Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Director of Employment Standards
("Director")

- 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

ADJUDICATORS: Paul E. Love, Panel Chair
Fern Jeffries
David B. Stevenson

FILE No.: 2000/803

DATE OF DECISION: March 14, 2001

DECISION

OVERVIEW

This is an application for reconsideration, made by the Director of Employment Standards of a decision of the Employment Standards Tribunal ("Tribunal") dated May 30, 2000 (the "original decision"). In this case, neither the employer nor the employee filed any application for reconsideration, and the Director's application was untimely. The Director argues that this application concerns significant issues of law, which impact commission sales employees earning the minimum wage level. This application was filed with the Tribunal on November 16, 2000, more that 5 ½ months following the original decision. Applying the approach in *Milan Holdings*, this a case where there is prejudice to the employer, arising from a unreasonable delay of the Director. This is not a compelling case for the exercise of the Tribunal's reconsideration power. The original Determination does not clearly identify the contract between the parties. This case involves "calculations" as opposed to significant pronouncements of law related to commissioned sales.

ISSUE TO BE DECIDED

As a threshold issue, is this a proper case for the exercise of the Tribunal's discretion to reconsider under s. 116 of the *Employment Standards Act* (the "*Act*")?

If we are satisfied on the threshold issue, the issues raised by the Appellant are:

(a) Did the Adjudicator err in admitting evidence which was not provided to the Delegate during the investigation;

(b) Did the Adjudicator err in the application of the minimum wage provisions from future commission payments;

(c) Did the Adjudicator err by finding in the absence of sufficient evidence that the employer and the employee agreed to the deduction of certain commission payments from future payments?

FACTS

The original decision was issued on May 30, 2000. On June 6, 2000, counsel for the Director gave notice to the Tribunal and to the parties, that the Director intended to appeal the decision. On November 16, 2000, counsel for the Director filed the appeal. In the appeal submission the Director does not explain the reasons for the lengthy delay in the filing of the appeal other than to indicate that "the issues were complex and do not admit of a glancing treatment".

The employee, Heather Holmes, was a travel agent, employed by Athlone Travel (Oak Bay) Ltd., who was paid a guaranteed wage of $1,400 per month for the first six months, plus commissions. Ms. Holmes did not produce any commissions in excess of the base for the first six months. After the first six month period, Ms. Holmes was paid on a commission basis, and received an advance on her commissions of $700.00 per pay period. The employer deducted the advances from future commissions when the commissions exceeded $1,400 per month.

The complaint arose from an employment period between January 1, 1996 to February 13, 1998, and while the complaint was filed in time, a Determination was not made until January 21, 2000. The Delegate found that the employer had not calculated correctly the minimum wages owing to the employee in a pay period. In the determination, without considering the contract between the parties, the Delegate calculated a shortfall of $2,959.65 in earnings over a two year period. He calculated an hourly wage based on a payment of $700 per pay period for a 35 hour week. When the employee's actual commission earnings fell below this amount, the Delegate credited her with $700.00. When the actual commission earnings in a pay period exceeded $700.00 he credited the employee with the full commission earnings.

This determination was reversed by the adjudicator, after an oral hearing. In the decision the adjudicator found that the delegate erred in failing to treat the $700 payment in a pay period as an advance which had to be reconciled against the commissions earned by the employee. The adjudicator found that there was an employment contract which provided that commissions were to be reconciled to advances. When commissions were reconciled, and deductions made for sick days, and "fam days", the adjudicator found that there were no wages owing. The adjudicator did not accept the evidence of the employee when she asserted that she did not understand the employment agreement in place between the parties for two years.

The Director alleges that the adjudicator erred in:

(a) admitting evidence which was not provided to the Delegate during the investigation;

(b) erring in the application of the minimum wage provisions from future commission payments;

(c) finding in the absence of sufficient evidence that the employer and the employee agreed to the deduction of certain commission payments from future payments.

