

An Application for Reconsideration

- by -

Key Fund Raising Ltd.
("Key")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2001/275

DATE OF DECISION: June 14, 2001

DECISION

OVERVIEW

This is an application filed by Key Fund Raising Ltd. (“Key”) pursuant to section 116 of the *Employment Standards Act* (the “Act”) for reconsideration of an Adjudicator’s decision (B.C.E.S.T. Decision No. D083/01) issued on February 14th, 2001. The Adjudicator, in this latter decision, confirmed a Determination that was issued by a delegate of the Director of Employment Standards (the “delegate”) on September 15th, 2000 under file number ER 094-782 (the “Determination”).

By way of the Determination, the Director’s delegate ordered Key to pay its former employee, Martin Godbout (“Godbout”), the total sum of \$492.95 on account of unpaid wages (principally, minimum daily pay--\$365.89--but also statutory holiday pay and vacation pay) and section 88 interest.

Key appealed the Determination to the Tribunal on the ground that Godbout was not a Key “employee” but, rather, an independent contractor. Key also argued that the delegate erred in awarding Godbout (who worked as a commission-based “canvasser”) compensation pursuant to section 34 of the *Act* (minimum daily pay) for those shifts where he failed to generate any commission earnings. According to Key, it was not probable that “a canvasser would work a shift without receiving donations from which a commission would be calculated” (Adjudicator’s decision at page 2).

The Adjudicator held that the delegate correctly determined that Godbout was employed by Key during the period in question (April 1st to October 19th, 1999). The Adjudicator also confirmed the delegate’s award of statutory holiday pay (\$45.74), minimum daily pay and vacation pay. With respect to the matter of minimum daily pay, the Adjudicator noted that the delegate relied on Godbout’s apparently accurate and contemporaneously maintained records as to his hours worked and that Key failed to present any evidence to support its supposition that a canvasser would not work an entire shift without obtaining any commissionable donations.

KEY’S APPLICATION FOR RECONSIDERATION

Key’s request for reconsideration is contained in a letter to the Tribunal dated April 3rd and filed April 6th, 2001. By way of this letter, Key attacks three particular findings of fact set out in the Adjudicator’s decision. Tellingly, Key does not advance any substantive argument suggesting that the Adjudicator erred in her legal analysis of the situation. Nor does Key suggest how these allegedly erroneous findings of fact affected the ultimate decision.

ANALYSIS

In my view, Key's concerns with respect to the three particular findings of fact are more in the nature of "quibbles" than significant and material errors or omissions. Even if I were to accept that Key's factual assertions are correct, I do not find that such minor errors cause me to question, in any material respect, the substance of the Adjudicator's decision. Leaving aside the three minor factual matters in dispute, there was overwhelming evidence against the position advanced by Key. Further, it should be remembered that in this appeal the burden rested with Key to show that the Determination was wrong; the Adjudicator, in part, rested her decision on the basis that Key had simply failed to meet its evidentiary burden. I have reviewed the entire appeal file and, having done so, cannot conclude that the Adjudicator erred in this latter regard.

In my opinion, this application, though timely, fails to satisfy the first branch of the *Milan Holdings* test (see B.C.E.S.T. Decision No.D313/98). This application does not raise a sufficiently significant issue that would warrant further inquiry. The Tribunal has consistently held that applications for reconsideration should succeed only when, for example, there has been a demonstrable breach of the rules of natural justice, or where there is compelling new evidence that was not available at the time of the appeal hearing, or where the adjudicator has made a fundamental error of law. The reconsideration provision of the *Act* is not to be used as a second opportunity to challenge a finding of fact made by the adjudicator, unless the factual finding was essential in terms of the ultimate decision and, in addition, was made in the absence of a proper evidentiary foundation (which is not the situation here).

ORDER

The application to vary or cancel the decision of the Adjudicator in this matter is refused.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal