

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-

Vitality Products Inc. ("Vitality")
(the "Appellant")

-of a Decision issued by-

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR:	E. Casey McCabe
FILE No.:	98/601
DATE OF DECISION:	December 8, 1998

DECISION

APPEARANCES

Mrs. Susan Grant on behalf of Vitality Products Inc.

OVERVIEW

This is an application by Vitality Products Inc. ("Vitality") pursuant to Section 116 of the *Employment Standards Act* (the "Act") for reconsideration of BC EST # D322/98 (the "Decision") issued July 29, 1998. That Decision confirmed a Determination dated March 11, 1998 which found that the complainant, Ms. Susan Campbell, was entitled to \$1,716.00 plus interest accruing since the date of the Determination pursuant to Section 88 of the Act. The issues that were decided in that Determination were firstly, whether Campbell was an employee of Vitality and, secondly, the amount of unpaid wages she was entitled to receive.

The Decision was written following an oral hearing that was held on June 15, 1998. The adjudicator concluded that Ms. Campbell was an employee of Vitality and that she was owed a specified sum of money as unpaid wages. The adjudicator dedicated approximately 3 pages of his award to a review of the evidence given by Mrs. Susan Grant on behalf of Vitality and the complainant on her own behalf. The adjudicator then commenced an analysis of the definition of "employee" and "employer" under the Act. He further acknowledged and applied the recognized common law tests that bear on the issue whether an individual is an employee or an independent contractor. Commencing at the bottom of page 5 of the Decision he states:

"In addition, the common law has developed a number of tests to be applied in deciding whether an individual is an employee or a independent contractor. These include: the degree of control exercised over the worker by the alleged employer, the worker's integration with the alleged employer's operation; the worker's degree of economic dependence on the alleged employer; the worker's ability to experience profit or loss in relation to the work performed; and the degree of discretion that the worker had over his or her time (See *Astrolabe Marine Inc.* BC EST #D525/97).

In this case, Campbell held herself out to be a contractor, but that action did not determine her status. Certainly her work was that normally performed by an employee. She was under the control of Vitality and was integrated into its operation. She owned no tools, and she had no opportunity for profit or loss. At the time in question, she had no other employment or contract of service. She did exercise some control over her hours of work, but her testimony contradicts Grant's evidence on this point. Flexibility of hours is only one element in determining employee status, and not a

particularly important factor. In this case the type of work Campbell performed and the degree of control Vitality exercised over her work clearly pointed to her status as an employee. On the balance of probabilities, I conclude that Campbell was an employee of Vitality under the *Act*."

The appellant raises four points on reconsideration:

1. Vitality objects to evidence that was admitted at the hearing on June 15, 1998 because that information was not provided by June 1, 1998 which is the date the Tribunal had set for the parties to make submissions.
2. Vitality objects to the finding that Campbell was an employee.
3. Vitality argues that Campbell filed the initial complaint after the 6 month statutory deadline. Furthermore, evidence that Campbell lead on June 15, 1998 was prejudicial because Vitality, unaware of the information, was unprepared to give a full answer.
4. Vitality takes exception to findings of fact made by the adjudicator with respect to Campbell's status as an employee and interpretation of the evidence by the adjudicator.

In essence points 1 and 3 raise an issue of procedural fairness and natural justice. Points 2 and 4 object to findings of fact and the legal conclusion drawn from those findings.

ANALYSIS

I turn firstly to the natural justice arguments set out in points 1 and 3 of the application for reconsideration. With respect to point 1, Vitality points to a paragraph in the Notice of Hearing which states:

"You are requested to attend the hearing to present evidence and make submissions. Please bring four copies of any records or documents you wish to present/support your claim. If any of these records or documents have not been previously disclosed to the other parties, please ensure a copy is sent to the Tribunal no later than June 1, 1998. Any further submissions will be disclosed to the other parties."

Vitality argues that this paragraph should preclude a party to the hearing from introducing new documents or evidence that was not disclosed prior to June 1, 1998. I disagree with that submission. The paragraph does not limit or even attempt to limit the ability to introduce documents or evidence not disclosed prior to June 1, 1998. The paragraph specifically states that "Any further submissions will be disclosed to the other parties." The paragraph is not a limitation on the admissibility of evidence but rather is a notification that if further documents are received by the Tribunal after June 1, 1998 but prior to the hearing they will be disclosed to the other parties. That is consistent with the earlier sentence which allows that any documents which have not previously been disclosed to other parties should be sent to the Tribunal no later than June 1, 1998.

This theme of a lack of disclosure is further developed by Vitality in point 3 of its grounds for appeal. Vitality complains that it was unable to answer certain of the statements made by Campbell in the newly introduced materials because Mr. Grant, a principal of Vitality, was not available at the hearing to make an answer. For example, Vitality states that Campbell testified that she had not received any response to her request for payment but that hand written responses were found in file material which was discovered by Vitality prior to the June 15, 1998 hearing but after what Vitality thought was the June 1, 1998 deadline for the submission of information.