With regard to the admission of evidence, the adjudicator has not modified or enlarged on the test in *Kaiser Stables*, BCEST #D 058/97. This is a case of "application" of the test. The admission of new evidence is not barred absolutely, the adjudicator has discretion to admit the evidence. In many cases the adjudicator exercises its discretion in favour of the Director, because the new information raises a new issue which was not considered in the Determination, and therefore is unhelpful to the task of the adjudicator on appeal which is to assess and correct "delegate error". In this case, the new evidence was copies of Revenue

Canada T4 slips, pay-cheque stubs and cancelled cheques, which were "support" for the payroll ledgers provided to the Delegate. The adjudicator accepted the submission of the employer that those source documents only became necessary to locate and produce once the employer disagreed with the totals which appeared in the Determination. The adjudicator also found that the evidence was an "inherently reliable" record of the amount actually paid. As this case, dealt with essentially an allegation by the employer, that over time, the employee had been properly paid for work performed, the adjudicator exercised his discretion in favour of admission.

In our view grounds (b) and (c) can be combined for convenience as an allegation that the adjudicator erred in interpreting the minimum wage provisions of the *Act*, and the contract between the parties concerning commissions and minimum wage.

I note that the Director has also raised the issue of the correctness of the Adjudicator's findings of fact with regard to "fam days", which were dates the employee went on familiarization tours. The adjudicator found that the employee was not working on these days, and was therefore not entitled to payment. The Delegate did not address the issue of "fam days" in the Determination. The Director did not raise this issue as an error of law but as an incorrect conclusion that "fam days" were not work.

The employee supports the application for reconsideration made by the Director. The employer opposes the application on the basis of timeliness. The employer indicates:

> I am outraged that a period of six months has been needed to request this reconsideration of a decision made on May 30th, 2000. I feel most strongly that I will have been prejudiced should this request for reconsideration by upheld. If this decision of May 30th, 2000 were to be overturned, I could face costly new liabilities related to how some employees at Athlone Travel have chosen to be paid. When the Tribunal decision was made, it indicated to me that the way commission agents are reimbursed was in fact acceptable. All agents are paid at least minimum wage plus holiday pay for the hours they work. Furthermore, it is my understanding that the May 30th decision was not disbuted (sic) by the employee, Ms. Heather Holmes.

ANALYSIS

An application for reconsideration of a Tribunal's decision involves a two stage analysis, as set out in *Milan Holdings Ltd., BC EST #D186/97*

> At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration: Re British Columbia (Director of Employment Standards), BCEST #D122/98. In deciding this question, the Tribunal will consider and weigh a number of

factors. For example, the following factors have been held to weigh against a reconsideration:

(a) Where the application has not been filed in a timely fashion and there is no valid cause for the delay: Re British Columbia (Director of Employment Standards), BC EST #D122/98. In this context, the Tribunal will consider the prejudice to either party in proceeding with or refusing the reconsideration: Re Rescan Environmental Services Ltd. BC EST #D522/97 (Reconsideration of BCEST #D007/97).

(b) Where the application's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): Re Image House Inc., BCEST #D075/98 (Reconsideration of BCEST #D418/97); Alexander (c.o.b. Pereguine Consulting) BCEST #D095/98 (Reconsideration of BCEST #D574/97); 323573 BC Ltd. (c.o.b. Saltair Neighbourhood Pub), BC EST #D478/97 (Reconsideration of BC EST #D186/97);

(c) Where the application arises out of a preliminary ruling made in the course of an appeal. "The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid multiplicity of proceedings, confusion or delay": World Project Management Inc., BCEST #D134/97 (Reconsideration of BCEST #D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.

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. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": Zoltan Kiss, supra. As noted in previous decisions,

"The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons":

> Khalsa Diwan Society (BCEST #D199/96, reconsideration of BCEST #D114/96).
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> After weighing these and other factors relevant to the matter before it, the Panel may determine that the application is not appropriate for reconsideration. If so, it will typically give reasons for its decision not to reconsider the adjudicator's decision. Should the Panel determine that one or more of the issues raised in the application is appropriate for reconsideration, the Panel will then review the matter and make a decision. The focus of the reconsideration panel "on the merits" will in general be with the correctness of the decision being reconsidered.
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> The very point of reconsideration being to provide a forum for sober reflection regarding questions which are considered sufficiently important to warrant such review, we consider it sensible to conclude that questions deem worthy of reconsideration - particularly questions of law -should be reviewed for correctness.

