

An Application for Reconsideration

- by -

Woodfire Restaurant Ltd.
("Woodfire")

- 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/258

DATE OF DECISION: November 24, 2003

DECISION

SUBMISSIONS:

Ruth Schroth

On behalf of Woodfire Restaurant Ltd.

Amanda Clark Welder

On behalf of the Director of Employment Standards

OVERVIEW

This is an application by Woodfire Restaurant Ltd. (“Woodfire”) for a reconsideration of Decision #D268/03 (the “Original Decision”), issued by the Tribunal on September 3, 2003.

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.

The factual background is as follows. Betty Jackson filed a complaint with the Employment Standards Branch, alleging that Woodfire had not paid her minimum wages.

At issue before the Director’s delegate was whether Ms. Jackson was an independent contractor or an employee, and whether she was entitled to wages. After an investigation, the delegate determined that Ms. Jackson was an employee, and that Woodfire had contravened the Act in failing to pay her regular wages. The delegate determined that Ms. Jackson was entitled to a total of \$2,169.91 including wages, vacation pay and interest.

Woodfire appealed the Determination. Although its ground of appeal was that the delegate failed to observe the principles of natural justice in making the Determination, Woodfire’s submissions related solely to Ms. Jackson’s hours of work and pay. Nothing in Woodfire’s submissions dealt with issues of natural justice.

The Tribunal held a hearing based on written submissions. In a decision rendered April 8, 2003, the adjudicator upheld the Determination. Although the adjudicator did not address the issue of whether the delegate had failed to observe the principles of natural justice, he concluded that the delegate had not erred in finding that Ms. Jackson was an employee rather than an independent contractor. The adjudicator also found that Ms. Jackson was a manager for the purposes of the overtime provisions of the Act. The adjudicator referred the matter of the wages owing to Ms. Jackson for the period January 1 to March 31, 2001 back to the delegate for further calculation.

In a memorandum dated June 19, 2003, the delegate varied the original Order, increasing the amount owing to Ms. Jackson to a total of \$3,930.01. Woodfire also appealed this determination, contending that the delegate’s calculations were incorrect. In the September 3, 2003 decision, the adjudicator concluded

that Woodfire had failed to show that there had been an error in the Determination, and confirmed the June 19, 2003 memorandum.

Woodfire seeks reconsideration of the decision because of “unfairness in looking at facts like payroll and T4 slips”, “our payroll company did not have time to do adjustments per pay period, so they were done in a lump sum”, “we dispute [Ms. Jackson’s] hours...” “[Ms. Jackson] never wanted to pay taxes...”, among others.

The Director submits that the request for reconsideration does not meet the criteria established by the Tribunal for exercising the reconsideration power. She submits that the request is an attempt to have the reconsideration panel “re-weigh” the evidence already provided to the adjudicator. She also submits that the applicant has not raised any compelling new evidence, or demonstrated that any findings of fact were made without a rational basis. Further, she submits that the applicant has not raised any significant questions of law, principle or procedure that might be important for future cases.

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?

ANALYSIS

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.

Woodfire's request for reconsideration addresses the same issues that were advanced before the delegate and on two occasions before the adjudicator, those being Ms. Jackson's rate of pay, and whether that met the minimum standards prescribed by the Act.

As noted above, the Tribunal will not exercise its reconsideration power where the applicant seeks, in essence, to "reargue" the case. Woodfire had sufficient opportunity to advance its case and be heard. There is nothing in Woodfire's application that raises significant questions of law, fact, principle or procedure. Further, there is nothing in Woodfire's application that relates to any of the factors set out in *Zoltan Kiss*.

I find 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