

An Application for Reconsideration

- by -

Jean Tharp

- 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: John M. Orr

FILE No.: 2002/499

DATE OF DECISION: December 2, 2002

DECISION

OVERVIEW

This is an application by Jean Tharp ("Tharp") pursuant to Section 116 (2) of the *Employment Standards Act* (the "*Act*") for a reconsideration of a Tribunal decision #D397/02 (the "Original Decision") which was issued by the Tribunal on September 09, 2002.

Ms. Tharp operated a retail mall kiosk for the Calendar Club of Canada Ltd. She worked under a management contract from a Ms. Holmes who was an independent agent for the corporation. The fundamental issue addressed in the Director's determination and in the original decision related to the nature of the business arrangement between Ms. Holmes and Ms. Tharp. Ms. Tharp claimed that she was a manager employed by Ms. Holmes. Ms. Holmes maintained that Ms. Tharp was an independent contractor.

The Director's delegate who investigated the claim determined that Ms. Tharp was indeed an independent contractor. Ms. Tharp appealed that decision and a hearing was held before an independent adjudicator of the Tribunal. The adjudicator subsequently issued the original decision in which he confirmed the determination having concluded also that Ms. Tharp was not an employee.

Ms. Tharp now seeks reconsideration of that decision.

ANALYSIS

The test for the exercise of the reconsideration power under section 116 of the *Act* is set out in *Milan Holdings Ltd.*, BCEST #D313/98. 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 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, "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.

In my opinion this is not a case that warrants the exercise of the reconsideration discretion. The submissions made by Ms. Tharp on this reconsideration application only reiterate the arguments that have already been decided by the delegate and by the adjudicator in the original decision.

The argument that Ms. Tharp was a manager and not an independent contractor was presented fully to the adjudicator and was considered carefully by him. The delegate and the adjudicator considered the relevant jurisprudence. There is no suggestion in the application that the adjudicator failed to understand the argument or failed to give the appellant's submissions due consideration. The appellant simply submits that the decision is wrong. The adjudicator clearly was cognisant of the arguments put forward by Ms. Tharp. He analysed the material presented carefully and obviously decided that he agreed with the determination that Ms. Tharp was an independent contractor and the adjudicator supplied a well reasoned basis for his decision.

It is fully within the intent and purposes of the act that there be some finality to the decisions of the Tribunal. As stated above, reconsideration should be used sparingly and should not be used to substitute my analysis and my opinion for that of the adjudicator who wrote the original decision.

I am not persuaded that there is a sufficient basis in fact or in law to warrant any interference in the decision made by the adjudicator in the original decision. Therefore I am not prepared to exercise my discretion to reconsider the original decision.

ORDER

The application to reconsider the decision of the adjudicator in this matter is dismissed.

John M. Orr
Adjudicator
Employment Standards Tribunal