An Application for Reconsideration

- by -

Sunshine Cabs Limited
(“Sunshine”)

- 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: Carol L. Roberts

FILE No.: 2003A/225

DATE OF DECISION: October 29, 2003

DECISION

OVERVIEW

The *Employment Standards Act,* R.S.B.C. 1996 c. 113 ("Act") confers an express reconsideration power on the Tribunal. Section 116 provides

(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) cancel or vary the order or decision or refer the matter back to the original panel.

This is an application by Sunshine Cabs Limited ("Sunshine") for a reconsideration of Decision #D188/03 (the "Original Decision"), issued by the Tribunal on June 13, 2003.

The factual background is as follows. On August 22, 2002, Mohsen Anvari filed a complaint with the Employment Standards Branch, alleging that Sunshine had contravened the Act in failing to pay him statutory holiday pay, annual vacation pay and compensation for length of service. At issue before the delegate was whether Mr. Anvari was an independent contractor or an employee, whether Mr. Anvari quit or was fired, and if he was an employee, what his entitlement to vacation pay and statutory holiday pay was.

The delegate conducted a hearing on December 17, 2002. On February 20, 2003, the delegate issued a Determination concluding that Mr. Anvari was an employee, both using the statutory definition and common law tests. The delegate also preferred Mr. Anvari's evidence to that of the witnesses for Sunshine, and found that the employer had not discharged the burden of showing that Mr. Anvari had quit.

The delegate ordered Sunshine to pay Mr. Anvari annual vacation pay, statutory holiday pay, compensation for length of service, vacation pay on statutory holiday pay and compensation for length of service and accrued interest in the total amount of $3,584.86.

Sunshine appealed the Determination. Its grounds of appeal were that

1. it had new evidence that was not available at the time of the hearing, and

2. the delegate erred in finding that Mr. Anvari had been terminated

The Tribunal held a hearing based on written submissions. In a decision rendered June 13, 2003, the panel upheld the Determination. The panel found no compelling reasons Sunshine could not have presented the new evidence, which consisted of a statement by a former employee and three statements from current employees on the issue of whether Mr. Anvari quit, at the original hearing. Sunshine did not say why the former employee was unable to give evidence at the original hearing. The panel noted that one of the affidavits appeared to have been made by the individual who had appeared as a witness for Sunshine at the delegate's hearing, and that no reason was given as to why the other two individuals had not been called to testify.

Sunshine also sought to introduce computer printouts of "samples" of Mr. Anvari's trips, contending that it did not have access to its database at the time of the hearing before the delegate.

The panel applied the Tribunal's test for the introduction of new evidence on appeal (*Tri-West Tractor Ltd.* and *KaiserStables Ltd.*) and concluded that Sunshine had not presented any compelling reasons why the witnesses were not called at the original hearing. He also held that, because the issue of termination turned on credibility, he did not find that the evidence was of assistance in any event. Furthermore, the panel found that it would be prejudicial to Mr. Anvari to allow the evidence at such a late point in the process. He also found the computer logs to be of no assistance.

The Tribunal confirmed the Determination.

Sunshine's counsel made a number of submissions regarding an alleged denial of natural justice and procedural and legal errors committed by the delegate. This is an application pursuant to section 116 of the *Act.* A reconsideration application is not an opportunity to re-appeal the delegate's Determination, and I have not considered those submissions.

Counsel submits that the Tribunal incorrectly restated the evidence of Mr. Mottighain to Mr. Jawanda. Counsel contends that the adjudicator incorrectly attributed this evidence to the employer's witness when it is clear that it was given by Mr. Mottighian.

Counsel also contends that the Tribunal erred in rejecting affidavit evidence on the basis that no other explanation was provided by the employer as to why they did not call him other than that he no longer worked for them. Counsel submits that the employer had no way to know that Mr. Mottighain would be called to confirm Mr. Anvari's allegation that he was terminated for non-payment of his lease, and could not anticipate the need to corroborate what they assumed to be a fact. Counsel also submits that the complaint form failed to disclose allegations of termination for non-payment of lease arrears, so that the employer could not have anticipated what evidence it had to meet.

Finally, counsel submits that the Tribunal's failure to allow new evidence is an error because "[the panel] misunderstands the fundamental fact that the employer based their case on the complaint form received and had no notice that a termination based on lease arrears would be raised and thus they could not have anticipated that [the former employee] was required as a witness". Counsel submits that Sunshine was not represented by legal counsel and the agent could not properly articulate the need to show why the witness was not called earlier.

