An Application for Reconsideration

- by -

Curtyn Construction 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: Fern Jeffries

FILE No.: 2002/30

DATE OF DECISION: April 19, 2002

DECISION

OVERVIEW

This is a request from Curtyn Construction Ltd. ("Curtyn") to reconsider a decision #D002/02 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.

Decision #D002/02 denied the employer's request to extend the deadline for his appeal and confirmed the determination ordering payment of wages owing in the amount of $39401.42 plus interest pursuant to Section 88 of the *Act*.

FACTS:

Curtyn is a construction company performing work on sites governed by the provisions of the *Skills Development and Fair Wage Act* (*SD&FWA*). On October 25, 2000, the Director received a complaint from James N. Kelly ("Kelly") alleging that he had not received fair wages or overtime from Curtyn in over a year. The Director issued a Demand for Records in respect of this complaint. The employer failed to comply with the Demand and a Penalty Determination was issued and not appealed.

On May 2, 2001, the Director received a complaint from Terrance K. Mark ("Mark") alleging that he had not been paid the fair wage rate. The Director issued another Demand for Records on May 25, 2001, following up with a reminder sent by facsimile on June 12, 2001. No records were received. A penalty Determination was issued and not appealed. Two other penalty Determinations were issued relating to the failure to produce records. No appeals were filed. The Director sent a "Preliminary findings letter" to Curtyn on October 2, 2001. There was no response. The Determination was issued on October 15, 2001.

The Determination clearly stated that the appeal deadline was November 7, 2001. Further, attached to the Determination was a fact sheet describing the Employment Standards Tribunal as a quasi-judicial body, independent of the Employment Standards Branch. These were the facts as found by the adjudicator.

The appeal filed November 9, 2001 requested an extension of the time limit for filing.

The request to reconsider the decision of the Tribunal that denied this extension was filed January 29, 2002.

ISSUE:

Does this request to reconsider meet the threshold established by the Tribunal? If so, should the Decision be cancelled, 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.

See Milan Holdings, 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 this request, the appellant alleges that the adjudicator committed an "error in law" by stating that the appellant must demonstrate "a strong prima facie case" in order to obtain an extension of the appeal time limits. The appellant quotes from two other decisions in which adjudicators have phrased this test somewhat differently. I cannot agree that the adjudicator erred. He correctly used the leading case (*Re Niemisto*, BC EST #D99/96) commonly used when considering an

extension. This case establishes a set of non exhaustive criteria to be used in determining whether to extend the time limit:

> "i. there is a reasonable and credible explanation for the failure to request an appeal within the statutory time limit;
> ii. there has been a genuine and on-going bona fide intention to appeal the Determination;
> iii. the respondent party (i.e. the employer or employee), as well the Director, must have been made aware of this intention;
> iv. the respondent party will not be unduly prejudiced by the granting of an extension; and
> v. there is a strong prima facie case in favour of the appellant."

The adjudicator applied these criteria and determined that the request to extend the time limit was not warranted. Specifically the adjudicator found that there was little in the appeal material as presented that would succeed in proving that the Determination was wrong. In the letter sent by the Tribunal advising of the criteria to be applied to a late filing, the requirement that there be a 'strong prima facie case' is phrased "does the person appealing have a strong case that might succeed". In my view, this 'lay person's version' is equivalent to the phrase "strong prima facie case" as noted in the leading case and as applied by the adjudicator to this case. I cannot agree with the appellant that this is too high a standard or that is it different from the standard used by other adjudicators.

The adjudicator notes that the employer has demonstrated a continuing pattern of non compliance with the requests for records. The leading cases are cited (*Tri-West Tractor Ltd. BC* EST #D268/96 and *Kaiser Stables Ltd.*, BC EST #D058/97) in support of the Tribunal's practice not to allow an appellant to fail to or refuse to cooperate with the delegate in the investigation and later seek an appeal of the Determination before this Tribunal. This in large part is why the adjudicator does not believe the appeal would succeed.

In the request for reconsideration, the appellant argues that he didn't participate in the investigation because "he was frustrated with the process and found it pointless trying to deal with Mr. Ross because Mr. Ross did not believe anything he said and simply asked for records which did not exist and that he thought he would be able to present his side of the story at a hearing of the appeal". However, there is nothing in the Tribunal's public information or in the Tribunal's jurisprudence that would lead the appellant to believe that he could choose not to deal with the delegate and make his case for the first time at the appeal hearing.

The appellant argues that the adjudicator committed an error in law by finding that there was no demonstrated ongoing intention to file an appeal. The appellant suggests that this is "clearly contrary to the evidence". I cannot agree. There is no record at the Tribunal of any attempt to file prior to the late application; there is no evidence of any attempt to contact the Tribunal to request assistance or an extension prior to the expiration of the appeal period. In a letter to the Director dated October 24, 2001 counsel for the appellant requests that the delegate vacate the

Determination. This letter is not an appeal, and it is not addressed to the Tribunal. I believe that the appellant was advised as such in a response from the delegate dated October 25, 2001.

The appellant argues that there is a significant amount of money involved and that "Principles of fairness and natural justice demand that he should not be deprived of that opportunity [to meet his accusers or examine the evidence or records…to have his credibility tested] simply because he was two days late in filing his appeal…" The same standards of care and criteria for extensions are applied at the Tribunal regardless of the amount of money involved. From an examination of the record I find that Curtyn was given ample opportunities to participate in the investigation prior to the determination. The Tribunal has always held that employees are denied natural justice when an employer fails to participate in the investigation and postpones participation until it files an appeal of the determination. While the appellant makes light of the time limits, these are adhered to in order that the appeals procedures meet the fairness and efficiency expectations as articulated in section 2 of the *Act*.

The Tribunal has established high standards both for extending established time limits and for reconsidering decisions. This is in order that the dispute resolution procedures of the Act operate as efficiently as possible.

The request for reconsideration fails because in my opinion, the appellant has not shown any error in law in the original decision that rejected the request to extend the time limit for appeal. The appellant has not shown any denial of natural justice. Curtyn was given every opportunity to participate in the investigation, but chose not to. Numerous penalty determinations were issued, none were appealed. It appears that action was taken by the employer only when the director initiated collection activities.

DECISION:

The request for reconsideration is denied; the original decision confirming the determination is confirmed.

Fern Jeffries
Chair
Employment Standards Tribunal