An Application for Reconsideration

- by -

Manjit Mahal operating as Mahal Trucking
("Mahal")

- 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.: 2001/896

DATE OF DECISION: February 19, 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.

On November 14, 2001 the Tribunal heard an appeal of a Determination issued on July 24, 2001. The original decision of the adjudicator confirmed the determination, ordering that the employee be paid outstanding wages plus interest. The employer filed for reconsideration of this decision on December 28, 2001 on the basis that there had been a denial of natural justice. The basis for this claim was that the delegate had not adequately considered information filed by the employer. In fact this information was before the adjudicator. The appeal hearing 'cured' any deficiency in natural justice that may have occurred in the process of the investigation and issuance of the determination. This application for reconsideration therefore fails to meet the standard established by the Tribunal and is therefore denied.

FACTS

Manjit Mahal operates as Mahal Trucking. The employee, Wayne Masson, worked as a driver in this trucking business and was compensated on a commission basis. In response the complaint filed by the employee, the employer first took the position that Masson was an independent contractor. Later, he took the position that the hours claimed by Masson were incorrect and that in fact the employer overpaid the employee. The delegate made a preliminary finding and gave the employer until July 4 to provide evidence. The Determination issued July 24,2001 indicates that:

> "Mahal was given until the following Wednesday, July 4, 2001 to provide all of his evidence to support his position that he had over paid him and that the hours claimed were not accurate. No additional evidence was provided."

At the appeal of this Determination, the employer claimed that the delegate had refused to consider information that he submitted on July 2 and was marked 'received' on July 3, 2001". As the delegate was not present at the hearing to offer any other perspective, the adjudicator agreed to consider this evidence, noting that:

> "It is well established Tribunal practice not to accept new evidence on appeal. While I accepted Mr. Mahal's spreadsheet on the basis that he attempted to give it to the delegate after the deadline she provided to him, and she refused to accept it, I place little weight on it. The document was purportedly prepared by an employee of Kel-Mac to whom Mahal Trucking contracted its vehicles. The document does not identify the driver of the vehicle, and Mr. Masson was unable to say whether the dispatches noted were in respect of trips that he took. Furthermore, I am unable to determine, on the face of the document, what time Mr. Masson began work, or what time he quit".

The request for reconsideration is made on the basis that the failure of the delegate to consider this information provided on July 2nd amounted to a denial of natural justice and as such asserts that "a new hearing should be held".

ISSUE

Was critical evidence overlooked by the delegate or by the adjudicator? Was the employer denied a fair hearing?

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* (BC EST # D313/98) the Tribunal has developed a principled approach in determining when to exercise its discretion to reconsider. 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.

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.

In order to determine whether this application meets this threshold, I turn to the grounds for reconsideration submitted by the employer. In the attempt to prove that there has been a denial of natural justice, the counsel for the employer states that:

> "Judy MacKay was the delegate appointed to adjudicate Mr. Masson's claim. The Application was heard on July 2nd, 2001".

This appears to be a serious misunderstanding of the scheme outlined in the *Employment Standards Act*. Under the *Act*, a delegate of the Director investigates a complaint and may issue a Determination. There is no 'hearing' per se, nor is the delegate an "adjudicator", although clearly there is an adjudicative component to the process of issuing a Determination.

It is unclear why counsel for the employer believes that a hearing was held on July 2nd. I can find no basis for this belief. The application proceeds to comment further on deficiencies in the findings of the delegate and in summary states that:

> "the inadvertent failure by the Delegate to consider the evidence properly presented by the Employer within the time constraints imposed upon him amounts to a denial of natural justice, which has severely prejudiced the Employer's rights in this case. As such, the Delegate's decision should in these circumstances, be vacated and a new hearing should be held to determine what amount, if any, is owing by the Employer to Mr. Masson."

This application for reconsideration focuses solely on the defects, if any, of the investigation and determination. It does not consider the fact that there has been an appeal of the determination. The reconsideration process exists to consider whether there is serious fault with the decision of the adjudicator made at appeal.

In the January 22, 2002 response to the application for reconsideration, the delegate submits that the delegate did in fact consider the July 3rd submission and did try to contact the employer after

but had no response. The delegate goes on to explain why the July 3rd submission did not provide convincing evidence of hours worked.

At the November hearing, the adjudicator did consider new information from the employer on the understanding that the delegate did not have this in arriving at the determination. Therefore, if there was any denial of natural justice by the delegate, this was 'cured' at appeal when the 'new evidence' was in front of the adjudicator.

The test at reconsideration is whether there has been a serious error of law or a serious abuse of the principles of natural justice. The case made by the employer is focused solely on the allegations of deficiency with the investigation and determination, ignoring the appeal hearing and the decision of the adjudicator.

In my analysis, I find that any deficiency at the investigation and determination stage of this complaint was taken care of at the appeal. The employer has not raised any deficiency with the appeal process such that a claim of denial of natural justice is substantiated.

ORDER

I deny this request for reconsideration and confirm the original Decision of the adjudicator.

Fern Jeffries
Adjudicator
Employment Standards Tribunal