Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Swiftsure Taxi Co Ltd
("Swiftsure")

- 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.: 2001/715, 2001/716 & 2001/723

DATE OF DECISION: January 8, 2002

DECISION

OVERVIEW

Swiftsure Taxi Co. Ltd. ("Swiftsure") seeks reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of two decisions of the Tribunal, BC EST #D469/01 (the "original decision"), dated September 10, 2001, which confirmed a Determination made on May 2, 2001, and BC EST #D470/01 (the "penalty decision"), also dated September 10, 2001, which confirmed a penalty Determination dated May 2, 2001. Swiftsure says the original decision contains errors of fact, significant issues were either overlooked or misunderstood and the decision was inconsistent with previous decisions of the Tribunal. Swiftsure says the penalty decision should not have been made without a hearing. Swiftsure has also requested a suspension, under Section 113 of the *Act*, of the original and penalty Determinations and decisions pending a further hearing on the original decision and a 'true hearing' on the penalty decision.

This application for reconsideration has been filed in a timely way.

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 are whether the appeal hearing should be re-established to allow Swiftsure to call more witnesses; whether the adjudicator of original decision made errors of fact, and misunderstood or overlooked critical evidence, whether the original decision was inconsistent with a previous decision of the Tribunal and whether the penalty Determination should be cancelled and a hearing held on the appeal of the penalty Determination. Depending on the outcome of the foregoing issues, the question of a suspension of the effect of the decisions may also arise.

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.

ARGUMENT AND ANALYSIS

I find that none of the matters raised in this application warrant reconsideration. The reasons for that conclusion follow.

In support of the application for reconsideration of the original decision, Swiftsure raises several arguments which I shall summarize as follows:

1. The adjudicator overlooked key evidence given by Cynthia Cantelon, where she said that Swiftsure's dispatchers only recorded the time the drivers took the keys and the time they returned them;

2. The adjudicator used the evidence given by Sandra Evans, even though she changed her evidence and lied at the hearing;

3. The adjudicator does not state that Laurie Aho told the investigating officer during the investigation that Godfrey would not answer his radio when called for a trip;

4. There were witnesses who were not available to testify at the appeal hearing, whose evidence would have lead the adjudicator to a different conclusion, although the identity of those persons is not provided nor is any summary of their evidence provided anywhere in the application;

5. The adjudicator wrongly indicated that Mr. Whalla and Mr. Kang took control of the operations of Swiftsure in July, 2000;

6. The adjudicator failed to make any reference in the original decision to an assertion made by Swiftsure in its opening statement; and

7. The decision is inconsistent with another decision involving the same complainant and Duncan Taxi Ltd.

In reply to the submission concerning the testimony of Ms. Cantelon and Ms. Evans, the Director submits that Swiftsure has not established a valid ground for reconsideration based on their disagreement with the evidence given by Ms. Cantelon or their perception that Ms. Evans gave contradictory or false evidence. The Director submits that the adjudicator was in the best position to weigh their evidence against other evidence presented at the hearing and to assess what effect should be given to their evidence and, more particularly, to assess Ms. Evans' credibility and whether her evidence should be accepted. The Director notes that Swiftsure has provided no evidence to support the allegation that Ms. Evans lied and says the matter relied on by Swiftsure had, in any event, no bearing on the decision. I agree with the Director, and add the following comments.

In respect of Ms. Evans, an allegation that a witness has lied is a serious one. It is, in fact, an allegation of criminal conduct. The Tribunal has a compelling interest in ensuring the integrity of its authority and processes and welcomes any appeals or applications whose objective is to rectify a fraud committed against the Tribunal or its processes. However, keeping in mind the seriousness of the subject matter, such appeals and applications must be accompanied by clear and cogent evidence in support of the allegation. It is futile for an applicant to come before the Tribunal with a bald assertion that a witness has lied under oath. Such assertions may represent nothing more than a disagreement with conclusions of fact made by the adjudicator and a subjective manifestation of that disagreement. This application contains no evidentiary support for the assertion that Ms. Evans lied and contains no other basis upon which I might disregard the decision of the adjudicator to accept her evidence.

Swiftsure appears to have made the submission to the adjudicator at the hearing that the evidence of Ms. Evans should be discounted. Their argument was, obviously, not accepted. In a very

real sense, this part of the application is nothing more than a request for another panel of the Tribunal to second guess the decision of the adjudicator of the original decision to accept the evidence of Ms. Evans over evidence provided by Swiftsure. In *Milan Holdings Ltd., supra*, the Tribunal said:

> At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration: *Re British Columbia (Director of Employment Standards)*, BC EST #D122/98. In deciding the question, the Tribunal will consider and weigh a number of factors. For example, the following factors have been held to weigh against a reconsideration:
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> . . .
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> (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).

The same considerations apply to the argument made in respect of the evidence provided by Ms. Cantelon. The application does no more than request that I take a different perspective of her evidence than taken in the original decision. That much is abundantly clear from Swiftsure's reply to the submission of the Director on the application. In that reply, Swiftsure says:

> How can one believe that Ms. Cantelon makes a statement that the drivers take the keys and she does not know what drivers do after that and then turn around and say they worked 12 hour shifts . . .

The above is just an argument about her evidence should have been viewed. It does not show any error that would warrant reconsideration of the original decision.

The application, as it relates to the decision of the adjudicator not to consider the statement made by Laurie Aho to the delegate, is also determined on the same basis, with one additional consideration. Ms. Aho did not give evidence under oath at the hearing, although she was invited to attend by at least two of the parties. The adjudicator was not bound to accept the information she provided during the investigation. He was free to accept it or not. If Swiftsure considered her evidence important to their appeal, it was their responsibility to ensure her attendance in order to provide that evidence under oath to the adjudicator and be subjected to cross-examination on it. Failing that, it was open to the adjudicator to accept other evidence in preference to her earlier statements. No error has been shown and this argument raises no proper ground for reconsideration.

Swiftsure says there are witnesses who were not available for the hearing that can provide evidence which should lead the adjudicator to a different conclusion. The Director argues the application gives no indication who these potential witnesses are nor give any indication of what they might say. I have noted the same concern, above. In its response, Swiftsure sheds no light on these concerns, but simply states:

> The witnesses were not available for the hearing and the Director states if it is the drivers they would have been available on the hearing date, but does not explain how he came to that conclusion or is he just guessing.

That is not the point. The point is that if the Director is uncertain about the basis for the application, then the Tribunal is likely to be equally uncertain. The Tribunal should not be left guessing about the factual basis for this application. The Tribunal has a discretion to grant a reconsideration and takes a restrained approach to the exercise of that discretion. The rationale for that approach is grounded in the purposes and objects of the statute and have already been set out more fully in the reference to *Milan Holdings Ltd.*, *supra*. The burden is on the applicant to show there is some basis for the Tribunal exercising its discretion to grant a reconsideration. In the face of uncertainty over the factual foundation for the application, the likelihood the Tribunal will refuse to exercise its discretion in favour of the applicant is increased and that is the result with this argument. More fully stated, I can find no factual foundation for concluding this matter is one that warrants reconsideration.

Nor does the assertion made by Swiftsure that the adjudicator wrongly stated that Mr. Whalla and Mr. Kang took control of Swiftsure in July, 2000 warrant a reconsideration of the original decision. While it does appear that this is a factual inaccuracy in the original decision, it appears to make no significant difference in the analysis of the problem. There was no factual issue before the adjudicator concerning when Mr. Whalla and Mr. Kang assumed control of Swiftsure. The issues were how much Swiftsure owed Godfrey for fuel purchased by him during his employment and whether Swiftsure owed Godfrey for wages, annual vacation and statutory holiday pay. Central to the first issue was whether Godfrey was being required to pay for all of the fuel he used, or only ½ of it, and central to the second issue was whether the Director's calculation of number of hours worked was fair, reasonable and rationally grounded in the facts made available to the Director during the investigation.

The allegation that the adjudicator failed to make any reference to Swiftsure's opening statement does not provide any ground for reconsideration. In any event, the suggestion that the drivers do not really pay for their own fuel because the money used is part of an advance is just semantics and ignores the question which the adjudicator had to decide, which was whether Godfrey was required to pay part of Swiftsure's business costs. The adjudicator was satisfied on the evidence that he was.

Finally, Swiftsure has suggested the original decision is inconsistent with another decision made by the same adjudicator involving Godfrey and Duncan Taxi. No reconsideration is warranted on this ground. The application does not indicate how these two decisions are inconsistent. I have read the decision to which Swiftsure is referring, *Duncan Taxi Ltd.*, BC EST #D471/01, and

I can find no inconsistency between that decision and the original decision. In any event, the application appears to say no more than that the adjudicator should have decided the appeal of Duncan Taxi Ltd. before he decided the appeal of Swiftsure because Godfrey's claim in one was not consistent with his claim in the other. There is nothing in either the application nor the Duncan Taxi decision to indicate there is merit to that suggestion.

In support of the application for reconsideration of the penalty decision, Swiftsure says only that the adjudicator agreed to suspend the hearing on the penalty Determination until a decision was made on Godfrey's file. The Director disagrees with that view, alleging the agreement was that if the Determination on which the penalty was assessed was not confirmed, the penalty Determination would be cancelled.

I do not need to decide which version of the "agreement" is correct, as I am satisfied there is no reason to reconsider the penalty decision. I have noted that the sole ground of appeal on the penalty Determination was that Swiftsure had "fully and honestly cooperated" in resolving the first contravention of the *Act*, which was identified in the penalty Determination as the first step in the series of escalating penalties described in Part 11, Section 98 of the *Act*. The penalty decision considered that position, but decided other circumstances justified the imposition of some penalty. In the circumstances, there is nothing that would lead me to conclude the penalty decision was wrong.

For all of the above reasons, I conclude these applications do not raise any matters that warrant reconsideration and are, accordingly, denied.

In light of my conclusion on the applications for reconsideration, it is unnecessary to consider whether the application by Swiftsure under Section 113 of the *Act* for a suspension of the effect of the Determinations and decisions. That application is moot and, on that basis, is denied.

ORDER

Pursuant to Section 116 of the *Act*, I order the original decision, BC EST #D469/01, and the penalty decision, BC EST #D470/01, be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal