



An Application for Reconsideration

- by -

Interior Joinery Ltd.
("IJL" or "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: M. Gwendolynne Taylor

FILE No.: 2001/415

DATE OF DECISION: August 2, 2001

DECISION

OVERVIEW

This is an application for reconsideration, pursuant to Section 116 of the Employment Standards Act (the "*Act*"), made by Interior Joinery Ltd. ("IJL" or "employer") of a decision of the Employment Standards Tribunal (the "Tribunal" or "Adjudicator") dated April 11, 2001. This application was decided based on written submissions received from IJL, John Bakay ("Bakay" or "employee") and the Director.

This case involved a finding, by the Director of Employment Standards (the "Director") and the Tribunal, that Bakay was an employee, not a manager, of IJL, entitled to overtime wages in the amount of \$7,768.00, plus interest.

IJL raised two grounds in the application for reconsideration:

- a) some misunderstanding of or a failure to deal with a significant issue in the appeal; and
- b) a failure by the Adjudicator to comply with the principles of natural justice.

ISSUE

As a threshold issue, is this a proper case for the Tribunal to exercise discretion to reconsider?

If this is a proper case for reconsideration, did the Adjudicator err in finding that Bakay was an employee, or fail to comply with the principles of natural justice?

FACTS

The Adjudicator conducted an oral hearing and took evidence from IJL and Bakay. The Director attended the hearing. The sole issue was whether Bakay was a manager during the time for which he claimed overtime.

The Adjudicator's decision sets out a summary of the evidence of both parties. It is apparent that the Adjudicator accepted Bakay's description of the employment over that of IJL. The Adjudicator found that Bakay had some hiring and supervisory authority, but found it was similar to a plant foreman rather than a manager. Authority and control rested with one of the owners, and all financial authority and access to that information remained with the owner.

The Adjudicator dismissed the appeal and confirmed the Director's determination.

ANALYSIS

The burden rests with the Appellant to show that this is a proper case for reconsideration. In *Milan Holdings Inc.*, BC EST #D313/98, the Tribunal set out a two stage analysis for determining whether to reconsider a decision. In the first stage, the Tribunal considers and weighs whether the application is timely, whether the application arises out a preliminary ruling, or whether the primary focus of the application is to have the reconsideration panel "re-weigh" evidence.

Although I have some concerns about the timeliness of the application, being approximately 1½ months after the Decision, neither Bakay nor the Director raised concerns about prejudice stemming from the delay.

The primary factor in favour of reconsideration is whether the applicant has raised significant questions of law, fact, principle or procedure which should be reviewed because of their importance to the parties or to future cases. It is not sufficient that a party disagrees with the decision. One of the purposes of the Act is provide fair and efficient procedures for resolving disputes. Accordingly, Tribunal decisions should not be open to reconsideration unless there are compelling reasons: *Khalsa Diwan Society* BCEST #D199/96.

In *The Director of Employment Standards*, BCEST #D475/98, the Tribunal identified some circumstances that could justify reconsideration:

- failure to comply with natural justice;
- mistake of law or fact;
- inconsistency with other decisions;
- significant new evidence that has become available;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

After reviewing the Adjudicator's decision and the parties' submissions, I find that IJL has not raised a compelling reason for reconsideration. IJL has not presented any evidence that was not available at the time of the hearing and has not demonstrated that the Adjudicator was mistaken in law or fact or misunderstood or failed to deal with a serious issue.

IJL takes issue with the Adjudicator's findings regarding Bakay's primary job function. The Adjudicator had the opportunity to assess the evidence and the witnesses. IJL had ample

opportunity to submit evidence and make submissions. It is apparent that the adjudicator had evidence and grounds to conclude that Bakay was an employee. The Adjudicator acknowledged that Bakay had some management/supervisor responsibilities, but found they were similar to a foreman, not a general manager.

The Decision sets out the legal grounds for the finding. In effect, IJL's application amounts to a request for the Tribunal to re-adjudicate. It would be an improper exercise of discretion for me to interfere with the adjudicator's findings, absent new evidence or a demonstrated error, or one of the other circumstances listed above.

IJL submitted that the Adjudicator failed to comply with the principles of natural justice. In support of this submission, IJL submitted that the Adjudicator failed to consider all of the facts. In particular, IJL stressed that Bakay continued to work longer hours than required, even after being told not to and that this case sets a dangerous precedent for other employees to work extra hours. IJL also submitted that Bakay was not forthcoming in cross-examination and, implies, that the Adjudicator should have taken a negative inference from his evasive answers.

I have concluded that IJL has not raised an issue of natural justice. Rather, IJL has raised more concerns about the evidence, the Adjudicator's preference for Bakay's evidence over that of IJL's witnesses, and the Adjudicator's finding that the evidence fell short of establishing that Bakay was a manager. The Adjudicator's function was to assess the evidence and come to a conclusion. The Adjudicator had ample evidence, applied the evidence to the appropriate legal considerations and gave a reasoned decision.

I find that this is not an appropriate case for reconsideration. I dismiss the application on the first stage of the *Milan Holdings Inc.* test.

ORDER

Pursuant to section 116 of the *Act*, I order that the decision dated April 11, 2001, be confirmed.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal