

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.: 2001/854

DATE OF DECISION: January 31, 2002

DECISION

OVERVIEW

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.

The employer appealed a Determination issued by the delegate on March 30, 2001 that ordered him to pay two former employees wages, statutory holiday pay, annual vacation pay and accrued interest. Further, a zero dollar penalty was assessed. At appeal the onus is on the appellant to prove that the Determination is wrong. In the appeal, the employer raised numerous issues that were not raised with the delegate. Normally this would not be allowed at appeal. Moreover the appellant failed to appear at the hearing. According to Tribunal practice in cases where the appellant fails to appear, the Adjudicator considered that the appeal had been abandoned and ordered that the determination be confirmed.

The employer now seeks reconsideration. Reconsideration is discretionary and is only granted in extraordinary circumstances where there is a serious error in law or where there has been a violation of the principles of natural justice. This request fails to meet that standard and is denied.

ISSUE:

Does this application meet the Tribunal’s threshold for reconsideration?

ANALYSIS

The Tribunal has developed a principled approach to the exercise of its discretion to reconsider a decision. 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 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.

The employer requests reconsideration for three reasons:

- “1. Decision was obtained by default and a rehearing is requested
2. The adjudicator made several errors and ignored inconsistencies, misrepresentations, and obvious untruths made by Douglas [the employee] and therefore failed to comply with the principles of natural justice.
3. Significant issues in the appeal were misunderstood and ignored including under the terms and conditions that confirm that she could only be paid as an independent contractor and not as an employee.”

However no substantiation is offered. This is the same approach as was taken with the initial appeal. Many allegations were made, but no substantiation was offered.

I therefore conclude that this is not a request that meets the threshold test established by the Tribunal.

ORDER:

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

Fern Jeffries
Chair
Employment Standards Tribunal