An Application for Reconsideration

- by -

Fresh Slice Operating Ltd. operating as Fresh Slice Pizza
(the "Employer")

- 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: Fern Jeffries

FILE No.: 2001/814

DATE OF DECISION: January 15, 2002

DECISION

This is a request to reconsider a decision pursuant to Section 116 of the *Employment Standards Act* (the *"Act"*) that provides:

(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.

OVERVIEW:

The Determination issued on October 23, 2000, found the employer contravened the *Act* and accordingly ordered unpaid wages, overtime, vacation pay and statutory holiday pay in the amount of $370.80 plus interest to be paid to Sabrina Arai; and unpaid wages, overtime, and vacation pay in the amount of $1041.43 plus interest to be paid to Jayda Martinolich

In the appeal, the Employer contested the amounts owed. The Tribunal attempted to get the parties to agree to a settlement however, after many discussions the matter was referred to adjudication. Given the differing perspectives in this case, the Tribunal decided that an oral hearing was necessary to decide this appeal. Notices of the hearing were sent on March 8, 2001 to the parties at the addresses they supplied. The hearing was scheduled for April 2, 2001.

The Employer failed to appear at the hearing. At appeal, the onus is on the appellant to prove that the Determination is wrong. Therefore, consistent with Tribunal practice, the adjudicator dismissed the appeal. The Employer now requests that the Tribunal reconsider this decision however the Tribunal has decided that this is not a case that warrants reconsideration.

ISSUE:

Did the adjudicator fail to comply with the principles of natural justice by denying the employer a hearing?

Did the adjudicator make a serious mistake in stating the facts of the case such that the Decision is fundamentally flawed?

FACTS:

The complaints date from work performed in October and November 1999. The delegate experienced some difficulty with the Employer's records with respect to both gaining access to the records and to the completeness of the records provided. The Employer alleged criminal activity on the part of one of the employees. Although the Employer provided the name of the

alleged witness to this theft to the delegate, the witness did not return the calls made by the delegate.

Following the investigation, the delegate found that the records and accounts of the claims made by the employees to be more credible than the versions of events provided by the employer.

The Determination was issued on October 23, 2000 and the appeal was filed on November 14, 2000. Following an unsuccessful attempt to settle the dispute, a hearing date was set. The notice of hearing was sent to parties on March 8th, advising that the hearing would take place on April 2, 2001.

On April 5, 2001, the Employer left a voice mail message at the Tribunal's office informing the Tribunal of a new address: 2411 East Hastings.

The Decision issued on April 18th and mailed to the new address supplied on April 5th provided the following reasons:

> "Freshslice was notified of the appeal hearing but it did not attend the hearing, nor has it provided the Tribunal with what is a reasonable explanation for the failure to attend. It is Tribunal policy to consider an appeal abandoned where the appellant does not appear for his or her hearing and does not offer any reasonable explanation for the absence.
>
> I am satisfied that it is either that the appeal has been abandoned or it is that it is frivolous, vexatious, trivial or not brought in good faith and one to dismiss on that basis as the Tribunal may do pursuant to section 114(1) (c) of the *Act*.
>
> Freshslice has failed to show that the Determination is in any way in error. It claims that Arai did not work two of the days for which she is awarded pay but it has failed to provide clear proof of that. And while Freshslice, on filing its appeal, again suggested that moneys went missing during Martinolich's shift, I find that, as matters are presented to me, there is in fact no evidence of theft at all."

On May 15th, the Tribunal received a letter from the Employer's representative indicating that the Employer intended to request a reconsideration. The actual application for reconsideration was not received until November 15, 2001. The request alleges that the Employer did not receive the notice of hearing as it had relocated and that the adjudicator has mistaken certain facts in his Decision.

ANALYSIS:

The Act intends that the adjudicator's Appeal Decision be "final and binding". Therefore, the Tribunal only agrees to reconsider a Decision in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and

to promote efficiency and fairness of the appeal system to both employers and employees. This reflects the purposes of the *Act* detailed in Section 2.

As established in Milan Holdings (BCEST # D313/98) the Tribunal has developed a principled approach in determining when to exercise its discretion to reconsider. 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.

Again, as established in the case noted above, a primary factor weighing against reconsideration is when the application for reconsideration has not been brought in a timely manner and when there is no valid reason for the delay. Even if the application has not been brought in a timely manner, the Tribunal may reconsider the Decision if the matter cries out for correction.

Reasons the Tribunal may agree to reconsider a Decision are detailed in previous Tribunal cases. For example, BC EST#D122/96 describes these as:

- The adjudicator fails to comply with the principles of natural justice;
- There is some mistake in stating the facts;
- The Decision is not consistent with other Decisions based on similar facts;
- Some significant and serious new evidence has become available that would have led the Adjudicator to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The Decision contains some serious clerical error.

While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case. As outlined in the above-cited case:

> It would be both unfair and inefficient if the Tribunal were to allow, in effect, two hearings of each appeal where the appeal hearing becomes nothing more than a discovery process for a reconsideration application.

In determining whether this application for reconsideration meets the high standard applied by the Tribunal, I will first consider whether this application was brought in a timely manner. In her submission, the Director argues that the application was not timely:

The Director submits that Fresh Slice Operating Ltd. operating as Fresh Slice Pizza ("Fresh Slice") only brought forward the application for reconsideration when a Third Party Demand notice had been issued against the company's bank accounts in the collection of the monies owed, resulting in payment to the Director.

I note that the representative of the applicant wrote to the Tribunal on May 15, 2001 indicating an intention to apply for reconsideration. In response, the Tribunal wrote on May 17, 2001 advising Fresh Slice of the reconsideration procedures and of the requirement for "full particulars regarding the grounds of your application". There was no action for some six months. Therefore in my view the argument made by the Director seems quite plausible.

I note also that one of the respondents indicates a certain level of frustration with the length of time involved in this process:

> "This claim has been investigated and unsettled for a little over 2 years now. Within that time, no new information or evidence for us or against us has been found. ... I am appalled and frustrated at the idea that FSO might still get yet another chance to prove themselves and cheat us out of our pay."

Fresh Slice has not provided any reasonable explanation for the delay. I find that the application is not timely. Nonetheless, the Tribunal may reconsider the decision if there is a grievous error or miscarriage of justice. I turn then to the allegation that there was a denial of natural justice.

Correspondence and notice of hearing was sent to the address supplied by Fresh Slice. The business moved during the course of these proceedings. None of the material sent by the Tribunal was returned by the Post Office as undeliverable. This would lead a reasonable person to believe that the business had submitted a notice of Change of Address to Canada Post requesting that its mail be redirected. This would certainly be normal business practice.

In his May 15, 2001 letter to the Tribunal, the representative of the employer notes that

> "The registered records office of the Company did not change during the period and there was no notice of the hearing delivered there…"

I must point out that all correspondence with the employer was to the address provided by the employer, i.e. its East Hastings Street address, not the address of the registered records office. At no point did the employer request that the Tribunal send correspondence to that address.

Also, I concur with the Director that there is an obligation on the part of the business to advise the Tribunal of a change of address that occurs during proceedings before this body.

I find that, in all probability, notice of the hearing was received and that there was no denial of natural justice. The employer simply failed to attend the hearing.

Was there then a mistake in the facts? No additional information is before the Tribunal in this regard. While there is an allegation that the adjudicator made an error, the applicant provides no substantiation. The Tribunal has requested such substantiation on numerous occasions:

- On May 17, 2001, the Tribunal requested "full particulars regarding the grounds of your application."

- On November 22, 2001 the Tribunal acknowledged the application for reconsideration and asked parties "to respond to the issue of whether the Tribunal should accept this reconsideration application, given it was filed seven months after Adjudicator Collingwood rendered his decision. The parties are also invited to respond to the substance of the application".

- On December 18, 2001 the Tribunal shared copies of the submissions from the Director and from one of the respondents and invited "a final reply".

The employer has not responded to any of these requests. No written submissions containing any new evidence or argument was submitted throughout this process.

On January 9, 2001 the Tribunal advised parties that the case was set for adjudication. At that point, the employer phoned the Tribunal, claiming not to have understood any of the other correspondence and therefore requiring an extension to file a submission. In the unlikely event that the Tribunal's correspondence was not clear, an extension to 9:00 a.m. January 14 was granted.

A submission was received at the Tribunal office at 9:51 on January 14, 2001. This submission simply re-states the facts and promises an additional submission by the Employer's witness to the alleged criminal activity. No such additional submission has been received by the Tribunal and the deadline is long since past. I give this late submission by Fresh Slice no weight.

I find that there is no evidence to substantiate the claim that the adjudicator made a serious mistake in the facts.

Natural justice requires that parties have the opportunity to:

1. Know the case against them;

2. Have the opportunity to dispute, correct or contradict anything prejudicial to their position.

3. Present argument and evidence in support of their position.

I find that there has been no denial of natural justice and that there has been no serious error on the part of the adjudicator.

ORDER

The Decision of the Adjudicator is confirmed.

Fern Jeffries
Adjudicator
Employment Standards Tribunal