The reconsideration power is one to be exercised with caution. A non-exhaustive list of grounds for reconsideration include:

- a failure by the adjudicator to comply with the principles of natural justice;
- a mistake of fact;
- inconsistency with other decisions which cannot be distinguished;
- significant and serious new evidence that has become available and that would have lead the adjudicator to a different decision;
- misunderstanding or failing to deal with an issue;
- clerical error.

In our view, this case falls to be determined on the threshold question of whether the Tribunal should exercise its discretion to reconsider the Decision. Timeliness, has been a factor in the analysis of whether a decision should be reconsidered. The *Act* does not provide a time limit for the bringing of an application for reconsideration. Timeliness, and finality, however, are important “values” in any administrative law scheme. In particular in sections 2(d) the legislature provided that a purpose of the Act was to provide fair and efficient procedures for resolving disputes concerning the application and interpretation of the Act, and 2(b) to promote fair treatment of employers and employees. The Tribunal has recently analysed the issue of timeliness in *Director of Employment Standards, BCEST #RD046/01*, and in particular summarized principles relating to timeliness.

> We find it useful to summarize the principles we have set out above:
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> 1. The Tribunal will properly consider delay in deciding whether to exercise the reconsideration discretion;

2. Where delay is significant, an applicant should offer an explanation for the delay. A delay which is not explained will militate against reconsideration.

3. Delay combined with demonstrated prejudice to a party will weigh even stronger against reconsideration. In some cases, the Tribunal may resume prejudice based on a lengthy unexplained delay alone.

4. Even in cases of unreasonable delay, the Tribunal ought to consider the merits, and retains the discretion to entertain and grant a reconsideration remedy where a clear and compelling case on the merits is made out.

In this case, while the Director communicated an intention to apply to reconsider the decision, there is a lengthy, inordinate, and unexplained delay in the filing of the application for reconsideration. While the Director's notice of its intention may have been a courtesy to the parties, it cannot be characterized as an application for reconsideration, and in our view does not absolve the Director of its responsibility to file its application in a timely manner. In the meantime, the employer has continued employment relationships in accordance with the Tribunal decision. There is prejudice to the employer arising from the Director's delay in the filing of its application. This is a case where the employee did not file an application for reconsideration, but supports the Director's application. The parties, other than the Director, appear to have considered that "enough was enough" and that the Tribunal decision resolved finally the dispute between the parties concerning minimum wage.

The Director argues that this application concerns significant issues of law, which impact commission sales employees earning the minimum wage level. This is not a clear and compelling case for the exercise of the Tribunal's reconsideration power. The Determination does not clearly identify the contract between the parties. The contract between the parties is an important consideration in assessing whether the employee is entitled to advances made by the employer to comply with the minimum wage provisions of the *Act*, in addition to the full amount of wages earned under a commission agreement. The adjudicator accepted the evidence of the employer concerning the contract, and did not accept the evidence of the employee. The adjudicator's decision then, in part, rested on credibility and the assessment of evidence, and made findings concerning the contract, which was not considered by the Delegate in the Determination. The adjudicator referred to and relied on *Wen-Di Interiors Ltd., BCEST #D 481/99*, and the adjudicator found that the facts in *Wen-Di* were indistinguishable from the facts before him. This case involves "calculations" as opposed to significant pronouncements of law related to commissioned sales. This case involves an application of existing Tribunal jurisprudence concerning the minimum wage and commission sales persons, and the admission of new evidence.

On the issue of "fam days", we note that this is an issue of fact, which is within the jurisdiction of the adjudicator to make. This issue was not dealt with by the Delegate in the determination, and the parties took different positions on this point during the appeal. This is

not an issue which can be characterized as a clear and compelling case for the exercise of reconsideration power.

For all the above reasons, this appears to be a case where the application for reconsideration does not fall within the proper factors for a reconsideration, and the application for reconsideration is dismissed on the basis that the matters do not warrant reconsideration.

ORDER

Pursuant to section 116 of the *Act*, we order that the Decision in this matter, dated May 30, 2000 be confirmed.

PAUL E. LOVE

Paul E. Love
Adjudicator
Employment Standards Tribunal

FERN JEFFRIES

Fern Jeffries
Chair
Employment Standards Tribunal

DAVID B. STEVENSON

David B. Stevenson
Adjudicator
Employment Standards Tribunal