Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

William Sleigh operating as U-Haul Co (Canada) Ltd.
("Sleigh")

- 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: Paul E. Love

FILE No.: 2001/385

DATE OF DECISION: July 23, 2001

DECISION

OVERVIEW

This is an application for reconsideration by William Sleigh operating as U-Haul Co (Canada) Ltd. ("Sleigh") of a decision of the Tribunal dated April 26, 2001. The Adjudicator confirmed a Determination that Colleen Neill-Levesque was an employee and entitled to the sum of $5,451.66. The employer failed to tender any cogent evidence or argument to show that that the Adjudicator erred in the findings of fact or application of law to the findings of fact, and therefore I dismissed this application on the basis that this was not a suitable case for reconsideration:

ISSUE

Is this an appropriate case for reconsideration?

If this is an appropriate case for reconsideration did the Adjudicator err in finding that Colleen Neill-Levesque was an employee?

ARGUMENT

The employer argues that the Adjudicator erred in the finding of facts, in the consideration of evidence, and application of the law.

THE FACTS AND ANALYSIS

This is an application for reconsideration by the employer of a Decision of an Adjudicator rendered after a review of the written submissions of the parties. Colleen Neill-Leveque ("Neill") worked for William Sleigh operating as U-Haul Co (Canada) Ltd ("Sleigh") commencing in 1999. She was moved to a position as the sole office staff, with a title of receptionist on or about January 24, 2000. She worked until May 1, 2000. The issue before the Delegate was whether Neill was an employee. Sleigh argued that Neill was in business as a self-employed manager.

The Delegate found that Niell was an employee and entitled to wages, including overtime wages and vacation pay for the period of January 24, 2000 to May 21, 2000. The Delegate preferred the evidence and the records of the employee. The employer failed in its record keeping responsibilities under the Act. The employer also failed to supply records to the Delegate. From a reading of the Decision, and the written file materials submitted, it is apparent that the employer did not focus on the tests that can be used to distinguish an employee from a self employed person. The employer focussed on the character of Neill. This approach was repeated in the material filed in support of the reconsideration application.

I do not intend to repeat those allegations in this decision. The Adjudicator found that Sleigh had not presented any evidence to support a cancellation of the Determination. The Adjudicator confirmed the Determination that the employee was entitled to the sum of $5,451.66. Wages were calculated by the Delegate on the basis of $7.15 per hour, and based on records maintained by the employee and submitted to the Delegate.

I note that the original position taken by the employer in dealing with the Delegate was that Neill did not "work" at all. The modified position then taken was that Neill was "in business" for herself. There was independent evidence before the Delegate that Neill was employed at the business. In the submissions to this Reconsideration panel, there was a complete lack of focus by the employer on the facts and legal tests related to the issue of employer or contractor.

In a reconsideration application, the burden rests with the appellant, in this case the employer to demonstrate an error in the Decision such that I should cancel or vary the Decision. In assessing an application for reconsideration, the Tribunal engages in a two-stage process. The Tribunal first considers whether the case is one in which the Tribunal should exercise its discretion to reconsider.

In regard to the first stage some of the following are grounds for reconsideration:

- A failure by the Adjudicator to comply with the principles of natural justice;
- There is some mistake in stating the facts;
- A failure to be consistent with other decisions which are not distinguishable on the facts;
- Some significant and serious new evidence has become available that would have led to the Adjudicator to a different decision;
- some serious mistake in applying the law;
- some misunderstandings of or a failure to deal with a significant issue in the appeal; and
- clerical error in the decision.

(Kiss, BCEST #D #D122/96)

If the case is an appropriate one for reconsideration, the Tribunal considers the merits: *Milan Holdings Ltd, BCEST #D313/98*.

This is a case that is not appropriate for reconsideration. While the employer has recited the grounds for appeal, the employer has not provided any persuasive evidence or argument to demonstrate error in the Decision. The employer has failed to focus on the issue of employer

or contractor and has focussed on the issue of credibility of the employee. I am not persuaded that the employer has identified or developed any cogent argument, based on the usual grounds, for the Tribunal to exercise its discretion to reconsider the merits of the Decision. For the above reasons I dismiss the employer's application for reconsideration.

ORDER

Pursuant to s. 116 of the Act, I confirm the Decision dated April 26, 2001.

Paul E. Love
Adjudicator
Employment Standards Tribunal