Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Mountainside Day Care Ltd.
("Mountainside" or "Appellant")

- 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

TRIBUNAL MEMBER: Paul E. Love

FILE No.: 2003A/308

DATE OF DECISION: March 9, 2004

DECISION

OVERVIEW

This is an application for reconsideration, made by Mountainside Day Care Ltd. ("Mountainside", or "Employer" or "Appellant") of a decision of the Employment Standards Tribunal ("Tribunal") dated September 24, 2003 (the "Original Decision"). The Delegate issued a Determination, dated May 9, 2003, finding that Sarah Daniel ("Daniel" or the "Employee") was entitled to the sum of $1,402.10 consisting of overtime wages, vacation pay on the overtime wages and interest in accordance with section 88 of the *Act*. The Original Decision was issued on the basis of written submissions, without an oral hearing.

The submission of the Employer clearly indicated that the Employer was asking the Reconsideration Adjudicator to re-weigh and re-consider the evidence on rather minor calculation points, which were dependent on accepting the Employer's version of the records. This was a relatively simple case where the Employer paid the employee at straight time rather than the overtime rates set out in the *Act*. The Employer's record keeping was deficient. This reconsideration application does not involve any questions of law, fact, principle or procedure which were so significant that the issues should be reviewed because of their importance to the parties and/or their implications for future cases. The purpose of reconsideration is not to re-weigh the evidence, or provide another opportunity for an unsuccessful party to re-argue its case. The applicant has not made out an arguable case of sufficient merit to warrant a reconsideration of the merits of the Determination. I dismissed this appeal on the basis of the first branch of the test in *Milan Holdings Ltd.*, BCEST #D186/97, as this case was not a proper case for reconsideration.

ISSUES TO BE DECIDED

Did the Employer met the threshold for a reconsideration of the merits of the Decision?

If, the Employer met the threshold for reconsideration, did the Delegate err in calculating the overtime wage entitlement of the Employee?

FACTS

I decided this reconsideration application on the basis of written submissions of Mountainside Day Care Ltd. ("Mountainside" or "Employer"), and submissions filed by the Delegate. Sarah Daniel ("Daniel" or "Employee") did not file a submission in this reconsideration process.

Daniel worked for Mountainside from February 2000 until April 26, 2002 as a day care worker. After resigning, she presented a claim for overtime to the Employment Standards Branch. She kept track of the overtime she worked, and submitted pay stubs corresponding to the record of hours worked.

The Delegate issued a Determination on May 9, 2003 in the amount of $1,402.10 consisting of overtime of $1,292.03, vacation pay of $51.68 and interest of $60.39. Daniel kept track of her hours and submitted copies to the Delegate, and also sent pay stubs corresponding to her hours. Her record of hours matched the hours submitted by the Employer, but the Employer paid the hours at straight time rather than at overtime rates as provided by the *Act*. Some of the overtime hours were worked for taking care of special

needs children funded by the Ministry of Children and Families, and the Mountainside alleged that this was a "different position", and that the hours were worked pursuant to an agreement to work at straight time rates. The Delegate found that any agreement to work overtime at straight time rates was not enforceable by virtue of section 4 of the *Act*. The Delegate found that Mountainside was Daniel's employer whether the child was funded by the Ministry of Children and Families, or another source, and that where the hours exceeded 8 per day, Daniel was entitled to overtime. The Delegate made a finding that the Employer failed to keep proper payroll records in accordance with section 27 and 28 of the *Act*. The Delegate imposed a zero dollar penalty , pursuant to Section 98 of the *Act*, and 29 of the *Employment Standard Regulation* for violating the overtime provisions of the *Act*.

Prior to issuing the Determination, the Delegate had some difficulties in interpreting the records provided to the Delegate by Mountainside. The Employer differentiated between hours worked for children at Mountainside, and hours worked at Mountainside for special needs children, subject to a Ministry of Children and Families Contract. Prior to issuing the Determination, the Delegate appears to have sent calculations to the Employer on the following dates in the following amounts:

January 24, 2003	$4,145.00
January 31, 2003	$1,576.00
February 12, 2003	$1,326.00
April 22, 2003	$1,292.00

In my view, nothing turns on this issue. It is not uncommon that a Delegate refines the calculations based on records and explanations of documents from the parties, prior to issuing a Determination.

The Adjudicator rendered the Decision on September 24, 2003 ("Original Decision"). The Adjudicator confirmed that Daniel was entitled to the sum of $1,402.10 which included annual vacation pay, overtime, and accrued interest for a total of $1,402.10. I have set out below the issues raised by Mountainside in the appeal, and the findings of the Adjudicator:

Did the Director observe the principles of natural justice in making the Determination?

The Adjudicator found that Mountainside had an opportunity to present its evidence, questions the evidence, and make submissions to the Delegate. The Adjudicator found that Mountainside failed to meet the onus on it to demonstrate a brach of natural justice.

Were the Delegate's calculations regarding overtime correct?

On this issue the Adjudicator stated:

> With respect to the Appellant's assertion that the Delegate's calculations are in error in view of the varying assessments that were issued over time and on the basis of calculating overtime on pay-periods of 12 or 11 days rather than bi-monthly pay-periods, the Appellant appears to ignore the evidence of the actual hours worked by the Respondent in any given day. I find that the Delegate correctly applied Section 40 of the Act which requires overtime to be paid for work over 8 hours in any one day. The Appellant has failed to establish an error in the Determination on this ground as well.

> Regarding the "banking of overtime" it is apparent that no written request was presented in evidence for such a request and the Respondent denies such a request. In any event, as the Delegate noted, this would not have an effect on the outcome of the Determination as the hours worked as overtime would still be paid out at the appropriate overtime rates pursuant to section 42(2) of the Act and I find that the Appellant has failed to demonstrate an error in the Determination on this ground as well.

The final issue related to the calculation of interest. Mountainside argued that it should not be responsible for interest incurred due to the delay on the Delegate in issuing the Determination. The Adjudicator referred to section 88 of the *Act*, and found that the Delegate correctly calculated the interest.

Employer's Argument:

The Employer sets outs its request for reconsideration as follows:

> 1. The Adjudicator did not take into account schedule referred to in my letter of August 20, 2003 showing errors in the overtime hours calculated by the Director. In the Determination the Director demanded overtime based on these incorrect calculations.
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> A copy of the schedule is attached for your ready reference.
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> 2. It would appear from the ANALYSIS that the Adjudicator unconditionally accepted all the arguments and excuses of the delegate as correct whilst disregarding evidence provided to me to prove otherwise. I believe it would have been appropriate for the Adjudicator to have considered presentations made by both the parties.

In a submission dated January 6, 2004 the Employer made further argument. In particular the Employer stated

> ... It was indeed very generous of the Delegate to reply to the points raised by us despite the fact that she considers this reconsideration process "an opportunity to reargue the case" I would mention here that we are not re-arguing the case. All that we are doing is to present *once again* the facts and evidence, which were not correctly interpreted or overlooked and some adjustments including those agreed to by the Delegate, were not taken into account. ...

The submission goes on to raise calculation errors, and interest issues.

Director's Argument:

The Delegate submits that the Determination sets out the evidence contained and the decisions reached. The Delegate submits that this is not a proper case for reconsideration as the employer is simply saying the Determination ought to be changed. The Delegate submits that the Employer is responsible for keeping proper, accurate and concise records of the hours worked, and that the record keeping of the Employer raised issues of interpreting the records. The Delegate says, however, that the Employer has provided no information or evidence to show that the Adjudicator failed to comply with the principles of natural justice or made a serious mistake in applying the law, or that there was significant new evidence available which would have led to a different decision.

Employee's Argument:

The Employee did not file an argument in this reconsideration application.

ANALYSIS

In an application for reconsideration, the burden rests with the applicant , in this case the Employer, to show that this is a proper case for reconsideration, and that the Adjudicator erred such that I should vary, or cancel the Decision. An application for reconsideration of a Tribunal' s decision involves a two stage analysis, as set out in *Milan Holdings Ltd.*, BCEST #D186/97:

> 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*), BCEST #D122/98. In deciding this 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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> (a) Where the application has not been filed in a timely fashion and there is no valid cause for the delay: Re *British Columbia (Director of Employment Standards*), BCEST #D122/98. In this context, the Tribunal will consider the prejudice to either party in proceeding with or refusing the reconsideration: Re *Rescan Environmental Services Ltd*. BCEST #D522/97 (Reconsideration of BCEST #D007/97).
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> (b) Where the application's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): Re *Image House Inc*., BCEST #D075/98 (Reconsideration of BCEST #D418/97); *Alexander (c.o.b. Pereguine Consulting*) BCEST #D095/98 (Reconsideration of BCEST #D574/97); *323573 BC Ltd. (c.o.b. Saltair Neighbourhood Pub)*, BCEST #D478/97 (Reconsideration of BCEST #D186/97);
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> (c) Where the application arises out of a preliminary ruling made in the course of an appeal. "The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid multiplicity of proceedings, confusion or delay": *World Project Management Inc*., BCEST #D134/97 (Reconsideration of BCEST #D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.
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> 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. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": *Zoltan Kiss, supra*. As noted in previous decisions,
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> > "The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons": *Khalsa Diwan Society* (BCEST #D199/96, reconsideration of BCEST #D114/96).

> After weighing these and other factors relevant to the matter before it, the Panel may determine that the application is not appropriate for reconsideration. If so, it will typically give reasons for its decision not to reconsider the adjudicator's decision. Should the Panel determine that one or more of the issues raised in the application is appropriate for reconsideration, the Panel will then review the matter and make a decision. The focus of the reconsideration panel "on the merits" will in general be with the correctness of the decision being reconsidered.
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> The very point of reconsideration being to provide a forum for sober reflection regarding questions which are considered sufficiently important to warrant such review, we consider it sensible to conclude that questions deem worthy of reconsideration - particularly questions of law -should be reviewed for correctness.

The reconsideration power is one to be exercised with caution. A non-exhaustive list of grounds for reconsideration include:

- a failure by the adjudicator to comply with the principles of natural justice;
- a mistake of fact;
- inconsistency with other decisions which cannot be distinguished;
- significant and serious new evidence that has become available and that would have lead the adjudicator to a different decision;
- misunderstanding or failing to deal with an issue;
- clerical error.

Mountainside raises allegations related to calculation errors made by the Delegate. The Employer suggests that the Adjudicator ignored Mountainside's evidence. The issues raised by Mountainside are substantially the same issues that were before the Adjudicator. In my view, the Employer's argument relates to the weighing of evidence by the Adjudicator. This is apparent from a submission of the Employer which indicates:

> All that we are doing is to present *once again* the facts and evidence, which were not correctly interpreted or overlooked and some adjustments including those agreed to by the Delegate, were not taken into account.

This application for reconsideration is simply a request to another Adjudicator to re-weigh the evidence and substitute the Reconsideration Adjudicator's findings for that of the Original Adjudicator. In Mountainside's submission of January 6, 2004, the Employer raises adjustments that should be made to the Determination in the amount of less than $200.00, as well an unquantified interest adjustment. These adjustments, are however, argued on the basis of the Employer's interpretation of the evidence. The amounts are relatively minor and insignificant and reconsideration is not the proper forum to deal with these issues. Mountainside has had its opportunity to persuade the Delegate and the Adjudicator on calculation issues. Mountainside has not made out an arguable case of sufficient merit to warrant a reconsideration of the merits of the Determination.

For all the above reasons, I dismiss this application for reconsideration.

ORDER

Pursuant to section 116 of the *Act*, I order that the Decision dated May 9, 2003 is confirmed.

Paul E. Love
Member
Employment Standards Tribunal