



An Application for Reconsideration

- by -

Swiftsure Taxi Co Ltd.

- 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: John M. Orr

FILE No.: 2001/438

DATE OF DECISION: August 29, 2001

DECISION

OVERVIEW

This is an application by Swiftsure Taxi Co. Ltd. (“Swiftsure”) under Section 116 (2) of the *Employment Standards Act* (the “*Act*”) for a reconsideration of a Decision #D053/01 (the “Original Decision”) which was issued by the Tribunal on February 06, 2001.

Swiftsure owned and operated a taxi fleet in Nanaimo, British Columbia and employed Linda Fraser (“Fraser”) as a dispatcher and office supervisor. When she terminated her employment Fraser claimed for wages owing including overtime and vacation pay. Swiftsure claimed that Fraser was a manager and had misappropriated a large sum of money and that no further monies were owed to Fraser.

A determination was issued on November 09, 2000 in which the Director of Employment Standards (the “Director”) found that Fraser was not a manager as her primary duties were as a dispatcher and not in supervising other employees. The determination also found that no money was misappropriated and that wages were owed in the sum of \$1,575.92.

Swiftsure appealed and on February 6, 2001 an adjudicator of the Tribunal dismissed the appeal on the basis of written submissions (see S.107 of the *Act* and *D. Hall & Associates* BCEST #D503/99) and confirmed the determination. The adjudicator commented, “the appeal simply reflects the Employer’s disagreement with the delegate’s conclusions and findings”. The adjudicator reviewed all of the evidence and submissions and was not persuaded that the determination was wrong.

Swiftsure has now applied for reconsideration of the original decision.

ANALYSIS

The exercise of the reconsideration discretion under section 116 of the *Act* is a two-stage process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. In deciding this question the Tribunal considers and weighs a number of factors such as whether the application is timely, whether it is an interlocutory matter, and whether its primary focus is to have the reconsideration panel effectively “re-weigh” evidence tendered before the adjudicator of the original decision

The primary factor weighing in favour of reconsideration is whether the applicant has raised significant questions of law, fact, principle or procedure of sufficient merit to warrant the reconsideration. The reconsideration process will not be used to allow for a “re-weighing” of evidence or the seeking of a “second opinion” when a party simply does not agree with the original decision.

It is one of the defined purposes of the *Act* to provide a fair and efficient procedure for resolving disputes and it is consistent with such purposes that the Tribunal's decisions should not be open to reconsideration unless there are compelling reasons: *Khalsa Diwan Society* BCEST #D199/96.

The circumstances in which an application for reconsideration will be successful will be limited. In a Reconsideration decision dated October 23, 1998, *The Director of Employment Standards*, BCEST #D475/98, the Adjudicator sets out those limits as follows:

- *failure to comply with the principles of natural justice;*
- *mistake of law or fact;*
- *significant new evidence that was not reasonably available to the original panel;*
- *inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;*
- *misunderstanding or failure to deal with a serious issue; and*
- *clerical error*

In my opinion this is not a case that warrants the exercise of the reconsideration discretion. The submission made by Swiftsure on this reconsideration application only reiterates the arguments that have already been decided by the director and by the adjudicator in the original decision. Essentially the issues come down to questions of fact that turn on the credibility of the evidence presented and the onus of proof on the parties.

If one accepted the submissions made by Swiftsure it might raise some suspicions about Fraser's handling of the finances. However, the Director's delegate had the opportunity to assess and weigh the evidence in person and the Tribunal's adjudicator very carefully and clearly sets out the reasons for his assessment of the evidence, applied a rational approach to the weighing of the evidence, and concluded that the evidence was lacking to prove the allegations made by Swiftsure. The adjudicator sets out fully and fairly the evidence and arguments presented by the parties. He applies the proper burden of proof and makes significant findings of fact.

In the application for reconsideration it is clear that Swiftsure simply wants a "second opinion". It is now a well-established principle of this Tribunal that we will not exercise the reconsideration discretion in such circumstances.

It is fully within the intent and purposes of the act that there be some finality to the decisions of the Tribunal. As stated above, reconsideration should be used sparingly and should not be

used to substitute my analysis and my opinion for that of the adjudicator who wrote the original decision.

I am not persuaded that there is a sufficient basis in fact or in law to warrant any interference in the decision made by the adjudicator in the original decision. Therefore I am not prepared to exercise my discretion to reconsider the original decision.

ORDER

The application to reconsider the decision of the adjudicator in this matter is dismissed.

John M. Orr
Adjudicator
Employment Standards Tribunal