Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Sukhwinder Parmar and Jaheeda Ali operating as J & R Janitorial Services
(the "Employer")

- 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

TRIBUNAL MEMBER: Kenneth Wm. Thornicroft

FILE No.: 2004A/88

DATE OF DECISION: July 13, 2004

DECISION

APPEARANCES:

Sukhwinder Parmar and Jaheeda Ali	on their own behalf
Richard Saunders	for the Director of Employment Standards

OVERVIEW

This is an application filed by Sukhwinder Parmar and Jaheeda Ali jointly operating as "J & R Janitorial Services". I shall refer to the applicants jointly as the "Employer". The application is made pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of an adjudicator's decision issued on April 29th, 2004 (B.C.E.S.T. Decision No. D064/04). The application is timely but not meritorious.

PREVIOUS PROCEEDINGS

The Determination

Ile Narayan ("Narayan") filed a complaint alleging that the Employer failed to pay him any wages for work done as a janitor during the period May 26th to July 12th, 2003. Narayan said that he quit on July 12th when his repeated efforts to get paid for his work proved futile. Narayan claimed wages at a rate of $10 per hour plus statutory holiday pay for July 1st, 2003 (Canada Day) and 4% vacation pay.

The Director's delegate conducted an oral hearing on November 13th, 2003 and subsequently issued a Determination and reasons for decision (both dated February 4th, 2004) holding that while Narayan was entitled to unpaid wages, the applicable wage rate was the minimum wage ($8 per hour) rather than $10 per hour (as had been claimed by Narayan). The Employer was ordered to pay Narayan a total amount of $1,596.73 on account of unpaid wages and section 88 interest.

By way of the Determination, the Employer was also assessed $1,500 (3 x $500) in administrative penalties (see section 98 of the *Act* and section 29 of the *Employment Standards Regulation*) for the separate contraventions of sections 18, 45 and 58 of the *Act.*

It should be noted that the Employer was represented at the delegate's hearing by Mr. Parmar. He did not attend the hearing in person. At 9:00 A.M. when the hearing convened, Mr. Parmar was not present and so another delegate contacted Mr. Parmar by telephone but did not reach Mr. Parmar personally; the other delegate left a voice mail message. About one hour later, Mr. Parmar telephoned the Employment Standards Branch and subsequently participated in the hearing by teleconference. Apparently at 8:00 A.M. the day of the hearing, Mr. Parmar hand delivered a letter to the Employment Standards Branch in which he stated that he did not intend to appear at the hearing because he did not "like people who lie and cheat and cost the government money" and that he "did not want to contribute to their lies". This latter statement was presumably in regard to Mr. Narayan but, as matters turned out, it was Mr. Parmar's credibility that was ultimately called into question.

The delegate, in his reasons, also noted the following:

> Parmar ended the teleconference by stating that he would get more witnesses to send letters to the ESB confirming Narayan worked a total of two (2) hours per evening. He was advised to have letters in to the ESB no later than eight (8) days from the date of the hearing. At the date of this decision being issued [note: the decision was issued February 4th, 2004] there have been no letters received.

The Appeal

Sukhwinder Parmar appealed the Determination (presumably on behalf of both himself and Mr. Ali) on the ground that "evidence has become available that was not available at the time the Determination was being made" [see section 112(1)(c) of the *Act*]. The appeal was adjudicated based on the parties' written submissions (see section 107 of the *Act*) by Tribunal Member Roberts and in a decision issued on April 29th, 2004 (the decision now under reconsideration), Member Roberts confirmed the Determination as issued.

The relevant portions of Member Roberts' reasons for decision (at pp. 4-5) are reproduced below:

> In *Bruce Davies and others, Director or Officers of Merilus Technologies Inc.*, BC EST #D171/03 the Tribunal set out four conditions that must be met before new evidence will be considered. The appellant must establish that:
>
> 1. the evidence 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;
> 2. the evidence must be relevant to a material issue arising from the complaint;
> 3. the evidence must be credible in the sense that it is reasonably capable of belief; and
> 4. the evidence 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.
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> Mr. Parmar has not met any of these conditions.
>
> All of the documents submitted by Mr. Parmar could have, with due diligence, been obtained either before the hearing, or within the time period granted by the delegate following the November hearing.
>
> Fact sheets enclosed with the notice of hearing outline the hearing process, including a statement that "all documents to be used at the hearing must be provided in advance".
>
> Had Mr. Parmar appeared at the hearing with his witnesses, as he ought to have, the witnesses would have been placed under oath and subject to cross-examination. Their statements are unsworn, and at this point, have little evidentiary value.
>
> In any event, I am not persuaded that the evidence presented by Mr. Parmar is credible. Corporate searches indicate that, as of February 4, 2004, J & R Janitorial was still registered as a business. In addition, the first response to Mr. Narayan's complaint was from "J & R Janitorial Services--Jaheeda", and the material deposited at the Branch the morning of the hearing was identified as being from "Sukie Parmar c/o J.R. Janitorial Services".
>
> I am not persuaded that, had the delegate considered this evidence at the hearing, he would have arrived at a different conclusion on the issue of whether Mr. Narayan was entitled to wages in the amount sought, or on the issue of whether J & R was the employer.

Thus, Member Roberts reached two fundamental conclusions, both of which were adverse to the Employer. First, the so-called "new evidence" that was submitted was available and could have been presented to the delegate at hearing. Second, and in any event, the evidence lacked probative value and would not have affected the outcome of the hearing before the delegate even if the Employer had not so cavalierly disregarded the Branch's hearing process.

THE APPLICATION FOR RECONSIDERATION

The Employer's request for reconsideration sets out several assertions. In general, there are two broad themes. First, the Employer is having difficulty paying the amount due under the Determination and would like the Employment Standards Branch to recognize his other financial obligations. Second, the Employer asks the Tribunal (in effect) to issue a stay or suspension of any enforcement proceedings (for example, a seizure of assets under section 92 of the *Act*) that might be taken by the Employment Standards Branch.

The Director's delegate says that the Determination ought to be summarily dismissed; Mr. Narayan did not file any submission with the Tribunal in response to the reconsideration application.

ANALYSIS

In *Milan Holdings Ltd.*, B.C.E.S.T. Decision No. D313/98 the Tribunal held that it would not even embark on a review of the merits of a reconsideration application unless the application, on its face, raised a presumptively significant substantive or procedural issue. The instant application does not pass this initial threshold.

There is absolutely nothing in the material before me that would justify the Tribunal embarking on a reconsideration of Member Roberts' decision. The Tribunal has no statutory authority over the Director in terms of supervising the Director's enforcement activities once a determination has been confirmed by the Tribunal. The Director has a valid Determination in hand (it now having been confirmed by the Tribunal) and she is entitled to use any or all of the enforcement tools that are open to her under Part 11 of the *Act* including issuing garnishing orders (section 89) and seizing assets (section 92).

The Employer does not call into question the legal correctness of either the Determination or Member Roberts' decision. Indeed, the applicants appear to acknowledge that the Determination and Member Roberts' decision are entirely correct: "We made our mistake and we learned the hard way..." (double-underlining in original text)

So far as I can determine, there would not appear to be any obvious legal basis for challenging Member Roberts' decision.

ORDER

The application to reconsider the decision of Member Roberts is **refused.**

Kenneth Wm. Thornicroft
Member
Employment Standards Tribunal