Finally, counsel submits that the Tribunal erred in failing to allow the introduction of computer dispatch records since they would have demonstrated that Mr. Anvari quit.

ANALYSIS

There are two issues on reconsideration: Does this request meet the threshold established by the Tribunal for reconsidering a decision. If so, should the decision be cancelled or varied or sent back to the Adjudicator?

1. The Threshold Test

The Tribunal reconsiders a Decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *Act* detailed in Section 2 "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act."

In *Milan Holdings (BCEST # D313/98)* the Tribunal set 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. The primary factor weighing in favour of reconsideration is whether the applicant has raised 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.

The Tribunal may agree to reconsider a Decision for a number of reasons, including:

- The adjudicator fails to comply with the principles of natural justice;
- There is some mistake in stating the facts;
- The Decision is not consistent with other Decisions based on similar facts;
- Some significant and serious new evidence has become available that would have led the Adjudicator to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The Decision contains a serious clerical error.

(*Zoltan Kiss* BC EST#D122/96)

While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.

Sunshine alleges that the Tribunal made a mistake in stating the facts. I have reviewed the original Determination, and find no error in stating the facts. The relevant portion of the Determination is as follows:

> The employer's witness, Mr. Jawanda, testified that the computer decides who gets a trip based on who is closest in the zone. (page 8 of the Determination)

I note here that, although the panel correctly referred to this paragraph of the Determination, the delegate did indeed err in identifying the source of the information. Reviewing the Determination, it was the employee's witness who gave that evidence. However, I am not persuaded that anything turns on this misstatement by the delegate, as there is no indication in the Determination that this statement was disputed. Counsel does not say how this error might change the panel's decision in any event, and I infer that it would not.

The Tribunal reviewed Sunshine's application to submit affidavit evidence on appeal and applied the Tribunal's test for the admission of new evidence. The panel concluded that no compelling evidence was provided for the failure to call the witnesses at the original hearing.

I do not find that the Tribunal made a serious mistake in applying the law. Sunshine was aware that Mr. Anvari's was claiming compensation for length of service, or, in other words, alleging that he had been fired.

Sunshine contended that Mr. Anvari quit. The burden of showing that Mr. Anvari quit rested with the employer. In *Burnaby Select Taxi Ltd.* (B.C.E.S.T. D091/96) and subsequent cases, the Tribunal has held

> "The right to quit is personal to the employee and there must be clear and unequivocal facts to support a conclusion that this right has been exercised by the employee involved. There is both a subjective and an objective element to a quit: subjectively, the employee must form an intent to quit; objectively, the employee must carry out some act inconsistent with his or her further employment... the uttering of the words "I quit" may be part of an emotional outburst...and as such it is not to be taken as really manifesting an intent by the employee to sever his employment relationship".

Although the record does not disclose whether Sunshine was aware that Mr. Anvari was alleging that he had been fired because he had not made his lease payments, there is no evidence it sought disclosure of those allegations, or, if it caught the employer by surprise at the hearing, sought an adjournment or extension of time to provide rebuttal evidence. Furthermore, there was sufficient evidence from the employer that Mr. Anvari's lease payments were an issue, since it stated at the hearing before the delegate that if Mr. Anvari wanted to return to the company, the company would take him back <u>so long as he made his lease payments</u> regularly. (My emphasis) This statement supports Mr. Anvari's version of events. It is disingenuous of the employer to claim, in a reconsideration application, that it did not know it was necessary to corroborate what it assumed to be a fact. Given Mr. Anvari's claim, Sunshine knew that it was not a fact insofar as Mr. Anvari was concerned, and had the burden of establishing that Mr. Anvari quit to the satisfaction of the delegate.

I am also unable to find that the Tribunal committed a serious mistake in applying the law with respect to the computer records. The parties were advised of the hearing well before December 17th. Sunshine presumably had many opportunities to access its database in preparation for the hearing. However, if the database was not accessible for many months and Sunshine felt it necessary to provide that information at the hearing, it could have sought an adjournment, or submitted the material after the hearing was concluded. Furthermore, it provided no explanation to the Tribunal as to why the records were unavailable at the first instance.

I am unable to find that the Tribunal erred in refusing to admit the computer records. However, I note that the panel did review the records and found them of no assistance.

I find that Sunshine has not raised significant questions of law, fact, principle or procedure, and that the reconsideration power should not be exercised in this case.

ORDER

Pursuant to Section 116 of the Act I deny the application for reconsideration.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal