An Application for Reconsideration

- by -

Atheneon Travel Service Ltd.
(the “Appellant”)

- 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: W. Grant Sheard

FILE No.: 2002/441

DATE OF DECISION: October 16, 2002

DECISION

OVERVIEW

This is a request for reconsideration based on written submissions pursuant to Section 116 of the *Employment Standards Act* (the "*Act*"). On March 20, 2002 a Delegate of the Director of Employment Standards (the "Director") issued a Determination finding that Iryna Sochynska was an employee of the Appellant, Atheneon, not an independent contractor, and that the Appellant was therefore obliged to pay the employee minimum wage, other wages, vacation pay and interest for a total due of $6,851.68 (the "Determination").

The Appellant appealed that Determination pursuant to section 112 of the *Act*. An oral hearing was held and in a decision rendered by this Tribunal on August 7, 2002, file number D345/02 wherein the Adjudicator varied the Determination in part, confirmed the Determination in all other regards, and remitted the matter to the Director for recalculation of wages and interest based on the variation made (the "Decision"). The Adjudicator varied the Determination by ordering that the Employee be paid for hours worked on Saturdays to October 1, 2000, rather than until December 23, 2000. It is that Decision which the appellant now seeks a reconsideration of.

ISSUE(S) TO BE DECIDED

1. Are matters raised in the request for reconsideration which in fact warrant reconsideration?

2. If reconsideration is warranted, is the Decision appealed from correct "on the merits"?

ARGUMENT

The Appellant's Position

In an application for a reconsideration and two page letter in support, both dated August 14, 2002, the Appellant disputes the Decision on a number of points. The Appellant says that the Adjudicator erred finding that there was no agreement on hours worked, but only regarding the hours of work. The Appellant insists that the Employee was engaged with Atheneon Travel to work only on a monthly retainer commission plus extra commission for any tickets she issued. The Appellant says it was clear in the contract between the Appellant "that the Employee was not paid by an hour" (sic). The Appellant says that the Employee submitted "false hours".

The Appellant also says that the Adjudicator erred in finding that there was no evidence to support a conclusion that there should be a deduction for lunch. The Appellant says that the Employee never had lunch on her desk as the Employee asserted.

Finally, the Appellant says that the Adjudicator erred in ruling that the Employee commenced her employment on March 1, 2000 rather than April 3, 2000. The Appellant says that it had another Russian speaking agent for the period from March 1, 2000 to April 3, 2000 and it didn't have need for another Russian speaking agent at that time. Further, the Appellant says that the Employee asked the Appellant to work on an a computer at the Appellant's business during this time "only for practicing without

payment". The Appellant says that the Employee did not offer any services for the Appellant, not even to answer the phone, during this time.

In a second written submission dated September 16, 2002 the Appellant disputes a number of facts asserted by the Employee in her response to the application for a reconsideration and also replies to the Delegate's response to the application for reconsideration. In respect of the Delegate's response, the Appellant says that the hours recalculated by the Delegate are not acceptable. The Appellant attached to this letter a number of documents in support of its position. Those documents, as described by the Appellant, were as follows:

> "1. Iryna Sochynska Resume.
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> 2. Atheneon Travel signed contracts by Iryna Sochynska.
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> 3. T4A self-employed commission.
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> 4. General Ledger Sheets for Travel Agent's Commission.
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> 5. Cancelled cheques showing semi-monthly commission.
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> 5. (sic) Letter from Kleanthis Korkodilos - evidence that she stopped to work on Saturdays end of September 2000.
>
> 6. Larissa Makhotkina signed agreement to prove to the Employment Standards that we do not hire by an hour.
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> 7. Email to Immigration Authorities, April 15, 2002 that Sochynska she was still working by Atheneon Travel as she quit on June 26, 2001.
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> 8. Email from Russia, who is Larissa Makhotkina and how she knows the confidential Rates. The only person who knew where are my confidential files is Iryna Sochynska and she was the one to release my confidential documents to Larissa Makhotkina and who is a competitor for Russia, Sochynska in order to bring her in the Employment Standards Tribunal to testify as false witness, Sochynska released all my confidential Rates to Makhotkina.
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> 9. Her counterclaim in the Small Claims Court requesting from Atheneon $10,000.00 with false statements.
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> 10. Release News this month of September 2002, to the Russian newspaper Vancouver and Us, re: signed contracts by the employees translated also in English."

The Respondent's Position

In a written submission dated August 30, 2002 the Respondent insists that she began her work at the Appellant business on March 13, 2000 and signed an employment agreement on Saturday April 1, 2000 and strictly followed it. The Respondent states that she regrets she was unable to prove at the oral appeal hearing that she worked on Saturdays from October 1, 2000 to December 31, 2000. The Appellant seeks "a decision in favour of the truth".

The Director's Position

In a written submission dated August 21, 2002 the Director provides a revised calculation sheet recalculating the wages and interest due by the Appellant to the Respondent to conform with the Decision now appealed from dated August 7, 2002. Responding to this application for a reconsideration the Director says "the Appellant had every opportunity during the investigation and the Tribunal hearing to

present all evidence. The Adjudicator has considered this evidence and an order has been made. ……. The Appellant has not provided any new evidence or information in her request for reconsideration to show that there was an error in the facts, an error in interpreting the law or that there were other facts that weren't considered during the Employment Standards Tribunal hearing. All information provided in the request for reconsideration has been addressed in the Tribunal Decision D#345/02."

The Director requests that the Tribunal Decision be upheld.

FACTS

In a Determination dated March 20, 2002 a Delegate of the Director of Employment Standards issued a Determination ruling that the Appellant, Atheneon Travel Service Ltd., owed the Respondent, Iryna Sochynska, $6,851.68 for unpaid wages, statutory holiday pay, vacation pay, and interest.

The Appellant is a travel wholesaler and travel agency. The Respondent was a travel agent employed by the Appellant from March 13, 2000 to June 26, 2001. During the investigation the Appellant claimed the Respondent was hired as an independent contractor to assist the company in providing translation services to its Russian speaking clients. In return for this service, the Employer said that the Respondent was paid $800.00 per month as a retainer plus commissions which increased to $1,000.00 per month on September 1, 2000. The Appellant contended during the investigation that the Respondent was able to set her hours of work and was not required to come in at any specific time.

The Respondent took the position during the investigation that she was an employee and was required to sign an employment contract which was attached to the Determination. That document was titled "Atheneon Travel Service and Grecian Paradise Tours Commission on a Sub Contract Basis". The document provided conditions including in part, "office hours, 9:30 to 6:00, starting time 10:00 finish 6:00 unless you have a client and you must finish your services. Monday to Friday. Saturday 10:00 to 4:00. Monthly commission on a sub contract basic $800.00" (that figure then deleted and $1,000.00 written in).

An oral appeal of that Determination was held on June 19, 2002 and, after hearing and reviewing the evidence adduced and submissions made, a written Decision was rendered by this Tribunal on August 7, 2002. In that Decision the Adjudicator noted the Appellant decided to accept the earlier decision that the Respondent is an employee under the *Act*. The appeal proceeded with the issues being raised by the Appellant that the Delegate erred in deciding both the days worked and the hours worked by the Employee. The Appellant took the position that the Employee did not begin working until April 3, 2000 and that the Employee stopped working on Saturdays in September 2000 rather than in December 2000. The Appellant also then claimed that the Delegate should have deducted, for each day worked, one hour for lunch and at least another two hours per day worked due to the many personal telephone calls made by the Employee. Finally, the Appellant claimed that the Employee should not be awarded pay for holidays that are not statutory holidays, time spent with a realtor or time spent training. At the oral hearing the Adjudicator ultimately refused to hear a number of witnesses tendered by both the Appellant and the Respondent when, after twice cautioning both parties that persons in the hearing were not speak to any excluded witnesses until such time as those witnesses had given their evidence at the hearing, the parties did speak to those witnesses during the course of the hearing but before they testified. Neither the Employer or the Employee kept a record of hours worked.

The Adjudicator noted that, in respect to the assertion that the Employee was to be paid commission only, section 4 of the *Act* provides that parties cannot contract out of the minimum requirements of the *Act* including minimum wage. Further, the Adjudicator noted the obligation of an Employer under section 28 of the *Act* to keep records of hours worked. In the absence of such records, the Adjudicator found that the best evidence of work is the agreement on terms and conditions which were attached to the Determination. The Adjudicator varied the Determination to the extent that he found that the Employee only worked Saturdays until October 1, 2000 and not until December 23, 2000 as the Employee alleged. The Adjudicator confirmed the Determination in all other regards and remitted the matter to the Director for recalculation of wages and interest based on the variation ordered.

