

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 -

Doug Bensley
operating as
Smoother Movers

re: Colin Jackson

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR:	John M. Orr
FILE No:	1999/556
DATE OF DECISION:	December 02, 1999

DECISION

OVERVIEW

This is an application by Doug Bensley ("Bensley") operating as Smoother Movers under Section 116 (2) of *the Employment Standards Act* (the "Act") for a reconsideration of a Decision #D324/99 (the "Original Decision") which was issued by the Tribunal on August 11, 1999.

The issues in this case related primarily to whether an employee, Colin Jackson ("Jackson"), was a "manager" and whether the business "Smoother Movers" should be associated with a corporate entity called "Smoother Movers Limited". There was also an issue of the calculation of wages owing.

The issues between Bensley and Jackson were the subject of a Determination, which I believe was dated July 16 1998, that was appealed by Bensley to the Tribunal and a decision was made by Adjudicator Petersen on March 10 1999 to refer the matter back to the Director. Subsequently two further Determinations were issued by the Director on May 27, 1999. One of these Determinations was against Bensley operating as Smoother Movers in the amount of \$2,033.79 and the other was against Smoother Movers Limited in the same amount.

Bensley and Smoother Movers Limited appealed both of these Determinations and the appeals were considered together by Adjudicator Stevenson who rendered the "Original Decision" which is the subject of this Application for Reconsideration.

In the original decision Adjudicator Stevenson cancelled the Determination against Smoother Movers Limited on the basis that there was insufficient substantiation of the linkage between the corporate entity and the proprietorship operated by Bensley to associate them under Section 95 of the *Act*. Although the Application for Reconsideration is in the name of Smoother Movers Limited as well as the proprietorship I am assuming that Smoother Movers Limited does not wish the Tribunal to reconsider the cancellation of the Determination. I am also assuming, for the purpose of this application, that Bensley is not asking for the cancellation to be reconsidered.

The original decision issued by Adjudicator Stevenson confirms the Determination against Bensley in the amount of \$2,033.79. Bensley has now applied to the Tribunal to have this decision reconsidered. The application is made in a three page letter without itemized or numbered grounds for the application but consisting of 30 paragraphs. I will refer herein to those paragraphs as if numbered and summarize the grounds for the application as follows:

1. the first two paragraphs seek a stay of enforcement pending this decision;
2. paragraphs 3 to 12 allege that the director's delegate did not give Bensley sufficient opportunity to review and refute certain payroll calculations and takes exception to certain rulings or findings by both adjudicators Petersen and Stevenson on the amount of wages owing;
3. paragraphs 10, 20, 28, and 29 refer to the burden of proof;

4. paragraphs 13 to 19 allege that adjudicator Petersen was biased;
5. paragraphs 21 to 27 challenge the findings that Jackson was not a "manager";
6. paragraph 30 seeks an order for costs.

ANALYSIS

The current suggested approach to the exercise of the reconsideration discretion under section 116 of the *Act* was set out by the Tribunal in *Milan Holdings Ltd.*, BCEST #D313/98 (applied in decisions BCEST #D497/98, #D498/98, et al). In *Milan* the Tribunal sets out a two stage analysis in the reconsideration 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 should consider and weigh 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.

The Tribunal in *Milan* went on to state that 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 decision states that "at this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general". Although most decisions would be seen as serious to the parties this latter consideration 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:

Those circumstances have been identified in several decisions of the Tribunal, commencing with Zoltan Kiss, BCEST #D122/96, and include:

- original*
- * *failure to comply with the principles of natural justice;*
 - * *mistake of law or fact;*
 - * *significant new evidence that was not reasonably available to the 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*

BC EST #D525/99
Reconsideration of BC EST #D324/99

In my opinion this is not a case which warrants the exercise of the reconsideration discretion. Bensley has used the process of the Tribunal to delay and avoid paying to Jackson what has been consistently found to be owing to him. Any further delay of this matter would not be consistent with the purposes of the *Act*. In essence Bensley is seeking to have the Tribunal re-weigh the evidence tendered to the Director and the adjudicator. There is no significant new evidence that was not previously available and no significant points of law raised in the application.

The grounds set out by Bensley do not provide any reasonable basis upon which a review would likely be successful. It is clear that Bensley has been an active participant in this matter and has had ample opportunity to be heard. He misapprehends the burden of proof. His allegations of bias are frivolous and vexatious and his arguments about Jackson being a manager have all been heard and dealt with before.

ORDER

This Tribunal declines to reconsider the original decision BC EST #D324/99 and it is hereby confirmed as is the Determination dated May 27 1999 against Douglas Bensley operating as Smoother Movers.

John M. Orr
Adjudicator
Employment Standards Tribunal