An Application for Reconsideration

- by -

Delphi International Academy, Delphi Student Development Inc. and Double D Holdings Ltd. associated companies pursuant to section 95 of the Employment Standards Act

(the “associated entities”)

- 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.: 2002/487

DATE OF DECISION: December 17, 2002

DECISION

OVERVIEW

Delphi International Academy, Delphi Student Development Inc., and Double D Holdings Ltd., associated companies pursuant to Section 95 of the *Employment Standards Act* (the "associated entities") seek reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of two decisions of the Tribunal, BC EST #D166/02, dated May 2, 2002, and BC EST #D426/02, dated September 19, 2002, (the "original decisions"). The earlier of the original decisions considered an appeal of a Determination issued on October 10, 2001, which had associated the three entities under Section 95 and concluded the associated entities had contravened the *Act* and ordered them to pay an amount of $37,510.56. The latter of the original decisions addressed the calculation of the employees' entitlement to length of service compensation, a matter that had been referred back to the Director in the earlier of the original decisions.

The associated entities have raised the following matters in this application for reconsideration:

1. The Adjudicator erred in accepting the teachers (the complainants) were employees under the *Act* and not independent contractors;

2. If the teachers were employees, there is an error in the calculation of the "wages" due, as they appear to include wages for two weeks in the summer that, with one exception, was not worked;

3. If the teachers were employees, they were not entitled to length of service compensation as they were given "working notice" in their employment contracts.

4. If the teachers were employees, the calculation of the "wages' found to be owing to Dave Tanner ("Tanner") should have been adjusted downward and he should not be entitled to length of service compensation.

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 the case is appropriate for reconsideration, the substantive issues raised in this application arise out of the four points listed above.

ANALYSIS OF 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. An assessment is also be made of the merits of the Adjudicator's decision. Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. 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 Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration.

I am not satisfied that this application raises any matter that warrants reconsideration. This application represents little more than a re-argument of the appeal. All of the matters raised in this application were raised in the appeal and, to a greater or lesser extent, addressed in the original decisions. Apart from stating its disagreement with the result, the associated entities has not identified how the error in the original decisions arises, either in the context of an alleged 'error on the facts' or from an analytical perspective.

The question of the status of the teachers under the *Act* was not vigorously pursued in the appeal. I note the following comment from the earlier of the original decisions:

> At the appeal hearing, Mr. Alan Decker, for the appellants, conceded (and properly so) that the teachers were "employees"as defined in section 1 of the *Act*.

No reason is given why Adjudicator of the original decisions should not have accepted this concession or why the Tribunal should review whether the teachers are employees under the *Act* or independent contractors.

On the question of the wage calculation including two weeks pay for work which was not performed, that matter was also considered in the earlier of the original decisions:

> . . . as long as the employees were ready and available to perform their 2-weeks of "ESL" instruction (and, apparently, all employees were) they were [under their respective agreements] entitled to be paid up to the end of August since wages for July and August would have been earned and were thus payable by the employer.

Nothing in this application would persuade me the above conclusion was wrong in any respect. Further, no 'duplication' exists between the entitlement to the 2-weeks ESL instruction and length of service compensation. The former arises from an interpretation and application of the employment contract and the latter arises from the *Act*. The two entitlements are not mutually exclusive.

The matter of the teachers' entitlement generally, and of Tanner specifically, to length of service compensation was examined at some length in the earlier of the original decisions and commented on again in the later of the original decisions. While the associated entities disagrees with the result, no error has been identified and none is apparent on the face of the original decisions.

The Tribunal will not exercise its discretion to reconsider the original decisions.

ORDER

Pursuant to Section 116 of the *Act*, we order the original decisions, BC EST #D166/02 and BC EST #D426/02, be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal