

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: Murray White

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR:	John M. Orr
FILE No:	1999/557
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 #D325/99 (the "Original Decision") which was issued by the Tribunal on August 11, 1999.

The issues in this case related primarily to whether an employee, Murray White ("White"), 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 White were the subject of two Determinations issued by the Director on May 27, 1999. One of these Determinations was against Bensley operating as Smoother Movers 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 the Tribunal which issued the "Original Decision" on August 11 1999 that is the subject of this Application for Reconsideration.

In the original decision the Tribunal 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 confirms the Determination against Bensley in favour of White. Bensley has now applied to the Tribunal to have this decision reconsidered. The application is made in a two page letter without itemized or numbered grounds for the application but consisting of 18 paragraphs. I will refer herein to those paragraphs by number 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 and 4 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 16 and 17 refer to the burden of proof;
4. paragraphs 5 to 10 allege that adjudicator Petersen was biased;
5. paragraphs 11 to 15 challenge the findings that Jackson was not a "manager";

6. paragraph 18 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*

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 White 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 seeks to have the Tribunal re-weigh the evidence. The application for reconsideration alleges no significant new information and raises no substantial points of law.

BC EST #D526/99
Reconsideration of BC EST #D325/99

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 White being a manager have all been heard and dealt with before.

ORDER

This Tribunal declines to reconsider the original decision BC EST #D325/99 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