

An Application for Reconsideration

- by -

MacNutt Enterprises Ltd.

- 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.: 2001/702

DATE OF DECISION: December 31, 2001

DECISION

OVERVIEW

This is an application by MacNutt Enterprises Ltd. (“MacNutt”) under Section 116 (2) of the *Employment Standards Act* (the “Act”) for a reconsideration of a Decision #D293/01 (the “Original Decision”) which was issued by the Tribunal on June 7, 2001.

MacNutt operates a trucking company and employed Dale Wilkinson (“Wilkinson”) as a driver. When Wilkinson made a claim for unpaid wages the issue arose as to whether he was a “long distance truck driver” under the *Employment Standards Regulation*. The significance relates to the amount of overtime wages due to Wilkinson. A second issue arose as to whether Wilkinson had been in continuous employment during a period of time when he was off work due to a back problem. The Director of Employment Standards (“the Director”) determined that Wilkinson was not a long-distance driver and that his employment had been continuous.

MacNutt appealed the determination and a hearing was held on April 25 2001. MacNutt was represented by counsel at the hearing. On June 7, 2001 the Tribunal issued the adjudicator's decision in which she dismissed the appeal and confirmed the determination.

MacNutt 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. MacNutt submits that the adjudicator fail to properly apply the law in regards to interpreting the meaning of the term "long-distance truck driver" and the notion of "continuous employment".

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 MacNutt 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 about the meaning of "long-distance truck driver" was presented fully to the adjudicator and was considered carefully by her. She considered the relevant and related statutes and the appropriate 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 appellant's submission in regard to continuous employment was also fully canvassed at the hearing and given fair and reasonable consideration by the adjudicator. The adjudicator clearly was cognisant of the arguments put forward by, or on behalf of, MacNutt. She analysed the material presented carefully and obviously decided that she agreed with the determination that Wilkinson was not a long distance truck driver. She also concluded that employment had been continuous. While I may have not made the same decisions on these points there is no substantial legal reason to interfere with the original 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