

An Application for Reconsideration

- by -

Universal Cleaning Equipment Inc. op. as Kirby Home Care Products  
("Universal")

- 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:** Norma Edelman

**FILE No.:** 2002/343

**DATE OF DECISION:** September 3, 2002

## DECISION

### OVERVIEW

This is an application by Universal Cleaning Equipment Inc. op. as Kirby Home Care Products ("Universal") pursuant to Section 116 of the Employment Standards Act (the "Act") for reconsideration of Adjudicator Stevenson's Decision issued on April 4, 2002 (BCEST #D108/02). The Adjudicator dismissed the appeal based on the failure of Universal to attend the oral hearing that was scheduled to take place on March 26, 2002.

The Tribunal received a completed application for reconsideration from Universal on June 21, 2002. I do not consider this application to be untimely, however, because correspondence received from Universal dated May 6, 2002, which includes a Reconsideration Application Form, makes it clear, in my mind, that Universal wanted a review of Decision #D108/02. Universal's May 6, 2002 correspondence to the Tribunal satisfies me that this application has been brought in a timely manner.

Essentially, in its application for reconsideration, Universal wants the Tribunal to schedule another oral hearing. I have decided that another oral hearing will not be scheduled. This is not a case that warrants reconsideration.

### FACTS

On October 15, 2001, a delegate of the Director of Employment Standards issued a Determination which found that Joshua McLafferty and Tracey Williamson (collectively, the Respondents) were employees of Universal and were owed \$3,869.46.

Universal appealed the Determination. The Tribunal decided that the appeal would be heard by way of an oral hearing. A Notice of Hearing was sent to each of the parties on February 19, 2002. The Notice included the following paragraph:

All parties are expected to attend this hearing. If the Appellant fails to attend the hearing, the Tribunal will consider the appeal to be abandoned. If the Respondent fails to attend the hearing, the Adjudicator will not have the benefit of the Respondent's perspective. As a result, the Respondent risks that the Adjudicator may change or cancel the Determination.

Attached to Notice of Hearing was an information booklet on the appeal process. The booklet explained the hearing process and how to make a request for an adjournment if one was needed by a party.

The Respondents attended the hearing, but Universal did not. As a result the appeal was dismissed. In his Decision, which was issued on April 4, 2002, the Adjudicator stated:

This appeal is based on disagreements by Universal with conclusions of fact made by the Director in the Determination. The issues raised in this appeal, whether McLafferty and Williamson were employees for the purposes of the *Act* and whether Williamson was in any event entitled to the amount found owed to her, are predominantly factual. The burden in this appeal is on Universal to show the Director's conclusion on the facts was wrong and to persuade the Tribunal that the errors justify the intervention of the Tribunal under Section 115 of the *Act*. The failure of Universal to appear effectively means they have failed to satisfy that burden and the appeal must be dismissed.

On April 2, 2002 the Tribunal received a letter dated March 27, 2002 and faxed on April 2, 2002 from Loraine Shevchuk ("Shevchuk"), on behalf of Universal. She states she was unable to attend the hearing as she was "...out of the country and contracted a virus and was unable to make it". She said she called the Tribunal and was told to submit a written letter. She requests a hearing "...to dispute the relationship between ourselves and the complainants but as well as the hours they are claiming".

On May 6, 2002, the Tribunal received another letter from Shevchuk stating she was requesting a reconsideration for the following two reasons:

1. Representation was not available on the re-scheduled date that we were to appear. The director of the company was late arriving back in the country and was unavailable to defend the above case.
2. The amount of hours both individuals are defending are false and overestimated.

In the documents received from Shevchuk dated June 21, 2002 she states she wants a review of the Decision and she states, "As previously stated, I had missed the court date and gave legitimate reasons why I was unable to attend". She further says she has witnesses to support her case that the Respondents were independent contractors and have grossly exaggerated their claims; she just had her car seized and wants a "suspension of this seizure"; and she wants her day in court. It should be noted that the suspension issued was disposed of by the Tribunal in correspondence dated June 25, 2002 from the Tribunal Administrator, William Reeve, to Shevchuk.

In another letter received from Shevchuk dated June 27, 2002 and received by the Tribunal on July 3, 2002, Shevchuk states "When we did not appear at the hearing, we phoned the Tribunal and was told to write a letter why were unable to make it.... There was no way I could make it I was very ill as explained to Mr. Reeve on June 25, 2002. We feel we have a right to an oral hearing, it is just and fair."

The other parties were invited to reply to Universal's application for reconsideration.

One of the Respondents replied and essentially her position is that the Decision should be upheld.

The delegate replied that Shevchuk decided to travel to Mexico for a vacation concurrent with the hearing date without notifying the Tribunal she would not be attending the hearing. Further, had Universal appeared at the hearing it would have been restricted to arguing the employer-employee relationship as it did not provide records of hours or give input on the employees' records during the investigation. He says it is "preposterous" that Universal now wishes to bring forward new evidence that was not supplied in the investigation and was not even brought up at the appeal. The delegate wants the application for reconsideration to be dismissed.

## **ANALYSIS**

The Act intends that the adjudicator's appeal Decision be "final and binding". Therefore, the Tribunal only agrees to reconsider a Decision 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 employer and employees. This reflects the purposes of the Act detailed in Section 2.

Applications for reconsideration will succeed only when 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, or where the adjudicator has made a fundamental error of law or error in fact.

In this case the issue comes down to whether there has been some breach of the rules of natural justice.

Natural justice requires that parties have the opportunity to:

1. Know the case against them;
2. Have the opportunity to dispute, correct or contradict anything prejudicial to their position;
3. Present argument and evidence in support of their position.

I am more than satisfied there has been no denial of natural justice in this case. Universal had a complete opportunity to file written submissions on its appeal; it was provided with a Notice of Hearing well in advance of the hearing date; it was provided with information advising it that if it did not attend the hearing, the Adjudicator would consider the appeal abandoned; and it was provided with information on what to do if it could not attend the hearing. Universal failed to attend the hearing and it made absolutely no effort to contact the Tribunal or any of the parties in advance of the hearing to advise it required an adjournment. Moreover, it was made completely aware of the risks it ran if it failed to attend the hearing. Finally, Shevchuk's reason for not attending the hearing is entirely inadequate. There is no explanation why she did not advise the Tribunal in advance of the hearing of her travel plans. She left the country knowing a hearing was scheduled and she failed to request an adjournment. Further, her alleged illness on the date in question is irrelevant. Whether she was ill or not on the date of the hearing, she could not attend it as she was in Mexico.

Universal was given a full opportunity to make its case and participate in the appeal process.

I find that the Adjudicator's Decision was not incorrect and it would be neither efficient nor fair to the other parties to allow another hearing. There is no basis for reversing the Adjudicator's Decision.

## **ORDER**

The Adjudicator's Decision is confirmed.

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**Norma Edelman**  
**Vice-Chair**  
**Employment Standards Tribunal**