

An Application for Reconsideration

- by -

N.L. Poulin, operating as Poulin's Exterminators
(“Poulin”)

- 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.: 2002/053

DATE OF DECISION: April 12, 2002

DECISION

OVERVIEW

This is a request by N.L. Poulin Ltd. (“Poulin”) 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.

In a determination dated July 10, 2001, the delegate ordered Poulin to pay \$3,353.60 in unpaid wages. The employee, Janice Brunner (“Brunner”) appealed the determination alleging that the award for unpaid wages was incorrectly calculated. Brunner’s appeal was based on her understanding that there was a 35 hour work week and that hours worked above that were to be paid at the appropriate overtime rate.

The appeal succeeded and in a decision BCEST #D565/01, the adjudicator found that there was indeed a 35 hour work week. The matter was referred back to the delegate to recalculate the amount owing. Based on this recalculation, in a subsequent decision BCEST# D070/02, the adjudicator confirmed that \$15,426.73 was owed to Brunner, plus any further interest accumulated pursuant to Section 88 of the *Act*. Poulin requests reconsideration of that decision.

FACTS

Brunner worked as an office administrator for Poulin from February 1, 1999 to September 30, 2001. Her rate of pay varied: \$1900 per month from February 1, 1999 to April 30, 1999; \$2100 per month from May 1, 2000 until January 31, 2001; \$2200 per month for May 2001; and \$2300 per month thereafter.

Her hours of work varied. Poulin conceded that Brunner was not a manager and was therefore entitled to overtime wages. The delegate calculated wages owing by adding up the wages she earned during the specific period of time and dividing that by the number of hours she worked to arrive at an hourly wage. The hourly wage was used to calculate the additional overtime entitlements.

Brunner maintained that she worked a 35 hour week. She submitted a Workers Compensation Board form signed by the employer confirming that. Although this was submitted to the delegate, it does not appear to have been used by him in the Determination. At appeal, the adjudicator accepted that based on the WCB report, Brunner did have normal working hours and that she normally worked a 35 hour week as per the report submitted by Poulin to WCB.

ISSUE

There are two issues on reconsideration: Does this request meet the threshold established by the Tribunal for reconsidering a decision. If so, is the decision correct or should it be cancelled or varied or referred back to the original panel.

ANALYSIS

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*”.

In *Milan Holdings* (BCEST # D313/98) the Tribunal set out 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.

The Tribunal may agree to reconsider a Decision for a number of reasons, including:

- 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. (BC EST#D122/96)

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.

In making this request for reconsideration, Poulin submits that there is a serious error in fact in that the adjudicator was wrong in deciding that Brunner worked a 35 hour week. Poullin maintains that “she worked in excess of 35 hours”. This is the same argument made at appeal. The request for reconsideration does not meet the threshold test for reconsideration.

As at the appeal stage, the case before me is that an employee is provided with a form from the employer indicating that she works a 35 hour week. It seems reasonable to assume that this is therefore the base from which overtime is to be calculated. Neither the delegate nor Poulin address the reality of the WCB form. While the delegate supports Poulin's request for reconsideration, neither the delegate nor Poulin are able to meet the threshold test. Both simply seek to re-argue the case that Poulin lost at appeal.

ORDER:

The request for reconsideration is denied. The Order is confirmed.

Fern Jeffries, Chair
Employment Standards Tribunal