

BC EST #D495/99
Reconsideration of BC EST #D524/98

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116
of the *Employment Standards Act* R.S.B.C. 1996, C. 113

- by -

Alnor Services Ltd.
("Alnor")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: David B. Stevenson

FILE NO.: 1999/489

DATE OF DECISION: November 9, 1999

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DECISION

OVERVIEW

Alnor Services Ltd. (“Alnor”) seeks a reconsideration under Section 116 of the *Employment Standards Act* (the “Act”) of a decision of the Employment Standards Tribunal (the “original decision”), BC EST #D524/98, dated November 23, 1998. As it relates to this application, the original decision confirmed a Determination made by a delegate of the Director of Employment Standards (the “Director”) on June 18, 1998 that Michael Nordli (“Nordli”) was not a “manager” as that term is defined in the *Employment Standards Regulations* (the “Regulations”) and that Alnor had contravened the Act in respect of his employment.

Alnor says the conclusion in the original decision that Nordli was not a manager under the Act and Regulations is called into question by new evidence that was not available on November 4, 1998, the date of the hearing upon which the original decision was based.

ISSUES TO BE DECIDED

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. If satisfied the case is appropriate for reconsideration, the sole issue raised in the reconsideration is whether the original decision was wrong in its conclusion that Nordli was not a manager under the Act and Regulations.

ANALYSIS

Section 116 of the Act confers reconsideration powers on the Tribunal:

116. (1) *On application under subsection (2) or on its own motion, the tribunal may*
- (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.*

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Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is “to provide fair and efficient procedures for resolving disputes over the interpretation and application” of its provisions. Another stated purpose, found in subsection 2(b), is to “promote the fair treatment of employees and employers”. In *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97), the Tribunal noted:

To realize these purposes in the context of its reconsideration power, the Tribunal has attempted to strike a balance between two extremes. On the one hand, failing to exercise the reconsideration power where important questions of fact, law, principle or fairness are at stake, would defeat the purpose of allowing such questions to be fully and correctly decided within the specialized regime created by the *Act* and the Regulations for the final and conclusive resolution of employment standards disputes: *Act*, s. 110. On the other hand, to accept all applications for reconsideration, regardless of the nature of the issue or the arguments made, would undermine the integrity of the appeal process which is intended to be the primary forum for the final resolution of disputes regarding Determinations. An “automatic reconsideration” approach would be contrary to the objectives of finality and efficiency for a Tribunal designed to provide fair and efficient outcomes for large volumes of appeals. It would delay justice for parties waiting to have their disputes heard, and would likely advantage parties with the resources to “litigate”.

Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. In *Milan Holdings Ltd.*, *supra*, the Tribunal outlined that analysis:

At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration: *Re British Columbia (Director of Employment Standards)*, BC EST #D122/98. In deciding the question, the Tribunal will consider and weigh a number of factors. For example, the following factors have been held to weigh against a reconsideration:

- (a) where the application has not been filed in a timely fashion and there is no valid cause for the delay: see *Re British Columbia (Director of Employment Standards)*, BC EST #D122/98. In this context, the Tribunal will consider the prejudice to either party in proceeding with or refusing the reconsideration: *Re Rescan Environmental Services Ltd.*, BC EST #D522/97 (Reconsideration of BC EST #D007/97).

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(b) where the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the Adjudicator (as distinct from tendering new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): *Re Image House Inc.*, BC EST #D075/98 (Reconsideration of BC EST #D418/97); *Alexander (Perequine Consulting)*, BC EST #D095/98 (Reconsideration of BC EST #D574/97); *32353 BC Ltd., (c.o.b. Saltair Neighbourhood Pub)*, BC EST #D478/97 (Reconsideration of BC EST #D186/97).

(c) Where the application arises out of a preliminary ruling made in the course of an appeal. "The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid a multiplicity of proceedings, confusion or delay": *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.

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. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in a previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": *Zoltan Kiss, supra*. "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 reasons": *Khalsa Diwan Society*, BC EST #D199/96 (Reconsideration of BC EST #D114/96). . .

The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the tribunal as including:

- 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;

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- misunderstanding or failure to deal with a serious issue; and
- clerical error.

Consistent with the approach outlined above, I will first assess whether the applicant has established any matters that warrant reconsideration.

ANALYSIS

Alnor says the Tribunal should exercise its discretion in favour of reconsideration based on what they allege is significant new evidence, arising out of a small claims proceeding between Alnor and Nordli, that was not available at the time of the original decision. The following passage from Alnor's reconsideration submission fairly summarizes the basis for their application:

Mr. Nordli's claim before Judge Baker turned on the argument that he exercised the authority of a "foreman" in his employment with the employer. If he had testified to the same effect before the Tribunal, he ran the risk of being found to be a "manager" with no right to overtime under the *Employment Standards Act*. We submit the Tribunal's factual finding cannot stand in the face of the findings of Judge Baker.

Attached to the application was a copy of the oral reasons for judgement of Judge Baker which were said to contain the new evidence. In reply, Nordli submitted a portion of the transcript of proceedings in small claims court containing his evidence and the evidence of Mr. Svab, the president of Alnor.

Having reviewed the judgement and the portion of the transcript provided, I can find nothing in either of them that would warrant a conclusion that there was "significant new evidence" bearing on the matter for which reconsideration is being sought.

This is not a case that is appropriate for reconsideration.

ORDER

Pursuant to Section 116 of the *Act*, this application is denied.

David B. Stevenson
Adjudicator
Employment Standards Tribunal