

An Application for Reconsideration

- by -

Auto-Gard Protection and Appearance Centres Ltd and Auto Pride 200 Total Appearance Center Ltd and Lawrence Carl Hulth Operating as Auto Pride 2000 detail Centre, Auto.Fx Detail Centre, auto Gard Appearance Centre Ltd, Auto Fx Detail Centre Ltd (Auto Pride), Auto Pride Details N Glass Ltd, and Auto Pride Total Appearance Centre Ltd.

(Collectively referred to herein as "Auto-Pride")

- 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 Orr

FILE No.: 2001/722

DATE OF DECISION: December 31, 2001

DECISION

OVERVIEW

This is an application by the companies, persons and legal entities collectively referred to herein as “Auto-Pride” under Section 116 (2) of the *Employment Standards Act* (the “Act”) for a reconsideration of a Decision #D528/01 (the “Original Decision”) which was issued by the Tribunal on October 2, 2001.

Auto-Pride operates a business that ‘details’ automobiles. Two people who worked for the business filed complaints with the Director of Employment Standards (“the Director”) claiming unpaid wages. Auto-Pride maintained that these workers were not employees but independent contractors. The Director determined that the workers were not independent contractors but that they were employees and therefore entitled to substantial unpaid wages.

Auto-Pride appealed the determination and an adjudicator of the Tribunal, in a decision written without an oral hearing, dismissed the appeal and confirmed the determination. Auto-Pride has now applied for reconsideration of the original decision. The stated grounds for the application for reconsideration are the same issues that were addressed by the adjudicator. Auto-Pride maintains strongly that the workers were independent contractors.

ANALYSIS

The current 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. 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, “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:

- * 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

In my opinion this is not a case that warrants the exercise of the reconsideration discretion. The submission made by Auto-Pride on this reconsideration application only reiterates the arguments that have already been decided by the director and by the adjudicator in the original decision.

The argument that the workers were independent contractors was presented fully to the adjudicator and was considered carefully by him. He considered the relevant jurisprudence. There is no suggestion in the appeal 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 Auto-Pride. He analysed the material presented carefully and obviously decided that he agreed with the determination that the workers were 'employees'.

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