Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Ralph Zimmerman
("Zimmerman")

- 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: David B. Stevenson

FILE No.: 2001/491

DATE OF DECISION: October 2, 2001

DECISION

OVERVIEW

Ralph Zimmerman ("Zimmerman") seeks reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a Decision of the Tribunal, BC EST #D228/01, dated May 16, 2001 ("the original decision"). The Decision cancelled a Determination dated November 24, 2000.

Zimmerman had claimed he was owed wages by Celerity Capital Corp. ("Celerity") for work performed at the company's apartment building in Houston, B.C. The Determination concluded Zimmerman was an employee of Celerity and found he was owed an amount of $1314.80.

The application for reconsideration charges that the Adjudicator of the original Decision made his decision on assumptions of fact that were incorrect.

This application for reconsideration has been filed in a timely way.

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. If satisfied this case is appropriate for reconsideration, the substantive issue is whether the original decision erred in finding Zimmerman was not an employee of Celerity.

FACTS

In April, 1999, Mrs. Donna Zimmerman answered an ad in the Alaska Highway News for an apartment manager of an apartment building in Houston, B.C. The ad read:

> Apartment Manager for Houston. Couple, bondable, knowledge of building trades, good people skills. Salary $2000 per month. Fax resumes to . . . .

She spoke to John Davies, the principal of Celerity. The Determination addressed that discussion as follows:

> It is common ground that all discussions prior to the Zimmermans commencing work involved exclusively D. Zimmerman and Davies. Based on the evidence of the newspaper ad I find that there was an expectation on the part of the Employer that R. Zimmerman would perform work . . . .

The original Decision considered the Determination and stated:

> The Delegate . . . found that on the evidence of the newspaper ad, he found that there was an expectation on the part of the employer that . . . Zimmerman would perform work and therefore [he] was an employee.

The original Decision analysed that conclusion and found insufficient evidence to justify the conclusion a contract of employment between Zimmerman and Celerity had been created:

> There is no evidence of any communication between Celerity and Zimmerman that can be characterized as an offer. The advertisement is an invitation to submit a resume. There is no evidence here that Mr. Zimmerman submitted a resume and certainly no evidence of communication. . . .
>
> An offer of employment may be accepted by conduct. There, however, has to be some minimum degree of communication between the parties, before one could say there was an offer capable of acceptance. An advertisement in the form placed in the newspaper in this case is not an offer, it is an "offer to treat" or a request to apply. There is no evidence that Mr. Zimmerman faxed a resume to the employer and applied for a position.
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> . . . There appears to be no event to which Mr. Zimmerman can point from which a reasonable and objective person could conclude that a contract was formed between Mr. Zimmerman and Celerity. There is no event to which Mr. Zimmerman can point where the company allowed him to work directly or indirectly.. The evidence in this case points to the company being unaware that Mr. Zimmerman was providing service, until Mr. Zimmerman phoned the company following the issuance of a pay cheque to Mrs. Zimmerman.
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> There is no evidence on the face of the Determination from which I can conclude that Mrs. Zimmerman represented to the Delegate that the employer was agreeing to employ and pay two persons. There is no evidence that the principle [sic] of Celerity stood by and watched or had any knowledge that Zimmerman performed work. There is no evidence that Celerity allowed directly or indirectly Mr. Zimmerman to perform work. In my view, while the employer did place an ad, the ad was at very least ambiguous, it referred to "a manager", and a couple. The ad clearly called for handyman skills. Beyond that, it is my view any reasonable person would have inquired. I do not accept that Mrs. Zimmerman bound Mr. Zimmerman to any obligation to preform services for Celerity. . . .

> In my view there is no sufficient factual foundation for the Delegate to have found that the employer expected Ralph Zimmerman to work. . . . There is, however, no evidence that the employer intended to hire and pay two people for the job.

In this application, Zimmerman makes the argument that the Adjudicator of the original Decision made a "couple of assumptions that are simply incorrect.".

> First, he assumes that my doing maintenance was never discussed with Mr. Davies; second, he assumes that I did not send him a resume.

