

An application for Reconsideration

- by -

Takhar Electric Ltd.
("Takhar")

- 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: Carol L. Roberts

FILE No.: 2008A/104

DATE OF DECISION: November 21, 2008

DECISION

SUBMISSIONS

Robert Doran

On behalf of Takhar Electric Ltd.

Ken White

On behalf of the Director of Employment Standards

OVERVIEW

1. This is an application by Takhar Electric Ltd. (“Takhar”) for a reconsideration of Decision #D052/08 (the “Original Decision”), issued by the Tribunal on May 8, 2008.
2. Gursharan Bamrah and Tejinder Thind worked for Takhar as electrician’s helpers. They filed complaints alleging that Takhar had contravened the *Employment Standards Act* (the “Act”) in failing to pay them regular wages, overtime wages, annual vacation pay and compensation for length of service. The issue before the Director was the hours worked by the complainants and the wages they were paid.
3. The Director’s delegate held a hearing into Mr. Bamrah’s complaint on July 19 and 23, 2007, and Mr. Thind’s complaint on September 18, 2007. Following the hearings, at which the employer and complainants appeared with translators as well as witnesses for the employer, the delegate concluded that Takhar had contravened sections 17, 18, 27, 28, 40 and 46 of the *Act* in failing to pay the complainants wages, statutory holiday pay and overtime wages. The delegate concluded that the complainants had quit their employment and that Takhar was therefore under no obligation to pay compensation for length of service.
4. In a Determination issued December 21, 2007, the delegate ordered Takhar to pay wages and interest of \$16,858.71. The delegate also imposed penalties in the amount of \$3,000 for the contraventions. The deadline for the delivery of an appeal of the Determination was January 28, 2008.
5. Through counsel, Takhar filed an appeal of the Determination on March 11, 2008. The grounds of appeal were that the Director delegate had erred in law in accepting the records of the complainants regarding the hours worked over the records of the Employer. Takhar further asserted that evidence had become available that was not available at the time the Determination was being made. That evidence was said to be employer records and bank statements that supported the Employer’s position.
6. Thakar explained the delay in filing the appeal by stating that he did not become aware of the Determination until January 20, 2008 as he had been out of Canada until that date, and instructed his lawyer to file an appeal on January 22, 2008. He stated that he was not able to obtain additional records to support his appeal until February 6, 2008, following which the appeal form was prepared.
7. In the Original Decision addressing the timeliness of the appeal, the member reviewed the submissions, the facts and the law. He noted that Thakar had not explained the reasons for the delay between February 6 and March 11, 2008 in submitting the appeal. However, he considered the most important factor in determining the application was whether Thakar had a strong *prima facie* case.

8. The Member noted that the major issue in the case was conflicting evidence regarding the hours worked by the complainants. He observed that the delegate preferred the evidence of the complainants over Mr. Thakar and considered Thakar's grounds of appeal in this respect. The Member found that, in addition to the oral evidence of the witnesses, the delegate reviewed records from both parties. The Member noted that the original records were not originally produced and that when Takhar produced them at a later date, the delegate indicated that they appeared to have been written at one sitting, unlike those of the complainants. The Member reviewed the records and found them to be consistent with the delegate's findings.
9. The Member decided that the delegate was entitled to make the findings on credibility that he did. He noted that Takhar did not dispute several findings leading to contravention penalties, including a failure to pay the complainants semi-monthly, and although Takhar argued that the delegate erred in concluding that the complainants were not paid vacation pay on termination, produced no evidence demonstrating that this was the case. Further, the Member noted that the records demonstrated that the complainants were not paid overtime or statutory holiday pay in accordance with the *Act*. The Member concluded that Takhar had failed to demonstrate a strong *prima facie* case.
10. The Member also found that the "new evidence" presented by Takhar did not meet the test for new evidence on appeal, as he determined that some of it was already before the delegate and the rest could have been obtained and presented at the hearing of the complaint.
11. The Member denied the application for an extension of time in which to file an appeal.

ISSUE

12. There are two issues on reconsideration:
 1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?
 2. If so, should the decision be cancelled or varied or sent back to the member?

ARGUMENT

13. Takhar submits that the complainants have been paid in full and were not entitled to any additional money. In support of the reconsideration application, Takhar's counsel submitted statutory declarations from Charanjit Boparai and Devinder Bassi that he contends support a conclusion that one of the claimants, Tejinder Thind, committed fraud with respect to his claim. Counsel submits that where there is clear evidence a claimant has committed fraud, such a claim should be re-opened and the claim re-heard.
14. Takhar says that the information contained in the statutory declarations was not available either at the time of the hearing before the delegate or at the time of the appeal. Takhar's counsel submits that Messrs. Boparai and Bassi only recently came forward and volunteered their statements and that there should be no limitation period with respect to the power of the Tribunal to re-open such a claim.
15. The Director took no position on the reconsideration application.

THE FACTS AND ANALYSIS

16. The *Act* confers an express reconsideration power on the Tribunal. Section 116 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) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

The Threshold Test

17. The Tribunal reconsiders a Decision only 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 supports the purposes of the *Act* detailed in Section 2 “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act.”
18. In *Milan Holdings (BCEST # D313/98)* the Tribunal set 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. 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. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.
19. The Tribunal may agree to reconsider a Decision for a number of reasons, including:
- The member 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 member 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 a serious clerical error.
- (*Zoltan Kiss BC EST#D122/96*)
20. After weighing these and other factors, the Tribunal may determine that the application is not appropriate for reconsideration. Should the Tribunal determine that one or more of the issues raised in the application is appropriate for reconsideration, the Tribunal will then review the matter and make a decision. The focus of the reconsideration member will in general be with the correctness of the decision being reconsidered.
21. Takar does not seek reconsideration of the Member’s decision to deny an extension of time to allow the appeal on the basis of an error of law or procedural unfairness. Rather, it seeks to have the original

Determination set aside on the basis that it has “new evidence” that suggests that the decision was obtained by fraud.

