



An Application for Reconsideration

- by -

Peace Country Livestock Auction Ltd.

- 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:** John M. Orr

**FILE No.:** 2000/880

**DATE OF DECISION:** March 27, 2001

## DECISION

### OVERVIEW

This is an application by Peace Country Livestock Auction Ltd. ("PCLA") under Section 116 (2) of the *Employment Standards Act* (the "Act") for a reconsideration of a Decision #D451/00 (the "Original Decision") which was issued by the Tribunal on October 26, 2000.

The original decision was issued in response to an appeal filed by PCLA of three Determinations issued by the Director in relation to a number of employees who claimed overtime wages. The primary issue in the determination and in the original decision was whether the employees were “**farm workers**” and therefore not covered by Part 4 of the *Act* but subject to special rules in regard to overtime. The second of the three appeals was abandoned at the hearing.

PCLA operates a livestock auction mart in Dawson Creek. Most auction days start at about 7:00 am and do not end until 8:00 pm or later. Employees usually work throughout the auction and therefore, if they do not fall within one of the exceptions in the *Act*, they would be entitled to be paid overtime after the first 8 hours. The amounts as calculated by the Director are substantial. However PCLA submitted that the employees were “farm workers”. The significance of this designation is that Section 34(1) of the *Regulations* identifies employees to whom Part 4 of the *Act* does not apply, including:

- (p) *a farm worker;*

Section 1 of the *Regulations* defines farm worker as:

*“farm worker” means a person employed in a farming, ranching, orchard or agricultural operation, but does not include*

- (a) *a person employed to process the products of a farming, ranching, orchard or agricultural operation*
- (b) *a landscape gardener or a person employed in a retail nursery,*  
*or*
- (c) *a person employed in aquaculture;*

The Director and the adjudicator of the original appeal both concluded that the auction business was not a farming, ranching, orchard or agricultural operation. PCLA now asks the Tribunal to reconsider the original decision.

A second issue was argued at the time of the original hearing and original decision relating to settlements and “releases” signed by the employees. This issue was not included in the request for reconsideration.

## ANALYSIS

The current suggested approach to the exercise of the reconsideration discretion under section 116 of the *Act* was set out by the Tribunal in *Milan Holdings Ltd.*, BCEST #D313/98. In *Milan* the Tribunal sets 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. In deciding this question the Tribunal should consider and weigh a number of factors such as whether the application is timely, whether it is an interlocutory matter, and whether its primary focus is to have the reconsideration panel effectively "re-weigh" evidence tendered before the adjudicator.

The Tribunal in *Milan* went on to state that the primary factor weighing in favour of reconsideration is whether the applicant has raised significant questions of law, fact, principle or procedure of sufficient merit to warrant the reconsideration. The decision states, "At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general". Although most decisions would be seen as serious to the parties this latter consideration will not be used to allow for a "re-weighing" of evidence or the seeking of a "second opinion" when a party simply does not agree with the original decision.

It is one of the defined purposes of the *Act* to provide a fair and efficient procedure for resolving disputes and it is consistent with such purposes that the Tribunal's decisions should not be open to reconsideration unless there are compelling reasons: *Khalsa Diwan Society* BCEST #D199/96.

The circumstances in which an application for reconsideration will be successful will be limited. In a Reconsideration decision dated October 23, 1998, *The Director of Employment Standards*, BCEST #D475/98, the Adjudicator sets out those limits as follows:

- *failure to comply with the principles of natural justice;*
- *mistake of law or fact;*
- *significant new evidence that was not reasonably available to the original panel;*
- *inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;*
- *misunderstanding or failure to deal with a serious issue; and*
- *clerical error*

This case certainly raises serious issues for the parties and counsel for PCLA alleges 4 errors in law and 5 significant errors of fact. However, the mere alleging of errors of law or fact may not be sufficient to warrant reconsideration. It is an important principle established by this Tribunal that the adjudicator's decisions should generally be considered final unless such errors of fact or law have some substantial *prima facie* merit to them.

At this stage in the proceedings I must at least review the allegations of mistakes of fact or law to assess whether they warrant a full reconsideration of the original decision. In my opinion, they do not raise such significant issues as to warrant reconsideration.

The four errors of law alleged by counsel for PCLA are simply that PCLA disagrees with the interpretation of the *Regulations* as found by the adjudicator. As noted above the purpose of the reconsideration discretion is not to allow a party to simply seek a second opinion. In my opinion that is what PCLA is seeking.

I have reviewed the five factual errors and, while it may be that the phrase used by the adjudicator, “*there was no evidence that...*”, was not completely accurate, I find that it simply reflected his assessment of the evidence before him at the time. I have read the original decision carefully in light of these alleged errors and find that they did not significantly effect the ultimate decision as rendered by the adjudicator.

Counsel for PCLA submits that the reconsideration provision should be used where an incorrect decision was rendered. While I have found that this is not a case that warrants reconsideration, I would also add that in my opinion this is not a case in which an incorrect decision was made or that it is in the interests of justice to rectify the decision.

## **ORDER**

The application for reconsideration herein is denied.

***JOHN M. ORR***

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**John M. Orr**  
**Adjudicator**  
**Employment Standards Tribunal**