ANALYSIS

Section 116 of the *Act* contains the statutory authority for the Employment Standards Tribunal to reconsider its own decisions. The Section reads:

> ***Reconsideration of orders and decisions***
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> *116. (1) On application under subsection (2) or on its own motion, the tribunal may*
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> *(a) reconsider any order or decision of the tribunal; and*
>
> *(b) cancel or vary the order or decision or refer the matter back to the original panel.*
>
> *(2) The director or a person named in a decision or order of the tribunal may make an application under this section.*
>
> *(3) An application may be made only once with respect to the same order or decision.*

In the case of *Canadian Chopstick Manufacturing Co. Ltd.* BC EST #D448/00 this Tribunal said the following at page 12:

> The power to reconsider its decisions is a discretionary power which the Tribunal uses sparingly. Section 116 is not an avenue for parties to rehash evidence or repeat arguments that were made before an original panel.
>
> The leading case on the use of the discretionary power in Section 116 is *Zoltan Kiss* (BC EST #D122/96; Reconsideration of BC EST #D091/96).
>
> In *Zoltan Kiss* the Tribunal set out some typical grounds that the Tribunal may use as a guide to reconsider an order or decision. Those grounds were stated as (1) a failure by the Adjudicator to comply with the principles of natural justice; (2) there is a mistake in stating the facts; (3) a failure to be consistent with other decisions which are not distinguishable on the facts; (4) some significant and serious new evidence has become available that would have lead the Adjudicator to a different decision; (5) some serious mistake in applying the law; (6) some misunderstandings of a failure to deal with a significant issue in the appeal; and finally (7) some clerical error exists in the decision. That list is not viewed as exhaustive of the possible grounds for reconsidering a decision or order.
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> The Tribunal went on to set out important reasons why its statutory power to reconsider orders and decision should be exercised with great caution. Some of those reasons are:
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> > Section 2(d) of the Act established one of the purposes of the Act as providing fair and efficient procedures for resolving disputes over the application and interpretation of the Act. Employers and employees should expect that, under normal circumstances, one

> hearing by the Tribunal will resolve their dispute finally and conclusive. If it were otherwise it would be neither fair nor efficient.
>
> Section 115 of the Act establishes the Tribunal's authority to consider an appeal and limits the Tribunal to confirming, varying or cancelling the determination under appeal or referring the matter back to the Director of Employment Standards (presumably, for further investigation or other action). These limited options (confirm vary or cancel a determination) imply a degree of finality to Tribunal decisions or orders which is desirable. The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reason.
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> It would be both unfair and inefficient if the Tribunal were to allow, in effect, two hearings of each appeal where the appeal hearing becomes nothing more than a discovery process for a reconsideration application.
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> In his report, Rights & Responsibilities in a Changing Workplace, Professor Mark Thompson offers the following observation at pate 134 as one reason for recommending the establishment of Tribunal:
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> > The advice the commission received from members of the community familiar with appeals system, the staff of the Minister and the Attorney General was almost unanimous. An appeals system should be relatively informal with the minimum possible reliance on lawyers. Cases should be decided quickly at the lowest possible costs to the parties and the Ministry. The process should not only be consistent with principles of natural justice, but be seen to meet those standards.
>
> Professor Thompson also noted that the appeal process should not be protracted because many claimants (employees) "….need the monies in dispute quickly to meet their basic needs." (See *Zoltan Kiss, supra)*

In re: *Allard* [1997] BC EST #D265/97 the Tribunal stated:

> "It is the policy of the Tribunal that the power to reconsider orders and decisions under Section 116 is a power that should be exercised with caution and should only succeed where there has been a demonstrable breach of the rules of natural justice, or a fundamental error in law or where compelling new evidence is available. This policy has been established in order to provide a fair and efficient process where one hearing will provide a means of final and conclusive resolution of a dispute. The purpose is to allow cases to be resolved quickly, efficiently and inexpensively and it is contrary to the spirit and intent of the Act to allow a rehearing where a submission is based on a re-hash of evidence and argument before the original panel. Indeed it has been stated that reconsideration should be used sparingly and only in exceptional cases. (See *World Project Management Inc. et al* BC EST #D134/97)"

In another Decision of this Tribunal, *Milan Holdings Ltd.*, BC EST #D313/98, this Tribunal set out a two stage analysis in the reconsideration process. In the first stage, the issue is whether the matters raised in the application for reconsideration do in fact warrant reconsideration. In deciding this question, the Tribunal should consider and weigh a number of factors such as whether the application is timely, whether it is an interlocutory matter (to avoid multiple decisions), and whether its primary focus is to have reconsideration effectively "reweigh" evidence tendered before the Adjudicator. The second stage of the analysis involves a reconsideration of the merits of the application.

In *Milan*, the following was said:

> Paragraph 15. The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases……"
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> Paragraph 16. After weighing these and other factors relevant to the matter before it, the panel may determine that the application is not appropriate for reconsideration. If so, it will typically give reasons for its decision not to reconsider the Adjudicator's Decision. Should the panel determine that one or more of the issues raised in the application is appropriate for reconsideration, the panel will then review the matter and make a decision. The focus of the reconsideration panel "on the merits" will in general be with the correctness of the Decision being reconsidered.
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> Paragraph 17. The very point of reconsideration being to provide a forum for sober reflection regarding questions which are considered sufficiently important to warrant such a review, we consider it sensible to conclude that questions deemed worthy of reconsideration - particularly questions of law - should be reviewed for correctness……This approach is also consistent with the expectation of the courts on judicial review which will be reviewing decisions of reconsideration panels on questions of law within jurisdiction based on the "patently unreasonable" test; *Canada (Attorney General) vs. Public Service Alliance of Canada* (1993), 101 D.L.R. (4th) 673 (S.C.C.).

In reviewing the Appellant's written request dated August 14, 2002 I cannot find that the Appellant has met the onus on it to demonstrate an error in the Decision appealed from based on any of the grounds enumerated in the leading case *Zoltan Kiss*, supra. I find that the submissions made by the Appellant were considered by the Adjudicator before rendering his Decision.

The attachments to the Appellant's letter and submission of September 16, 2002 do not assist. Item 1, the Respondent's resume, is irrelevant. Item 2, the Atheneon Travel signed contract ("Commission on a Sub Contract Basis") was considered by the Adjudicator in his decision and, indeed, as he suggested, where it stated the hours required for work seems to be the best evidence of hours actually worked. Items 3, 4, 5, 6 and 10 (a T4A form, general ledger sheets, cancelled cheques showing semi-monthly commission, agreement by another employee for commission (not hourly pay) and excerpt of a Russian newspaper in Vancouver regarding employment terms) do not assist as, regardless of what these documents indicate, section 4 of the *Act* provides that parties cannot opt out of the minimum terms of employment regarding such factors as minimum wage. The second item 5 (letter from Kleanthis Korkodilos) was considered by the Adjudicator in his decision in so far as he heard viva voce evidence from this witness and indeed this witness's testimony formed the foundation for the Adjudicator varying the order in favour of the Appellant. Item 7 (an email from the Respondent to the Immigration Authorities) does not assist as, even if the Respondent did misrepresent facts or lie to the Immigration Authorities, this does not demonstrate an error in the facts found in the Decision appealed from. Item 8 does not assist either. The Appellant appears to assert that the Respondent disclosed confidential information to a competitor. However, just cause for termination has never been argued and is not an issue. Finally, the Respondent's counterclaim in Small Claims Court is also irrelevant. The Appellant has apparently sued the Respondent in Small Claims Court for lost income due to lost revenue for the time period when the Appellant did not have a Russian speaking employee to cater to its Russian clientele when the Respondent terminated her employment without notice. The Respondent apparently counterclaims for compensation for emotional anguish and loss of future wages due to a "bad reference" for her from the Appellant. None of this information is relevant to the issues on appeal.

Accordingly, I do not find that the Appellant's request warrants a reconsideration as it appears to merely request a reweighing of the evidence which was tendered before the Delegate and further considered on appeal. I do not find any other compelling reason exists to warrant a reconsideration.

In the circumstances I do not find it necessary to go on to consider the second issue or stage of the reconsideration analysis process to determine whether the Decision was correct on the merits.

ORDER

The original Decision dated August 7, 2002 and cited as BCEST #D345/02 is confirmed with interest to be calculated to date.

W. Grant Sheard
Adjudicator
Employment Standards Tribunal