An Application for Reconsideration

- by -

Roger Mawdsley
("Mawdsley")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2002/557

DATE OF DECISION: January 28, 2003

DECISION

OVERVIEW

This is an application filed by Roger Mawdsley ("Mawdsley") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of an adjudicator's decision issued on October 16th, 2002 (B.C.E.S.T. Decision No. D453/02).

PREVIOUS PROCEEDINGS

By way of a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on May 7th, 2002, ProBed Medical Technologies Inc. ("ProBed") was ordered to pay Mr. Mawdsley the sum of $31,026.90 on account of unpaid wages (including vacation pay) and section 88 interest. Mr. Mawdsely's wages were calculated on the basis of a "draft" offer of employment (for the position of "Chief Executive Officer") dated December 14th, 2000. Mr. Mawdsely's wage claim spanned the period from January 15th to September 15th, 2001.

The delegate rejected, *inter alia*, ProBed's assertion that Mr. Mawdsley was a "volunteer" and thus not entitled to file a claim for unpaid wages under the *Act*. The delegate also rejected, for lack of evidence, ProBed's assertion that Mr. Mawdsley was in a conflict of interest during the latter months of his employment. Accordingly, Mr. Mawdsley's unpaid wage claim was calculated based on a $3,000 monthly salary for the first three months of employment and a $5,000 monthly salary thereafter. Despite Mr. Mawdsely's tenure of less than one year, the delegate awarded him vacation pay at a rate of 12% (rather than the statutory minimum of 4%) since the draft offer of employment contained a reference to "six weeks annual vacation leave".

ProBed appealed the Determination on the grounds that ProBed never made a formal offer of employment and that Mawdsley provided services to the company without any expectation of wages. Rather, according to ProBed, Mawdsley became involved in the company in an effort to "turn the company around" and that he ultimately hoped to profit through some sort of equity position in the company. Further, ProBed contended that even if Mawdsley was an "employee" as defined by section 1 of the *Act*, there was no agreement in place with respect to the payment of wages and, still further, during his "employment" Mawdsley actively undermined the economic interests of ProBed.

ProBed's appeal came on for hearing before Adjudicator Collingwood on September 11th, 2002. In reasons for decision issued on October 16th, 2002 (the decision now before me by way of the instant application for reconsideration), the adjudicator allowed the appeal and varied the Determination as follows:

> **ORDER**
>
> ...It is not $31,026.90 that Mr. Mawdsley is owed but the minimum wage for all hours worked and 4 percent vacation pay plus interest pursuant to section 88 of the *Act.*

Adjudicator Collingwood confirmed the delegate's finding that Mr. Mawdsley was an "employee" as defined in section 1 of the *Act.* However, the adjudicator concluded, based on the evidence before him, that the so-called December 14th, 2000 "offer" was subject to a condition precedent that was never

satisfied--namely, the securing of certain funding from a federal government program known as the "Community Futures" fund or, failing that, from some other source. Accordingly, Mr. Mawdsley was only entitled to be paid in accordance with the minimum statutory provisions with respect to both regular wages and vacation pay. Mr. Mawdsely's actual entitlement was remitted to the delegate for purposes of recalculation.

THE APPLICATION FOR RECONSIDERATION

Mr. Mawdsely's request for reconsideration is contained in a lengthy submission to the Tribunal dated November 9th and filed November 14th, 2002. In essence, Mr. Mawdsley says that the adjudicator erred in finding certain facts and did not otherwise fully consider all of the relevant material.

ANALYSIS

Although this application is timely, in my view, it is simply an attempt to have one adjudicator (who did not hear the witnesses' testimony) set aside another adjudicator's (who did hear the *viva voce* evidence) findings of fact. As the Tribunal has repeatedly stressed, that is not a proper exercise of the Tribunal's reconsideration power. Applications for reconsideration do not proceed as a matter of statutory right. The Tribunal *may* reconsider a previous decision (see section 116 of the *Act*) but only if the issue(s) raised by the applicant is sufficiently significant to warrant further inquiry. For example, the Tribunal will exercise its reconsideration power if there is evidence of a significant error in interpreting the *Act* or where findings of fact may be characterized as lacking a proper evidentiary foundation. However, the reconsideration provision of the *Act* is not to be used as nothing more than a simple attack on the findings of fact made by the adjudicator.

Not surprisingly, Mr. Mawdsley does not challenge the adjudicator's confirmation of the delegate's conclusion that he was an "employee" as defined in section 1 of the *Act.* Thus, no issue of statutory interpretation arises in the instant application.

With respect to the adjudicator's principal findings of fact, the material before me provides ample corroboration for those findings. Mr. Mawdsley maintains that the adjudicator must not have fully considered his (Mawdsely's) submissions since the adjudicator did not see the case in quite the same way as did Mr. Mawdsley. That is hardly a novel position. Disputants are often convinced about the correctness of their position and often conclude that an adverse decision can only be explained by some sort of lack of understanding of their position on the part of the decision-maker.

However, I do not conceive this to be a case where the adjudicator either ignored or misunderstood key evidence. This was a case where the two parties had quite different recollections about the matters in dispute. Ultimately, the adjudicator accepted one party's view, in this case, the employer's. But in so doing, the adjudicator relied on what was the more probable result particularly in light of the available corroborative evidence.

In finding for the employer, the adjudicator noted a couple of key points. First, the so-called "offer" of employment is not signed and is stated, on its face, to be a "draft" document. There is nothing in the December 14th "draft" letter that suggests it represents a memorandum of an already concluded employment contract. Second, and more importantly, the document clearly states, as was noted by the

adjudicator, that the offer is conditional on obtaining funding from the "Community Futures" program or some other source. The evidence before the adjudicator was that such funding was never secured.

It should also be noted that minutes of a director's meeting held on February 1st, 2001 further corroborate ProBed's position. These minutes record that Mr. Mawdsley has joined the company (which, at that point, was essentially insolvent) as its "Chief Executive Officer" but that the compensation set out in the December 14th draft letter--as well as the compensation of all other ProBed executives--would not be payable until appropriate funding had been secured. Indeed, it was Mr. Mawdsely's task, in large measure, to endeavour to secure such financing.

Although there was no valid agreement in force with respect to compensation, it does not follow that Mr. Mawdsley is not entitled to any compensation. He was a ProBed employee during the period in question and, absent a valid compensation agreement, he is entitled to be paid in accordance with the minimum provisions of the *Act*. The adjudicator so concluded. I find, based on my review of the material that was before the adjudicator, that such a finding was amply supported by the evidence.

ORDER

The application for reconsideration is **refused.** It follows that B.C.E.S.T. Decision No. D453/02 is confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal