

An Application for Reconsideration

- by -

Edward P. Town  
("Town")

- 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:** Lorne D. Collingwood

**FILE No.:** 2003A/265

**DATE OF DECISION:** January 14, 2004

## DECISION

### OVERVIEW

Edward P. Town, pursuant to section 116 of the *Employment Standards Act* (“the *Act*”), applied for reconsideration of Tribunal decision BCEST No. D272/03 (the “original decision”). That decision, dated September 12, 2003, confirmed a May 21, 2003 Determination by a delegate of the Director of Employment Standards (the “Director”). The delegate, on conducting a detailed analysis of payroll and hours worked records, decided that Mr. Town is not entitled to vacation pay as he had claimed.

Mr. Town, in filing his appeal, claimed that the Determination reflected a failure to follow principles of natural justice. Mr. Town in essence, however, argued error in law in that he claims that the Determination contains significant factual errors and the delegate should not have decided to prefer records produced by the employer over the record that he had produced.

Mr. Town, on appeal, also sought to raise two entirely new issues, a claim for compensation for length of service and a claim for wages for the month of October, 2000.

The original decision of the Tribunal is that the Appellant had not shown a breach of natural justice, nor had he shown that there were other grounds to interfere with the Determination. The Adjudicator goes on to note in the original decision that an appeal is not an opportunity to raise new issues and that the Tribunal’s jurisdiction is to hear appeals, not conduct new investigations.

Mr. Town, in applying for reconsideration, complains of a lack of fairness but he is in the main unhappy with the fact that the Adjudicator did not order a new investigation or conduct her own analysis of work and pay records. He is convinced that something is not right with the Determination. He also raises two new appeal issues.

The Tribunal has a discretionary power to reconsider decisions. I have in this decision decided that Mr. Town does not have a compelling case for reconsideration and that the application for reconsideration should be dismissed.

### THE TRIBUNAL’S APPROACH TO RECONSIDERATION

Section 116 of the *Act* provides the Tribunal with a discretionary power to reconsider its own orders and decisions.

- 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.  
(my emphasis)

The Tribunal will only reconsider a decision where there is a compelling reason to do so (*Khalsa Diwan Society*, BCEST No. D199/96). To accept each and every application for reconsideration would

undermine the integrity of the appeal process, intended as the primary forum for resolving disputes regarding Determinations. Automatically accepting such applications is also contrary to purposes of the *Act*, “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*” and “to promote the fair treatment of employees and employers”.

With the above in mind, the Tribunal in *Milan Holdings Ltd.*, BCEST No. D313/98, adopted a two-stage approach to applications for reconsideration. At the first stage, the Tribunal decides whether any of the matters raised in the application warrant reconsideration. The following factors have been held to weigh against reconsideration:

- a) where the application has not been filed in a timely fashion and there is no valid cause for the delay: see *Re British Columbia (Director of Employment Standards)*, BC EST #D122/98. In this context, the Tribunal will consider the prejudice to either party in proceeding with or refusing the reconsideration: *Re Rescan Environmental Services Ltd.*, BC EST #D522/97 (Reconsideration of BC EST #D007/97).
- b) where the applicant’s primary focus is to have the reconsideration panel effectively “re-weigh” evidence already tendered before the Adjudicator (as distinct from tendering new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): *Re Image House Inc.*, BC EST #D075/98 (Reconsideration of BC EST #D418/97); *Alexander (Perequine Consulting)*, BC EST #D095/98 (Reconsideration of BC EST #D574/97); *32353 BC Ltd., (c.o.b. Saltair Neighbourhood Pub)*, BC EST #D478/97 (Reconsideration of BC EST #D186/97).
- c) Where the application arises out of a preliminary ruling made in the course of an appeal. “The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid a multiplicity of proceedings, confusion or delay”: *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.”

The circumstances in which the Tribunal will exercise its discretion to reconsider a decision are limited and have been identified 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.

Where the Tribunal is satisfied that a decision appears to warrant reconsideration, the Tribunal will proceed with an analysis of the substantive issues.

## ISSUE TO DECIDE

Has Mr. Town raised a compelling reason to reconsider the Tribunal's original decision?

## FACTS AND ANALYSIS

Appellants are asked to indicate the grounds for their appeal on the Tribunal's appeal form. Mr. Town indicated that his appeal was for reason of a failure to follow principles of natural justice but he made no attempt to show breach of natural justice. He did not, as the Adjudicator points out in the original decision, give an example or otherwise elaborate on that particular ground of appeal.

The original decision of the Tribunal is that an appeal is not a re-investigation of the complaint but a proceeding to decide whether a Determination is in error. The Adjudicator went on to find that there were not grounds to interfere with the Determination.

My reading of Mr. Town's appeal is that it is in essence and in the main a complaint that the delegate erred in law because there are not facts to support the Determination. Mr. Town argues that the delegate is wrong on the facts and that the delegate should not have preferred records produced by the employer over the record that he produced, a calendar. That said, however, I find that Mr. Town then made no attempt to show the Tribunal that the Determination contained an error, nor did he provide the Tribunal with any reason to believe that the decision to prefer the employer's records is obviously wrong and/or patently unreasonable. He did not, in other words, show the Adjudicator that there are grounds to interfere with the Determination.

What remained of Mr. Town's appeal is, as the Adjudicator noted, nothing more than an attempt to raise two new issues, a claim for compensation for length of service (what Town calls severance pay) and a claim for wages for work in October of the year 2000. The original decision advises Mr. Town that an appeal is not an opportunity to raise new issues. It goes on to say that the Tribunal's jurisdiction is to hear appeals of decisions, not to conduct new investigations.

Mr. Town in applying for reconsideration complains of a lack of fairness once again. In this regard, he makes the comment that natural justice is lopsided. He goes on to complain of the length of time that it has taken to have his complaint decided. He also complains that the Adjudicator lacked information, what he calls "through-put". He does nothing but complain, however. Nothing is explained. He has not advanced coherent argument that the original decision may somehow be unfair.

The original decision was issued three months after the appeal. Mr. Town does not explain how that is unfair.

Mr. Town does not explain how it is only fair that he be allowed to submit new evidence and raise new issues at the appeal stage. The Tribunal will not normally allow a party to raise issues and submit evidence which could have been raised or submitted at the investigation stage.

Mr. Town raises new issues in applying for reconsideration. He complains of use of an accountant by his former employer, that the employer knows how to "use the system" and that the process is unfair because it was allowed to do so. He also complains that his complaint was not properly investigated because of government cutbacks.

Reconsideration is not an opportunity to amend an appeal or add to it. I will not address either matter except to say that I am given no reason to believe that the investigation was in any way inadequate and Mr. Town is simply mistaken in his belief that there is something unfair with a process that allows an employer to be assisted by an accountant. Any party may choose to be represented or assisted by any persons that they wish, legal counsel or an accountant included. Fairness demands that.

What Mr. Town really seems to want is a new investigation or some kind of review which double-checks the Determination. He knows “there is something not right” with the Determination.

The Tribunal will not double-check determinations for appellants. It conducts appeals and an appeal is nothing more than an opportunity to show that there are grounds to cancel or vary a determination or refer a matter or matters back to the Director. Mr. Town alleged that the Determination contained serious errors but he failed to show an error of any sort. The Adjudicator had no reason to interfere with the Determination. The only appropriate decision was to confirm the Determination.

Mr. Town is unhappy with the original decision but he does not advance a compelling argument for reconsideration of the decision. I am satisfied that his application should be dismissed and the original decision confirmed.

## **ORDER**

I order, pursuant to section 116 of the *Act*, that the original decision, BCEST No. D272/03, be confirmed.

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**Lorne D. Collingwood**  
**Adjudicator**  
**Employment Standards Tribunal**