

An Application for Reconsideration

- by -

Suzanne Ashley operating as Body & Soul Health & Beauty Center  
("Ashley")

- 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:** William Reeve

**FILE No.:** 2002/390

**DATE OF DECISION:** October 23, 2002

## DECISION

### OVERVIEW

On July 11, 2002 the Tribunal received a request from Suzanne Ashley operating as Body & Soul Spa and Wellness Centre, Body & Soul Health & Beauty Centre (“Body & Soul” or “Ashley”) for reconsideration of Tribunal Decision BC EST #D256/02. That Decision, rendered on June 10, 2002 by Adjudicator Carol L. Roberts, dismissed the appeal and ordered that the Determination of the Director of Employment Standards (the “Director”) dated March 8, 2002 be confirmed.

The *Employment Standards Act* (the “Act”) intends that Adjudicator’s Appeal Decisions are “final and binding”. Therefore, the Tribunal only agrees to reconsider a Decision in exceptional circumstances. Reconsideration is not a right to which a party is automatically entitled, rather it is undertaken at the discretion of the Tribunal. The Tribunal uses its discretion with caution in order to ensure: finality of its decisions; efficiency and fairness of the appeal system and fair treatment of employers and employees.

The Tribunal will not normally agree to reconsider a Decision if the intent is simply to have the Tribunal “re-weigh” evidence previously considered or dismissed by the Adjudicator or to seek a "second opinion" when a party simply does not agree with the Adjudicator's Decision. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.

Some of the reasons why the Tribunal might agree to reconsider an Order or Decision are:

- The Adjudicator failed to comply with the principles of natural justice;
- There is some mistake in stating the facts;
- The Decision is not consistent with other Decisions based on similar facts;
- Some significant and serious new evidence has become available that would have led the Adjudicator to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The Decision contains some serious clerical error.

In the request for reconsideration Ashley reviews at length the Decision of Adjudicator Roberts and the Appellant’s arguments in the matter. The Appellant claims that the Decision is flawed on five of the seven grounds noted above.

### ISSUE

In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. In the present instance the

question is, first, whether any of the five allegations of error made by Ashley are justified and second, if so, whether the error is so serious as to require the Tribunal to reconsider the matter.

## ARGUMENT AND ANALYSIS

In alleging, “there is some mistake in stating the facts” Ashley refers to the question of whether or not she had declared bankruptcy. The Adjudicator, according to the Decision, did not have any documentation about a bankruptcy before her, though she was aware from the parties that there had apparently been a declaration of bankruptcy by Ashley. Attached to the request for reconsideration was documentation related to the bankruptcy. There is no evidence that this documentation or anything similar, was provided to the Tribunal during the appeal process therefore it is hard to understand how the Adjudicator can be faulted for being unaware of details that none of the parties chose to provide to her. Ashley reports that she provided details about the bankruptcy to the Delegate of the Director of Employment Standards however, as is stated in the Guide to the Appeal Process provided to the parties, “the Tribunal does not have the material you gave to the Delegate at the Branch – it only has the material you give it directly.” The failure of a party to provide possibly relevant information to the Tribunal during the appeal process cannot be held to be grounds for a later claim by the party that the Adjudicator made a mistake in alluding to the facts contained in the withheld information.

It is alleged by Ashley that, “there was a failure of the adjudicator to comply with principals [sic] of natural justice.” The allegation is that the bankruptcy trustee was not served with the Determination or related correspondence and that this deprived the Trustee of the opportunity to appeal the Determination. How this alleged failure can be construed to be a failure of the Adjudicator or the Tribunal to comply with the principles of natural justice is not explained. It was not the Adjudicator or the Tribunal that failed to do something that ought to have been done. It might be that the determination and the liability it implied were not brought to the attention of the Bankruptcy Trustee by Ashley, for whatever reason, or by the Delegate. How this was unfair to Ashley herself is not apparent or explained. There is no complaint from the Trustee that he was deprived of any right to appeal the Determination with respect to the estate that was under his control.

Ashley was aware of her bankruptcy but she failed to provide the Tribunal with any documentation concerning the bankruptcy until she made her reconsideration request. Ashley, having failed to provide the Tribunal with information about the bankruptcy, was allowed to pursue her appeal and had the opportunity for a hearing. Nothing in the request for reconsideration explains how anything done by the Tribunal or the Tribunal’s Adjudicator in this aspect of the matter was a violation of the principles of natural justice.

Under the same heading, Ashley alleges that the matter was improperly before the Tribunal and asks therefore that the determination be cancelled or the matter referred back to the original panel. There is no attempt to explain why Ashley thinks that her appeal to the Tribunal came before the Tribunal improperly, nor is there any explanation of how, if the matter were before the Tribunal “improperly”, the Tribunal could then legally issue an order cancelling the determination or referring the matter back to the original panel. Possibly Ashley got the idea that the matter was before the Tribunal improperly from the comment in the Decision,

“On a bankruptcy, the bankrupt's property vests in the trustee who is given, for the most part, exclusive authority to deal with the property. If in fact Body & Soul Health & Beauty Centre is

bankrupt, Ms. Ashley has no authority to deal with the property, and the appeal on its behalf is not properly before the Tribunal. (see Re Fyfe, BC EST #D080/00)”

If Ashley had provided the Tribunal with convincing evidence that Body & Soul was bankrupt, or that she personally was in bankruptcy with her assets in the hands of a bankruptcy trustee, then it is likely that the Adjudicator would have found that Ashley did not have standing to file or conduct an appeal and therefore the appeal by Ashley would probably have been dismissed, as, in fact, it was for other reasons.

Under the heading of error in law, Ashley alleges that,

“The Tribunal erred in a matter of law by stating that ‘if in fact Body & Soul Health and Beauty Centre is bankrupt etc..... the same, however cannot be said of any liability Ms. Ashley herself might have for vacation pay or compensation of service’ “

The entire passage in the decision reads as follows,

“There are no particulars of the bankruptcy before me. There is no evidence of a trustee in bankruptcy being appointed. If there was, the trustee did not file an appeal. On a bankruptcy, the bankrupt's property vests in the trustee who is given, for the most part, exclusive authority to deal with the property. If in fact Body & Soul Health & Beauty Centre is bankrupt, Ms. Ashley has no authority to deal with the property, and the appeal on its behalf is not properly before the Tribunal. (see Re Fyfe, BC EST #D080/00)

“The same, however, would not be true of any liability Ms. Ashley herself might have for vacation pay or compensation for length of service.”

One issue might be whether the Adjudicator made a legal error in distinguishing between the entity that was reported to be bankrupt, Body & Soul Health & Beauty Centre, and Suzanne Ashley, the person. Nothing in the reconsideration request appears to address such an issue directly. The fact that Ashley chose to appeal the Determination in her own name, without, apparently, informing the Bankruptcy Trustee, and without providing the Tribunal with documentary evidence that the liability concerned was a liability of the bankrupt estate, could be considered, on the face of it, evidence that Ashley recognized that she had a personal liability separate from the liability of the bankrupt Body & Soul Health & Beauty Centre.

In summary, Ashley has failed to provide a convincing argument that the Tribunal Decision contained an error in law with respect to bankruptcy issues.

Ashley alleges, with respect to Decision BC EST #256/02, that, “There was a failure to be consistent with other Tribunal decisions based on similar facts.” She refers to Decision BC EST #D090/00 and quotes several passages from that Decision. Unfortunately for Ashley the Decision to which she refers deals with the liability of a Director or Officer of a corporate entity. The Determination that Ashley appealed was not a “Director/Officer” determination and therefore the precedent of the decision quoted is not relevant.

As a final argument Ashley argues that, “There was a misunderstanding of or failure to deal with a significant issue in the appeal.” She then returns to the bankruptcy issue and her argument that, because of the bankruptcy, she bears little or no responsibility for the liability to the employee concerned. This matter has already been addressed in the preceding paragraphs of this decision. Ashley's course of conduct in failing to produce evidence during the appeal process that the liability was included within the

estate that was in the hands of the Bankruptcy Trustee and her conduct in launching a personal appeal of the Determination conflicts with her thesis, raised in the request for reconsideration, that the bankruptcy exempts her from responsibility for the liability.

There is one final matter that should be noted. In her request for reconsideration Ashley states, "I am filing the reconsideration request with the knowledge and consent of Westgeest & Associates, Trustee in Bankruptcy and on their behalf as well as on my own..." In response to the request for reconsideration Westgeest & Associates stated, in part, in a submission dated July 23, 2002,

"Contrary to the opening paragraph of the bankrupt's submission dated July 10, 2002, the bankrupt does not have the consent of the trustee (not for him to give) to launch her appeal, not [sic] is she conducting the appeal on behalf of the trustee. The trustee is discharged effective May 2, 2002."

In summary, nothing in the submission raises a serious challenge to the Decision on any of the seven grounds noted in the overview above. In this circumstance the request for reconsideration cannot succeed.

## **ORDER**

Pursuant to section 116 of the *Act*, and for the reasons given above, the request for reconsideration of Tribunal Decision BC EST #D256/02 is refused.

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**William Reeve**  
**Adjudicator**  
**Employment Standards Tribunal**