I am not able to agree with Vitality that it has been denied a fair hearing because it was surprised by Campbell's statement. Vitality was the appellant in the matter and therefore bore the onus to disprove the Determination against it. The documents that Vitality states it did not enter were its own documents. Vitality was well aware from the submissions by Campbell that Campbell's complaint was a failure by Vitality to pay outstanding wages. It is simply too late, at this stage in the proceeding, for Vitality to argue that it didn't introduce evidence because it assumed that submissions had closed on June 1, 1998. Secondly, a fair reading of the Decision by the adjudicator indicates that the fact that Campbell testified that she had no response to her request for payment was not critical to the Determination either of her status as an employee or the amount of the Determination.

Vitality also argues that Ms. Campbell had filed her complaint past the statutory 6 month deadline. That issue was addressed by the adjudicator in his Decision. At page 7 the adjudicator states:

"The delay in issuing the Determination in this case was excessive and not explained. Campbell stated that she did not file her complaint until after she ended her employment with Consolidated Firstfund because she was led to believe that she would receive her back pay. Her duties did not change substantially after January 1, 1996 and Grant stated that Vitality and Consolidated Firstfund had common owners. Prior to the appeal, the record contains no reference to any argument that the complaint was out of time. Given these circumstances, I conclude that Campbell filed her complaint within the time limits contained in the Act."

Vitality does not offer any new evidence in this application for reconsideration that the complaint was out of time. Therefore, I cannot agree with Vitality on this point.

Vitality further argues that the adjudicator was incorrect in his conclusion that Campbell was an employee. However, from the quotations I set out earlier in this award, I take the view that the adjudicator listened to the evidence, weighed that evidence and applied the law of the Act and common law principles in arriving at his conclusion that Campbell was an employee of Vitality Products Inc. I am not prepared to upset those findings of fact and law.

Vitality takes issue with the interpretation of the evidence entered at the hearing. Vitality argues that the complainant testified that she was an employee of Consolidated Firstfund

Capital Corp. ("CFC") and Vitality in 1996 but that the evidence also disclosed that she spent two days a week working under the same type of administrative contract the she had with CFC for another US company. Vitality argues that the complainant should not be allowed to take the position that she is an employee of one company but not the other. This argument objects to a finding of fact made by the adjudicator.

Likewise, Vitality objects to the adjudicator's interpretation of Campbell's December 15, 1995 invoice to Vitality for services rendered. Vitality argues that its principal, Mr. Grant, did not approve this invoice as stated in the Decision. Finally, Vitality argues that it offered a copy of a Record of Employment as supplementary evidence to a T4 that was issued by CFC for work performed by Campbell in 1996. Vitality argues that the adjudicator stated the Record of Employment wasn't necessary.

Vitality argues with findings of fact by the adjudicator when it raises these issues. A fundamental disagreement with findings of fact made by an adjudicator who heard the evidence, weighed that evidence and came to his conclusions based on the probabilities of the case is not a basis for overturning a Determination. The adjudicator was the trier of fact and had the opportunity to assess the witnesses and the evidence. A reconsideration panel is in no position to second guess those findings of fact.

Section 116 of the Act provides the Tribunal with the power to reconsider its own decisions. It does not provide a broad avenue of review. The section of the Act has been construed and applied consistently. As stated in *Director of Employment Standards*, BC EST #D479/97:

"It is now firmly established that the Tribunal will not interpret the above provisions (Section 116) to allow any dissatisfied party an automatic right of review. To the contrary, the Tribunal has stated the reconsideration provision will be used sparingly and has identified a number of grounds upon which the Tribunal may choose to reconsider an order or decision. These grounds may be summarized as cases demonstrating: a breach of the rules of natural justice; a significant error of fact that is either clear on the face of the record or that arises from the introduction of new evidence that is both relevant to the order or decision and was not reasonably available at the time of the original hearing to the parties seeking to introduce it; a fundamental error of law; or an inconsistency with other decisions of the Tribunal which are not distinguishable on their facts."

In the instant case I have determined that there has not been a breach of the rules of natural justice nor has there been a significant error of fact that is clear on the face of the record. Furthermore, I am not convinced that the documents provided on reconsideration or referred to in the submission is new evidence that is relevant to the order and was not reasonably available at the time of the original hearing to Vitality. Furthermore, I see no fundamental error of law in the adjudicator's reasoning on the issue of employee status nor is the adjudicator's Decision inconsistent with other decisions of the Tribunal.

ORDER

For these reasons, pursuant to Section 115 of the *Act*, Decision BC EST #D322/98 is confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal