An Application for Reconsideration

- by -

Pimm Production Services Inc.
("Pimm")

- 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.: 2001/815 and 2001/865

DATE OF DECISION: January 21, 2002

DECISION

OVERVIEW

Pimm Production Services Inc. ("Pimm") seeks reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decisions of the Tribunal, BC EST #D564/01 (the "original decision"), dated October 22, 2001, which varied a Determination made on June 26, 2001. Pimm says the original decision contains errors of fact and law and that the Tribunal contravened principles of natural justice by failing to hold an oral hearing on the appeal. The applicant says that Pimm Production Services Inc. was not the employer of the complainant and the actual employer was another corporate entity, Pimm's Production Equipment Ltd. Pimm has also requested a suspension, under Section 113 of the *Act*, of the effect of the original Determination and decision pending a reconsideration of the original 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, first, whether Pimm was correctly named as the employer for the purposes of the *Act* and, second, whether the original decision was correct in its conclusion that the employer had not met the requirements of the *Act* in regards to the payment of overtime.

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 am not satisfied that Pimm has raised any matters that warrant reconsideration and the application is, accordingly, denied.

Pimm argues the adjudicator of the original decision misunderstood the 'system' under which the complainant was, allegedly, paid a different wage rate (of his regular wage) for travel. It is apparent from the original decision, however, that the adjudicator did not misunderstand the position taken by Pimm. On page 3 and page 4 of the original decision, the adjudicator states:

> The employer claims there were two rates of pay, one for work as an electrician's apprentice and one for travel.
>
> . . .
>
> The employer's argument is that there is, in effect, a regular wage rate for travel, that being _ of the employee's regular wage (what I am going to call "the basic rate"), and a premium rate which is 1½ times the basic rate and that, because the latter was paid, overtime was in effect paid.

The adjudicator found no evidence that Pimm ever paid a travel rate:

> That rate is one which exists only in the employer's imagination.

In this application, Pimm has attached a letter from their accountant, dated November 7, 2001. The Director objects to the presentation of that letter with the application, arguing the information set out in that letter was reasonably available to Pimm both during the investigation and the appeal. I agree and have given no effect to it in considering the application. The letter does not, in any event, add significantly to the evidence before the adjudicator in the appeal and it certainly is not clear evidence of a so-called travel rate. It simply adds one more document to the same argument that was made by Pimm on appeal. That position was fully canvassed on the appeal and this aspect of the application is no more than an attempt to have the reconsideration panel re-weigh the evidence and arguments made on appeal.

I do not need to address the argument that the adjudicator made a mistake in law by concluding the agreement to have a separate travel rate was a nullity. There are at least two reasons for this conclusion. First, I agree with the Director that Pimm has mis-stated the finding in the original decision. The adjudicator did not say an agreement to have separate wage rates for work and travel was a nullity; the adjudicator said that an employee may not make an agreement that allows an employer to avoid the requirement to pay overtime pay in accordance with the requirements of the *Act*. That is a correct statement of the legal effect of Section 4 of the *Act*. Second, the key conclusion of the adjudicator was that there was no clear evidence of an agreement to pay a separate travel rate. I have already decided that no reconsideration is warranted on that conclusion. The comment about the legal effect of such an agreement was not central to the original decision, so even if I agreed it was wrong, it would not make any significant difference to the analysis of the problem nor change the result.

On the natural justice argument raised by Pimm, once more I agree with the Director's response. Pimm was adequately notified that the appeal might be decided without an oral hearing. No request for an oral hearing was ever made by Pimm to the Tribunal. The decision of the Tribunal not to hold an oral hearing is not a breach of principles of natural justice unless 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. 1142 (B.C.S.C.). Pimm was able to state its case on appeal through submissions and statutory declarations. An oral hearing was not necessary to an adjudication of the issue.

On the final argument, the identity of the employer, I note at the outset that for the purposes of the *Act*, 'employer' is defined as including a person:

> *(a) who has or had control or direction of an employee, or*
>
> *(b) who is or was responsible, directly or indirectly, for the employment of an employee.*

If Pimm wished to allege it was not the complainant's employer, there was not only an obligation to raise that issue on appeal, but there was also a burden to justify that allegation in the context of the objectives of the statute and the above definition. The issue was not raised and no evidence or argument provided on that question. Even in this application, Pimm has failed to frame the argument that it was not the complainant's employer for the purposes of the *Act* in either the context of the *Act* or the definition of 'employer' in the *Act*. There is nothing in this argument that warrants reconsideration of the original decision on this point. It is not unusual that more than one entity can come within the definition of employer for the purposes of the *Act* in respect of an employee.

In light of my conclusion on the applications for reconsideration, it is unnecessary to consider whether the application by Pimm under Section 113 of the *Act* for a suspension of the effect of the Determination and original decision. 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 #D564/01, be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal