

An Application for Reconsideration

- by -

1 Cellular Group Inc.
 (“# 1 Cellular”)

- 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.: 2002/556

DATE OF DECISION: January 15, 2003

DECISION

OVERVIEW

#1 Cellular Group Inc. (“#1 Cellular”), seeks reconsideration under Section 116 of the *Employment Standards Act* (the “*Act*”) of a decision of the Tribunal, BC EST #D472/02, dated October 23, 2002 (the “original decision”). The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on July 11, 2002 and which concluded #1 Cellular had contravened the *Act* in respect of the employment of Darrel Hamilton and ordered #1 Cellular to cease contravening, and to comply with, the *Act* and to pay an amount of \$1,190.61.

#1 Cellular seeks a reconsideration of the original decision on the ground that the Tribunal failed to comply with principles of natural justice by not conducting an oral hearing on the appeal.

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 is whether the decision to decide the appeal on written submissions only was a failure to comply with principles of natural justice.

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.

If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration.

ANALYSIS

The appeal of the Determination was filed by #1 Cellular with the Tribunal on July 16, 2002.

In the appeal, #1 Cellular did no more than assert Mr. Hamilton did not tell the truth and the delegate "supported fraudulent actions by the respondent". The appeal does not say what Mr. Hamilton failed to tell the truth about or what 'fraud' was committed. There is a reference in the appeal that Mr. Hamilton "never submitted any time sheets only commission statements", but that comment is unrelated to the issues raised in the appeal. The appeal alleged an error in the facts, but failed to identify the error or provide any material with the appeal supporting that allegation. The appeal indicated there was a "different explanation of the facts", but none was provided with the appeal. #1 Cellular asked for an oral hearing on the appeal, but no explanation was given to support this request.

The Tribunal acknowledged receipt of the appeal in a letter dated July 16, 2002, a copy of which was sent to #1 Cellular. The letter indicated, among other things, that the Tribunal could decide the appeal on the written submissions alone. #1 Cellular knew, or ought to have known, that the appeal could be decided upon written submissions. They were given the opportunity to, and did, make written submissions. #1 Cellular was provided with a copy of all documents which were provided by the Director to the Tribunal. The submissions filed by #1 Cellular in support of the appeal and requesting request for reconsideration indicate an ability to express thoughts in writing.

The Adjudicator of the original decision was aware of the request for an oral hearing, noting in the original decision that such a request had been made but the Tribunal had determined the appeal would be decided on the written submissions.

There were two issues raised in the appeal of the Determination: first, whether Mr. Hamilton was an employee for the purposes of the *Act*; and second, whether the Director correctly calculated the amounts owed.

The original decision noted, in respect of the first issue, that #1 Cellular had provided no new or additional evidence. The original decision found the correct legal tests had been applied and the conclusion was consistent with the available evidence. On the second issue, the original decision indicated that the findings of the Director were well grounded in the available evidence and substantially dictated by an application of the minimum wage, minimum hours of work, wage deduction and length of service compensation provisions of the *Act*.

Generally, the Tribunal will not hold an oral hearing on an appeal unless the case involves a serious question of credibility on one or more key issues or it is clear on the face of the record that an oral hearing is the only way of ensuring each party can state its case fairly (see *D. Hall & Associates Ltd. v. British Columbia (Director of Employment Standards)* [2001] B.C.J. No. 1142 (B.C.S.C.)). A party may not presume an oral hearing will be held simply because one has been requested. I see nothing in the appeal or the appeal material that indicates an oral hearing was required in order to fairly decide the issues raised.

Nor does this application contain any facts or reasons which lead me to conclude that an oral hearing would have been the only adequate way of providing a fair opportunity to state their case. No new evidence has been provided. No error in the findings made in the original decision has been identified and demonstrated, nor does the application contain any argument or reasons how the original decision is incorrect. There is no apparent error in the analysis and conclusion made in the original decision.

This application is denied; the Tribunal will not exercise its discretion to reconsider the original decision.

ORDER

Pursuant to Section 116 of the *Act*, I order the original decision, BC EST #D472/02, dated October 23, 2002, be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal