

An Application for Reconsideration

- by -

GF North Restaurants Ltd operating as Good Fellas II
(the “employer”)

- 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.: 2001/348

DATE OF DECISION: July 5, 2001

DECISION

OVERVIEW

This is an application filed by Robcon Management Ltd., apparently on behalf of GF North Restaurants Ltd. operating as “Good Fellas II” (the “employer”), pursuant to section 116 of the *Employment Standards Act* (the “Act”) for reconsideration of an adjudicator’s decision issued on March 27th, 2001 (B.C.E.S.T. Decision No. D146/01).

The adjudicator confirmed a Determination that was issued by a delegate of the Director of Employment Standards on December 1st, 2000 under file number ER 100283 (the “Determination”). By way of the Determination, the employer was ordered to pay \$2,110.66 to Dmitri Gritsaenko (“Gritsaenko”)--who worked as a pianist at the employer’s restaurant--on account of unpaid regular wages, vacation pay, compensation for length of service and section 88 interest.

The employer appealed the Determination to the Tribunal and, as noted above, the appeal was dismissed and the Determination confirmed. The sole ground of appeal concerned whether or not Gritsaenko was an employee or an independent contractor. The adjudicator concluded, as did the Director’s delegate, that Gritsaenko was an “employee” as defined in section 1 of the *Act*.

APPLICATION FOR RECONSIDERATION

The employer’s application for reconsideration is contained in an undated 1-page letter filed with the Tribunal on April 12th, 2001. The employer has not filed any other submission in support of the instant application. This application is timely and it raises, once again, the question of Mr. Gritsaenko’s status. The employer “ask[s] for a reversal of the Determination” based on the following grounds:

- “The claimant [sic] himself asked that no deductions be taken for monies agreed upon for his services”; and
- “Like any artist he was commisiioned [sic] to perform an artistic service and like any artist was told where the theme of his talents should be directed...”

The employer’s April 12th submission also refers to the very tenuous financial circumstances of the employer although these submissions are, of course, not relevant to the legal issue at hand, namely, whether or not Gritsaenko was an employee. The employer also states that the Determination and the adjudicator’s decision both show “bias against small business” but this latter allegation is wholly unsupported by any evidence.

FINDINGS

This application is entirely without merit. Both the delegate and the adjudicator reviewed the governing statutory provisions and relevant legal principles and applied them to the facts at hand. I completely agree with the delegate's and adjudicator's conclusion that Gritsaenko was an employee.

As for the two points raised by the employer in support of its application, the first is irrelevant inasmuch as the substance of the parties' relationship (rather than the superficial form) clearly indicated an employer-employee situation. I might note, in any event, that Gritsaenko disputes this assertion.

The second point--which simply corroborates the fact that the employer directed and controlled, at least to some degree, Gritsaenko's workplace activities--reinforces, rather than undermines, the notion that Gritsaenko was an employee.

ORDER

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

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal