Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Al Craft

- 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: Carol L. Roberts

FILE No.: 2003/15

DATE OF DECISION: April 23, 2003

British Columbia

DECISION

OVERVIEW

This is an application by Al Craft under Section 116 (2) of the *Employment Standards Act* (the "*Act*") for a reconsideration of Decision #D053/03 (the "Original Decision"), issued by the Tribunal on February 18, 2003.

Section 116 of the *Act* 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.

Mr. Craft filed a complaint with the Employment Standards Branch alleging that he had not been paid for all hours of work. The employer contended that Mr. Craft had been paid. Following a review of the evidence, a delegate of the Director of Employment Standards issued a Determination on August 26, 2002. The delegate concluded that, because Mr. Craft could not produce a credible record of hours worked, no determination could be made that wages remained payable. The delegate ceased investigation and closed the file.

The deadline for filing an appeal of that Determination was September 19. Mr. Craft appealed the decision on September 25. He also sought an extension of time in which to file the appeal on the grounds that he had moved and had not received the Determination until September 20. The Tribunal granted the extension and set the matter for an oral hearing. (BC EST #D515/02)

The Tribunal set the appeal for a hearing at 10:00 a.m., February 4, 2003. Mr. Craft did not appear at the time set for the hearing. The adjudicator concluded that Mr. Craft had received the hearing notice, and, in the absence of any evidence from Mr. Craft that the Determination was wrong, dismissed the appeal. (BC EST #D053/03)

Mr. Craft seeks a reconsideration of the decision dismissing his appeal on the grounds that he was never notified of the date of the hearing. He contends that the only document he received from the Tribunal was the decision dismissing the appeal, dated February 18, 2003.

The delegate opposes Mr. Craft's application, submitting that the Tribunal should have regard to Mr. Craft's history of claiming that he had not received documents that had been sent to him.

ANALYSIS

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

The Threshold Test

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 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 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 a serious clerical error.

(*Zoltan Kiss* 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.

Although Mr. Craft sets out a number of reasons for requesting a reconsideration, most are similar to those advanced in his initial grounds for appeal. The factors I must have regard to on an application for reconsideration are not ones Mr. Craft would raise on appeal. Therefore, I will only address one of Mr. Craft's reasons for the reconsideration, that being Mr. Craft's contention that he was unaware of the date and time of the appeal hearing.

This application raises an important natural justice issue; specifically, the right to be heard. Mr. Craft does not explicitly claim that the adjudicator failed to comply with principles of natural justice, but suggests that he was not heard because he was not advised of the hearing date.

The adjudicator, in his reasons for decision, says as follows:

> The hearing of this appeal was scheduled to commence at 10:00 a.m. February 5, 2003 in Kelowna. The hearing notice was issued on January 7, 2001. I am satisfied it was received by Craft.

At the outset, I note two typographical errors. The hearing date was set for February 4, not February 5. Both the notice of hearing and the date of hearing as set out on covering page of the adjudicator's decision note that the hearing date was February 4. Although Mr. Craft makes an issue of this error, I am satisfied it was inadvertent, and nothing turns on it. The second typographical error is that the hearing notice was issued January 7, 2003, not 2001. Again, I am satisfied this error was inadvertent, and nothing turns on it.

The adjudicator was satisfied that Mr. Craft received the hearing notice. Mr. Craft provides no evidence or compelling argument this conclusion was in error; rather, he merely alleges he did not receive notice of the hearing.

Admittedly, it is difficult, if not impossible, for a party to prove that he or she did not receive a notice. However, the presumption is that Mr. Craft was served.

The hearing notice, as noted by the adjudicator, was mailed by the Tribunal to the Kamloops address provided by Mr. Craft on January 7. It was received by the employer, by the delegate, and by the adjudicator. Mr. Craft's notice was not returned to the Tribunal as undeliverable. It does not appear that Mr. Craft had any difficulty receiving the Tribunal's two decisions, the first granting his application for an extension of time to file the appeal, and then denying the appeal, or any other documentation sent by the Tribunal.

Mr. Craft does not provide any details of his address or presence at that address to explain why he might have received two decisions from the Tribunal, but not the document giving him details of the hearing date and time. Furthermore, having succeeded in his application to extend the time to file an appeal, Mr. Craft does not appear to have made any inquiries to the Tribunal as to when that appeal might be heard.

I find that Mr. Craft has not raised significant questions of law, fact, principle or procedure, and that the reconsideration power should not be exercised in this case.

ORDER

Pursuant to Section 116 of the Act I deny the application for reconsideration.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal