

BC EST #D005/99
Reconsideration of BC EST #D454/98

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of a reconsideration pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Degelder Construction Co. B.C. Ltd.
("Degelder")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

RECONSIDERATION PANEL: Geoffrey Crampton

FILE NO.: 98/725

DATE OF DECISION: January 7, 1999

BC EST #D005/99
Reconsideration of BC EST #D454/98

DECISION

OVERVIEW

This is an application by Degelder Construction Co. B.C. Ltd. ("Degelder"), under Section 116 of the *Employment Standards Act* (the "Act"), for a reconsideration of a Decision issued on October 14, 1998 and numbered as BCEST #D454/98 (the "Original Decision").

The Original Decision confirmed the Determination dated June 22, 1998 which required Degelder to pay John Bates the sum of \$5,475.00 plus accrued interest.

Degelder's application has been considered and decided by way of written submissions.

The following excerpt from page 2 of the Original Decision provides a succinct overview of the issues which were germane to Degelder's appeal and to the hearing which was conducted as part of that appeal:

The delegate addressed two issues in a complaint filed by Mr. John Bates. First, whether Bates was owed compensation for length of service when his employment ended with Degelder in 1997. Second, whether Bates was owed compensation from Degelder's Superintendents Bonus Plan (the "Bonus Plan"). The delegate dismissed the first issue in Bates' complaint and concluded Degelder owed Bates a bonus of \$5,474.00. Degelder appealed the latter conclusion.

On August 21, 1998, the Tribunal sent the parties a Notice of Hearing. The hearing was scheduled for 9:00 a.m. on September 21, 1998. Degelder was not in attendance when the hearing commenced as scheduled. I waited a period of time for a Degelder representative to arrive. Before starting the hearing, I telephoned Mr. Carl Stewart, Vice President & General Manager with Degelder. He had made the appeal submissions on Degelder's behalf. He told me that he would not be attending the hearing. The hearing began with only Bates in attendance.

At page 4 of the Original Decision, the Adjudicator noted that Degelder's appeal was based on four major points, one of which was that Mr. Bates had not performed his duties well on a particular job (Job No. 219). On the issue of unsatisfactory work performance, the Adjudicator noted at page 4:

Degelder relied on a letter from a representative of the building's owner. Degelder said the letter confirmed the building owner's dissatisfaction with Bates. The letter was supposed to be attached to Degelder's July 13,

BC EST #D005/99
Reconsideration of BC EST #D454/98

1998 submission. The letter was not attached to the submission. Had Degelder attended the hearing, they could have produced the letter and requested that it be entered as an exhibit to the hearing. That did not happen and the letter was not in evidence before me.

The Adjudicator began his analysis of Degelder's appeal as follows:

In the original complaint, Bates had the obligation to prove his case. In appealing that Determination, the onus fell on Degelder to prove its case. As noted earlier, Degelder did not attend the hearing, give evidence at the hearing nor allow Bates to cross-examine Degelder witnesses on some or all statements that were made in their written submissions. Because of this, little weight can be put on the evidentiary claims in their submissions. I asked Bates to reply to the main points in Degelder's submission.

In confirming the Determination, the Original Decision contained the following conclusion:

There is no basis to overturn the delegate's Determination. The bonus was a "wage" as defined under the *Act*. Bates earned the bonus on Job No. 210. At the completion of the project, he was entitled to payment.

Degelder's application for reconsideration relies on three grounds:

1. the letter referenced in its appeals submission dated July 13, 1998 is "... fundamental to the determination of whether or not Mr. Bates was entitled to a bonus";
2. Job No. 210 and Job No. 219 were one project rather than two projects as decided by the Adjudicator; and
3. it is unreasonable for Degelder to pay a bonus to Mr. Bates for a project that was not completed to the satisfaction of either the client or Degelder.

ISSUES TO BE DECIDED

Degelder's application and the parties' submissions give rise to two issues:

1. Should the Tribunal reconsider the Original Decision; and
2. If so, should the Original Decision be confirmed, cancelled, varied or referred back to the Adjudicator?

ANALYSIS

Should the Tribunal reconsider the Original Decision?

The statutory authority to reconsider a decision of the Tribunal is found in Section 116 of the *Act*:

Reconsideration of 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.

The Tribunal has established a two-stage analysis for deciding whether it should exercise its discretionary reconsideration power (see: *Milan Holdings Ltd.*, BCEST #D313/98). At the first stage, the panel decides whether the matters raised in the application in fact warrant reconsideration.

The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases.
(*Milan Holdings*, page 7)

In *Northland Properties Ltd.* (BCEST #D423/98), the Tribunal described its discretionary powers under Section 116 of the *Act* as follows:

It is important to note that under Section 116 (1) of the *Act*, the Tribunal is given a discretion as to whether to reconsider a decision. Some further comments on the principles which should guide the Tribunal in exercising that discretion were set out in a recent reconsideration decision: *Director of Employment Standards* (BCEST #D313/98; Reconsideration of BCEST # D559/97) at page 6:

BC EST #D005/99
Reconsideration of BC EST #D454/98

The Tribunal has sought to exercise that discretion in a principled fashion, consistent with the fundamental purposes of the *Act*. One such purpose is to “provide fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*”: s. 2(d). Another is to “promote fair treatment of employees and employers”: s. 2(b).

To realize these purposes in the context of its reconsideration power, the Tribunal has attempted to strike a balance between two extremes. On the one hand, failing to exercise the reconsideration power where **important** questions of fact, law, principle or fairness are at stake, would defeat the purpose of allowing such questions to be fully and correctly decided within the specialized regime created by the *Act* and Regulations for the final and conclusive resolution of employment standards disputes: *Act*, s. 110. On the other hand, to accept all applications for reconsideration, regardless of the nature of the issue or the arguments made, would undermine the integrity of the appeal process which is intended to be the primary forum for the final resolution of disputes regarding Determinations. An “automatic reconsideration” approach would be contrary to the objectives of finality and efficiency for a Tribunal designed to provide fair and efficient outcomes for large volumes of appeals. It would delay justice for parties waiting to have their disputes heard, and would likely advantage parties with the resources to “litigate”: see *Re Zoltan T. Kiss* (BC EST #D122/96) ... (emphasis added).

And at page 7, the Tribunal elaborated further:

The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure **which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases.** At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise “a serious mistake in applying the law”: *Zoltan Kiss, supra*. As noted in previous decisions, “The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal’s decision or order in

BC EST #D005/99
Reconsideration of BC EST #D454/98

the absence of some compelling reasons”: *Khalsa Diwan Society* (BCEST #D199/96, reconsideration of BCEST #D114/96) ... (emphasis added).

Degelder’s application for reconsideration does not allege any mistake in applying the law nor that it has been denied a fair hearing. Rather, it questions two findings of fact made by the Adjudicator: that Job No.210 and Job No. 219 were two projects rather than one project; and a letter from one of Degelder’s clients was not attached to its submission dated July 13, 1998.

I note that Degelder attached to its application for reconsideration a copy of the letter which, it submits, was attached to its appeal submission dated July 13, 1998. I also note that the letter in question is dated July 14, 1998.

My review of Degelder’s application leads me to conclude that the Tribunal should not reconsider the Original Decision. Degelder has not established that the Original Decision contains a significant mistake in stating the facts. The reconsideration process which is created by Section 116 of the *Act* is not intended to provide a second opportunity to establish facts. One of the purposes of the *Act* (see: Section 2) is to provide a fair and efficient procedure for resolving disputes. It would be neither fair nor efficient to allow Degelder a second opportunity to make its appeal under the guise of a reconsideration application. The appeal process provided Degelder an opportunity to be heard, but it did not avail itself of that opportunity by not attending the hearing.

ORDER

I order that the reconsideration application be denied.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:sa