22. A Determination may be appealed on the grounds that there is new evidence (s. 112). By analogy, and in keeping with the principles of finality set out above, where a party, on a reconsideration application, is seeking to have a Determination set aside on grounds of “new evidence”, it must show that the evidence
- a) could not, with the exercise of due diligence, have been discovered and presented to the Director during the investigation or adjudication of the complaint and prior to the Determination being made,
 - b) must be relevant to a material issue arising from the complaint, the evidence must be credible in the sense that it is reasonably capable of belief;
 - c) must have high potential probative value, in the sense that , if believed, it could on its own or when considered with other evidence, have led the Director to a different conclusion on the material issue; and
 - d) was both unavailable at the time the original decision was made as well as material to the issue in dispute. (see *Bruce Davies and others, Directors or Officers of Merilus Technologies Inc.*, BC EST #D 171/03)
23. Although Takhar claims that the evidence contained in the two statutory declarations was not available either at the time of the original hearing or the appeal before the Tribunal, the information contained in the declarations themselves does not support that assertion.
24. In his statutory declaration of August 15, 2008, Mr. Boparai declares that he had a conversation with Mr. Thind in “May or June 2007” in which Mr. Thind told him that “Takhar Electric did not actually owe him any money but he wanted more money from the company and he wanted to teach Ranjit Takhar a lesson”, and that “if he received any money from the Employment Standards Branch that it was his intention to return the money to Mr. Takhar”. Mr. Boparai further declares that he informed Mr. Takhar of his conversation “during 2007” and that Mr. Takhar “asked me to meet with his layer to give a statement”. Mr. Boparai met with Takhar’s counsel to prepare his statement on August 13, 2008.
25. It is unclear from Mr. Boparai’s statement whether he met with Mr. Takhar during 2007 to report his conversation with Mr. Thind or whether he met with Mr. Takhar at some unascertained date to report his May or June 2007 conversation with Mr. Thind. Mr. Takhar himself does not provide a statutory declaration about the timeline of these conversations.
26. Mr. Thind’s complaint was heard on September 18, 2007. The Determination was issued on December 21, 2007 and Takhar’s appeal was filed March 11, 2008. Takhar has provided no evidence for me to conclude that he could not have provided the evidence contained in the statutory declaration to the delegate at the time he was making his Determination, or on appeal as new evidence. On that basis alone I find it cannot be properly considered as “new evidence” which did not become available before this stage in the proceedings.
27. Even if I were to conclude that the “new evidence” was not available earlier, I am not persuaded that it establishes fraud. The issue of whether Takhar owed Thind wages was not based on Mr. Thind’s

subjective views or his motivations for making a complaint. His claim was evaluated by a delegate, who made the determination based largely on Takhar's own documentation, which, under the *Act*, he was obliged to maintain.

28. While the Tribunal has held that fraud or deceit is a basis for overturning a decision (see *Randhawa Farm Contractors Ltd. (re)* (BC EST #D475/98), I am not persuaded that the statements by Mr. Boparai and Mr. Bassi are sufficient basis to conclude that Mr. Thind lied under oath or committed a fraud upon the Director in claiming that he was entitled to wages.
29. In the second statutory declaration, made on September 4, 2008, Mr. Bassi declares that in "late 2007", he attempted unsuccessfully to negotiate a settlement of Mr. Thind's claim against Takhar. He declares that Mr. Thind initially thought Takhar owed him "maybe \$1,000" but then said it was "approximately \$1,800". When Mr. Bassi brought Mr. Thind a cheque from Takhar in that amount, Mr. Thind allegedly rejected it on the basis that he was owed \$3,200. When Mr. Bassi questioned him about it, Mr. Thind allegedly said that he had never "calculated anything".
30. Mr. Bassi further declared that "some time after I informed Mr. Takhar of the details of my conversations with Tejinder Thind, Mr. Takhar asked me if I would meet with the lawyer for Takhar Electric Ltd. to give a statement". Mr. Bassi states that he met with Takhar's counsel on August 15, 2008.
31. Given that Mr. Bassi knows Mr. Takhar personally (indeed, Mr. Bassi was a witness on Mr. Takhar's behalf at the hearing of these complaints) I am unable to find that the evidence concerning the conversation that allegedly took place between Mr. Bassi and Mr. Thind took place "in 2007" could not have been made available, certainly by the time of the appeal of the Determination on March 11, 2008.
32. Furthermore, even if I were to overlook the untimeliness of this "new evidence", I am not persuaded that it provides a basis for concluding that Mr. Thind lied under oath or that his claim was fraudulent.
33. I am not persuaded that the statutory declarations provide a basis for reconsidering the Member's decision. I confirm the decision that Takhar has not made out a strong *prima facie* case for appeal such that an extension of time for the appeal ought to be granted.

ORDER

34. I dismiss the application for reconsideration.

Carol L. Roberts
Member
Employment Standards Tribunal