On the first point, Zimmerman alleges that when his wife was hired by phone, he asked whether Zimmerman did maintenance work, and was told he did. On the second point, Zimmerman says Mr. Davies asked for both his wife's and his resumes and both were sent. Zimmerman also questions why, if he was not required by Celerity to do maintenance work, he had authority to pick up material and supplies at the local hardware store for that purpose.

In response, Celerity, through Mr. Davies, says that while he has no recollection whether he asked for Zimmerman's resume, it was unlikely that he asked for it specifically. He says that Zimmerman did not have authorization to purchase items on local hardware accounts. He does not deny receiving Zimmerman's resume or being aware that Zimmerman was signing for supplies and material at local hardware stores.

The Director has filed a response on the application, indicating that there is a valid basis for the reconsideration application as Zimmerman is not simply requesting the Tribunal to review and reassess findings of fact made in the original decision, but has alleged the original decision was based on facts not in evidence and in respect of which potentially wrong assumptions were made. The Director also notes that the assertion by Zimmerman that he had authority to charge building supplies to Celerity's account was never made during the investigation.

ANALYSIS OF THE THRESHOLD ISSUE

The legislature has conferred an express reconsideration power on the Tribunal in Section 116, which provides:

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.*

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"*. The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally.

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

If the applicant satisfies the Tribunal at the first stage of the analysis, the Tribunal will address the substantive issue raised in the reconsideration.

Consistent with the approach outlined above, I must assess whether the applicants have established any matters that warrant reconsideration.

The principle concerns I have with this application are two-fold: first, Zimmerman is clearly asking this panel of the Tribunal to re-weigh conclusions made in the original decision on the available facts; and second, Zimmerman is asking this panel to consider and weigh evidence that was available to Zimmerman when he made the complaint and when he filed the appeal, but was not provided during the investigation and not raised in the appeal.

On the first point, the function of an Adjudicator hearing an appeal is judicial. An Adjudicator does not "assume" the existence, or non-existence, of facts. An Adjudicator normally decides an appeal on the basis of facts that are established in the Determination, supplemented by evidence provided by the parties to an appeal, either at an oral hearing or with the written submissions on the appeal.

In this case Zimmerman is wrong to say the original decision was based on certain "assumptions" made by the Adjudicator. Had the Adjudicator assumed facts not in evidence that would be a valid ground for reconsideration if those facts figured significantly in the decision, but it is apparent from the original decision that the Adjudicator did exactly what was required in the case before him - he looked at the Determination and at the available evidence, weighed that evidence in the context of the issues before him and reached conclusions from that evidence. The matter about which Zimmerman complains is the conclusion that there was *no evidence* in respect of certain matters, specifically about whether there was any discussion between Mrs. Zimmerman and Mr. Davies of Zimmerman doing maintenance work and whether Zimmerman had delivered a resume to Mr. Davies. It is that conclusion which Zimmerman is, in effect, asking this panel to change. That would require I re-evaluate the evidence before the Adjudicator of the original decision and arrive at a different conclusion. As noted above, however, applications for reconsideration that focus on having the reconsideration panel re-weigh the evidence before the original will not normally be allowed by the Tribunal. A reconsideration is not simply an opportunity to have another panel of the Tribunal reach a different conclusion on the material already considered by another panel of the Tribunal. The only circumstance where the Tribunal might allow an application seeking to re-weigh evidence on reconsideration is where an error in the original decision is apparent on the face of the record on a matter that is critical to the conclusion reached, either because the Adjudicator failed to consider key evidence or reached a conclusion not reasonably justified by the available evidence. In this case, there is no suggestion that the Adjudicator failed to consider critical evidence. To the contrary, it is apparent the Adjudicator looked very carefully at the available evidence to determine if it supported the existence of an employment relationship, but found it did not. As well, the conclusion made in the original decision appears to have been rationally justified on the available evidence.

The second concern with this application is that it attempts to introduce allegations of fact that have not previously been raised by Zimmerman, either during the investigation or in the appeal, but were obviously available to Zimmerman at the time the complaint was filed. It is

not an appropriate use of the reconsideration power to seek to introduce evidence that could reasonably have been provided during the investigation and in the appeal.

In sum, this application does not raise any matter that warrants reconsideration and is, accordingly, denied.

ORDER

Pursuant to Section 116 of the *Act*, I order the original Decision, BC EST #D228/01, be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal