



An application for Reconsideration

- by -

Raj K. Jaspal

- 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 (as amended)

TRIBUNAL MEMBER: John M. Orr

FILE No.: 2006A/98

DATE OF DECISION: October 26, 2006

DECISION

SUBMISSIONS

Raj Jaspal	on his own behalf
Mary Walsh	on behalf of the Director

OVERVIEW

1. This decision responds to an application by Raj K. Jaspal ("Jaspal") pursuant to Section 116 (2) of the *Employment Standards Act* (the "Act") for reconsideration of a Tribunal decision #D065/06 (the "Original Decision") issued by the Tribunal on June 5, 2006.
2. Jaspal filed a complaint with the Employment Standards Branch alleging that his employer, S.G. Roofing Ltd ("SG") had failed to pay his wages when he worked for SG as a roofer from August 18, 2005 to September 2, 2005.
3. On January 13, 2006 a delegate of the Director of Employment Standards conducted a hearing but Jaspal did not attend despite having been properly notified of the time and place of the hearing. The delegate delayed the hearing to allow time for Jaspal to attend and a phone call was placed to the number provided by Jaspal. The hearing subsequently proceeded in his absence.
4. Despite Jaspal's non-appearance the delegate accepted his complaint as some evidence of the nature of his claim. Mr. Harjinder Gill ("Gill") attended the hearing on behalf of SG. Gill denied that the company had ever employed Jaspal. Gill testified under oath that Jaspal had attended the job site seeking work but had become involved in a quarrel with a worker on the site. Jaspal then left the site without ever having worked. When Gill arrived at the site at 11:00 am Jaspal had already left. Only Gill had authority to hire him.
5. The delegate noted that the complainant bears the burden of proving his claim. This included the onus of proving on a balance of probabilities that he was an employee of SG and the hours he worked for which he was unpaid. The delegate found that given Gill's sworn testimony and in the absence of some evidence from the claimant he had not met that burden. The delegate issued a Determination to that effect on February 13, 2006.
6. Jaspal appealed the Determination. In his appeal he wrote that he had started work for SG on August 18, 2005 but had cut his arm and had to leave the site to attend hospital. He indicated that he had subsequently worked for SG on a number of days until September 2, 2005.
7. Jaspal indicated that he was unable to attend the hearing conducted by the delegate on January 13th because he did not have transportation to get to the hearing. The delegate noted that the appeal did not allege any of the limited legal grounds for an appeal such as an error in law or a failure to observe the principles of natural justice.

8. A Tribunal Member in considering Jaspal's appeal noted that Section 112 of the *Act* provides that a person served with a determination may appeal the determination to the Tribunal on the following three grounds:
 - (a) the director erred in law;
 - (b) the director failed to observe the principles of natural justice in making the determination;
 - (c) evidence has become available that was not available at the time the determination was being made.
9. The Member noted that Jaspal did not specify on which of the above grounds the appeal was based but nevertheless considered all of the possible grounds. Jaspal did not dispute that he had received notice of the hearing. The Member found that once a party is given notice of hearing, the onus is on that person to make appropriate arrangements to attend. If the person is unable to attend, it is up to that person to apply for an adjournment. Jaspal did not notify the delegate that he could not attend and did not apply for an adjournment.
10. The Tribunal Member found that there was no evidence of a denial of natural justice or any error in law. The Member then considered whether Jaspal's submission amounted to such new evidence that was not available at the time the Determination was made. The Member considered the jurisprudence developed by the Tribunal and found that there was no information in Jaspal's written submission as to why the information in question would not have been available, or could not have been submitted to the delegate prior to the hearing. She also noted that there was not a high probative value to the written submission being without supporting evidence.
11. The Member concluded in the original decision that there was no basis for setting aside the Determination and the appeal was dismissed.
12. Jaspal has now applied for reconsideration of the Member's decision.

ANALYSIS

13. The Tribunal reconsiders a Decision only in exceptional circumstances in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *Act* provided in Section 2 "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act."
14. In the application for reconsideration Jaspal did not provide reasons for requesting reconsideration. However, he attached approximately 90 pages of documents from the files of the *Workers Compensation Board of British Columbia* ("the WCB"). It appears from a review of those documents that the WCB investigated Jaspal's claim and based on their investigation concluded that Jaspal was employed as he claimed for the purpose of their legislation.
15. It must be noted that Jaspal did not provide any of the evidence relied on by the WCB to the delegate in January 2006 or to the Tribunal prior to the appeal decision in June 2006.
16. The test for the exercise of the reconsideration power under section 116 of the *Act* is set out in *Milan Holdings Ltd.*, BCEST #D313/98. The Tribunal sets out a two-stage analysis in the reconsideration

process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. In deciding this question the Tribunal should consider a number of factors such as whether the application is timely, whether it is an interlocutory matter, and whether its primary focus is to have the reconsideration panel effectively "re-weigh" evidence tendered before the adjudicator.

17. The Tribunal in *Milan* went on to state that the primary factor weighing in favour of reconsideration is whether the applicant has raised significant questions of law, fact, principle or procedure of sufficient merit to warrant the reconsideration. The decision states, "at this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general". Although most decisions would be seen as serious to the parties this latter consideration will not be used to allow for a "re-weighing" of evidence or the seeking of a "second opinion" when a party simply does not agree with the original decision.
18. Essentially Jaspal is asking the Tribunal to have the whole matter sent back to the Director to be re-investigated and reheard. Yet all of the evidence upon which he seeks to rely was available in January 2006 but was not provided to the delegate at the hearing. Certainly by the time his appeal was heard the WCB investigation had been completed yet the evidence was still not produced at the time of the appeal.
19. In my opinion there are not compelling reasons to warrant the exercise of the reconsideration discretion. There is no doubt that the primary focus of this application is to have the Tribunal effectively consider evidence not tendered before either the delegate at the original hearing or the Tribunal Member at the time of the appeal. The information or evidence is not "new evidence"; it was always available if sought out and presented. There is no submission that either the delegate or the Tribunal Member made any error in law, principle or procedure.
20. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and in this case Jaspal has had every opportunity to fully present his claim yet opted not to attend the original hearing and did not present the evidence at his appeal.
21. Accordingly, I am not persuaded that there is any substantial reason for me to vary or cancel the original decision or to refer the matter back for further consideration. Accordingly the application for reconsideration is dismissed.

ORDER

22. The application to reconsider the decision of the Tribunal Member in this matter is dismissed and the original decision is confirmed.

John M. Orr
Member
Employment Standards Tribunal