

An Application for Reconsideration

- by -

Dr. Robert H. Dykes

- 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.: 2001/855

DATE OF DECISION: January 25, 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 February 26, 2001, sets out in detail the lengthy process involved in the delegate’s attempts to access payroll records on behalf on the employee whose employment ended April 20,2000. These attempts began on July 14, 2000 with a letter from the delegate to the employer, followed by a Demand for Records issued on August 31, through to November 14 when the delegate finally received partial records.

The appeal set out numerous arguments for why the employee was not eligible to receive the wages claimed. The Decision issued by the adjudicator noted that:

“The appeal filed with the Tribunal on March 20,2001 raised no valid grounds of appeal in respect of matters arising under the *Act*”.

The Decision confirmed the Determination. The Reconsideration filed by the employer requests a rehearing on the grounds that the decision “was obtained by default”. No proof or substantiation is provided; no explanation is provided for the term “default”.

The reconsideration power of the Tribunal is discretionary. It is used sparingly, when there is a serious error of law or violation of the principles of natural justice. This request does not meet that test.

FACTS:

The facts of this case are clearly laid out in the Determination and the appeal Decision. The employee complained that she was not paid her final paycheque and that she was not paid for statutory holidays during her period of employment. The delegate made numerous efforts to obtain the payroll records that the *Employment Standards Act* obliges the employer to keep. The employer essentially ignored these requests, provided partial records, requested extension of established deadlines, and in short, failed to cooperate in the investigation. A penalty determination was issued in this respect. This process took from July 2000 through to January 31,2001. The Determination was issued on February 26, 2001. This Determination was based on “the balance of probabilities” as complete records never were provided.

In the submissions made at appeal, the employer submitted allegations that were entirely unrelated to the matter of whether wages were owed for work performed by the employee.

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 favor 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.

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.

I find that this application fails to provide any substantiation for its allegation. There is no serious error in the Decision and no violation of the principles of natural justice. Rather, in this

case, adherence to these principles seems to have denied to the employee reasonably speedy access to the wages that it has been determined she is owed.

ORDER:

The request for reconsideration is denied and the Decision is confirmed.

Fern Jeffries
Chair
Employment Standards Tribunal