware that there were other unpaid wage claims ... and that these other claims were only being held in abeyance pending the outcome of the arbitration proceedings. ..." (Page 7)

It is correct, as found, that the Lowans--perhaps blinded by their perception that the government based on their arguments with respect to ownership and control--did not address any of the traditional indicia of employer status.

The Lowans contend that they provided the delegate and the Adjudicator--in the previous appeal, as well--"with significant indicators and oral and written evidence ... to substantiate their position that they are not the true employers..." and that there is no evidence that the delegate conducted "full and fair investigation" of that issue. In fact, the Adjudicator set out in some detail the investigative process, including in some detail extracts from a letter submitted by the Lowans' counsel to the delegate. Having reviewed the original file, I am of the view that the Adjudicator did not err in his conclusions.

Third, the Lowans say that the Adjudicator failed to summarize the oral evidence of John Lowan. The Lowans contend that this is crucial to understanding their position that Corner House was essentially a government owned and controlled operation. The Adjudicator did mention that John Lowan provided viva voce evidence. His failure to summarize the evidence does not constitute a ground for reconsideration. It is clear that the Adjudicator not only considered the matter before him, he also allowed the Lowans an opportunity to present additional evidence on the issue, and opportunity, I might add, they did not take advantage of.

In short, the application has not demonstrated that the matters warrant reconsideration. It is dismissed.

ORDER

Pursuant to Section 116 of the *Act*, I order that the original Decision of the Tribunal is confirmed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal