An Application for Reconsideration

- by -

#1 Low-Cost Moving & Hauling Ltd.
(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: Kenneth Wm. Thornicroft

FILE No.: 2002/571

DATE OF DECISION: February 6, 2003

DECISION

INTRODUCTION

This is a timely application filed by #1 Low-Cost Moving & Hauling Ltd. (the "Employer") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of an adjudicator's decision issued on October 30th, 2002 (B.C.E.S.T. Decision No. D483/02).

PREVIOUS PROCEEDINGS

By way of a Determination that was issued by a delegate of the Director of Employment Standards on July 18th, 2002, the Employer was ordered to pay the sum of $990.74 to its former employee, Nicholas Kirschner ("Kirschner"), on account of unpaid wages (regular wages and overtime pay) and section 88 interest earned during the period October 21st to December 27th, 2001. Mr. Kirschner worked for the Employer, which operates a moving business, as a mover/driver (at an hourly wage of $10) during the last four months of 2001.

The Employer did not keep proper payroll records (and only produced incomplete records--after the Determination was issued--in response to a lawful Demand) with respect to the Mr. Kirschner's hours of work and, accordingly, the Director's delegate relied, in large measure, on Kirschner's own record of hours worked.

The Employer appealed the Determination to the Tribunal on the principal basis that Kirschner's time records did not accurately reflect his actual working hours during the period in question. In a decision issued on October 30th, 2002 (*i.e.*, the decision now before me on reconsideration), Adjudicator Stevenson properly noted that the burden was on the Employer to show that the Determination was incorrect. After noting that the Employer's appeal represented an attempt to introduce evidence that was not before the delegate (a tactic that is constrained by the Tribunal's decision in *Tri-West Tractors Ltd.*, B.C.E.S.T. Decision No. D268/96), Adjudicator Stevenson observed that even if the Employer's "new evidence" was accepted, it did not corroborate its position that the Determination was clearly incorrect:

> The burden is on Low-Cost, as the appellant, to persuade the Tribunal that the Determination was wrong and justifies the Tribunal's intervention...
>
> There is merit in the argument of the Director that I should not accept information provided by Low-Cost that was not provided during the investigation, but even if I accepted that information, I am not satisfied that it shows the Determination is wrong. I agree with the Director that simply providing information which shows how much a customer was charged for a particular service does not confirm either the hours worked by the individual or individuals who worked on that contract nor does it confirm that Kirschner worked on that contract. I also agree with the Director that there are discrepancies between the information shown on those contracts and the accompanying summary of hours worked without any explanation for those discrepancies. I am also puzzled, and concerned, that Low-Cost, after identifying the entries on a single page provided from the dispatch book as "examples of how records of employee hours are kept", has failed to provide all of the relevant pages from that book.
>
> I can find no basis for concluding that the Determination is wrong and the appeal is dismissed.
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> (Adjudicator Stevenson's Reasons for Decision, at pp. 3-4)

THE APPLICATION FOR RECONSIDERATION

The Employer has filed a timely request for reconsideration of Adjudicator Stevenson's decision. In essence, the Employer's position is that Mr. Kirschner is a proven liar and that his claim for unpaid wages amounts to an attempt to defraud the Employer.

Despite the forceful language used by the Employer's principal in his November 19th, 2002 submission to the Tribunal, I do not see that this is a case where the Tribunal ought to exercise its discretionary authority to reconsider a previous decision. Among other things, the Employer's principal asserts that Mr. Kirschner: "...when he made his application he lied and said he was not paid a dime during the entire period he was employed".

This latter statement is, itself, a fundamentally false representation of the substance of Mr. Kirschner's actual complaint. A perusal of Mr. Kirschner's complaint clearly shows that he only claimed unpaid regular wages for the period from December 19th to 27th, 2001--his last week or so of work. Mr. Kirschner also claimed unpaid wages for the period from October 1st to December 27th, 2001 but this aspect of the claim related, not to the failure to pay any regular wages (Mr. Kirschner acknowledges having received various wage payments during this period) but, rather, to the Employer's failure to pay *overtime pay* in accordance with the provisions of the *Act*. And on this latter point, I must say that there was nothing before the delegate, or the adjudicator or, indeed, before me, to show that the Employer did pay overtime wages to Mr. Kirschner in accordance with its obligations under the *Act*.

As previously noted, an application for reconsideration does not proceed as a matter of statutory right. The Tribunal *may* reconsider a previous decision (see section 116 of the *Act*). The Tribunal has indicated on countless occasions that an application for reconsideration is not to be used as a second (or, as in this case, a third) opportunity to challenge findings of fact that have been made after a proper consideration of the matter.

The Employer says that its appeal was adjudicated without the benefit of an oral hearing. That is so, however, an oral hearing is not a statutory requirement--see section 107 of the *Act*. In this instance, perhaps an oral hearing might have been appropriate if the Employer had presented cogent evidence that called into question the correctness of the Determination. However, in this case the Employer, who admittedly (albeit begrudgingly) did not maintain proper payroll records, says only that the employee's records are inaccurate. Further, my review of the limited evidence that has been submitted by the Employer leads me to conclude, if anything, that such evidence tends to undermine rather than advance the Employer's position.

ORDER

The application to reconsider the decision of the adjudicator in this matter is refused. It follows that the decision of Adjudicator Stevenson is confirmed as issued.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal