Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Lotte Enterprises Ltd. operating as Pacific Northwest Language Studies
("Pacific")

- 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: Paul E. Love

FILE No.: 2001/93

DATE OF DECISION: April 5, 2001

DECISION

OVERVIEW

This is an application for reconsideration, made by Lotte Enterprises Ltd. carrying on business as Pacific Northwest Language Studies ("Pacific") of a decision of the Employment Standards Tribunal ("Tribunal") dated November 29, 2000 (the "original decision"). The employer asks the Tribunal to re-weigh evidence and come to a different conclusion than the Delegate and the Adjudicator on the issue of whether the employer complied with s. 34 of the *Employment Standards Act* ("*Act*") in payment of Edith Chang ("Chang" or "employee") for minimum daily hours. The Adjudicator found that the Delegate had not erred in finding that Ms. Chang was entitled to be paid for four hours per day, and days that she worked 2.08 hours per day. Applying the approach in *Milan Holdings Ltd., BCEST #D186/97,* this is not a proper or compelling case for the exercise of the Tribunal's reconsideration power, as the employer was seeking the Tribunal to "re-weigh" the evidence on an issue of fact. The employer's allegation that the Tribunal had proceeded to determine the appeal on the basis of written submissions, without notice to the employer, was without foundation.

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 Act?

If this is a proper case for reconsideration, the issue raised by the Appellant is:

Did the Adjudicator err in failing to find that the parties had a contract that Ms. Chang would work 4 hours per day, and that she did not take advantage of her employer's offer to work four hours per day?

FACTS

This reconsideration application is decided upon written submissions of the employer, employee and counsel for the Director of Employment Standards. The employer wishes that this reconsideration was to be the subject of an oral hearing, however, the employer has been advised that this matter would be decided on the basis of written submissions.

Edith Chang was employed by Pacific as a English language instructor at its school in Vancouver Mr. Yun is the principal of the employer. . She worked on a part time basis from May 26, 1999 and thereafter on a full time basis. The Delegate issued a Determination dated August 17, 2000, and found that Ms. Chang worked 2.08 hours per day, and was paid for 2.08 hours a day. The Delegate found that the employer had violated s. 32 of the *Act* by not paying Ms. Chang for four hours as required. The Delegate determined that Ms. Chang was

entitled to the sum of $1,866.29 as unpaid wages, $92.16 statutory holiday pay adjustment, $78.34 vacation pay adjustment, and interest in the amount of $70.99, for a total of $2,107.78.

The Delegate was aware of the employer's argument that Ms. Chang could have stayed at the school and be paid for more hours. This evidence was contradicted by the evidence of Ms. Chang and two other part time teachers. The Delegate preferred the evidence of Ms. Chang and others. The argument of the employer was that the *Act* did not apply, where the employee was offered and chose not to work the four hours, on days she was scheduled to work. The Delegate determined that there was no evidence to support the employer's assertion that Ms. Chang agreed to work less than four hours per day. The only documentary evidence in this case supported the employee's position that she was scheduled and paid for 2.08 hours of work when she was a part time employee.

The employer appealed the Determination to the Tribunal, and the Tribunal decided the appeal on the basis of written submissions. The adjudicator found that the Delegate had not erred. The adjudicator found that there was no evidence to support the employer's assertion that there was an agreement between the parties that Ms. Chang would utilize an additional two hours per day for other curriculum or school promotion purposes. Ms. Chang denied that this agreement existed, and denied that she was ever designated further work. The adjudicator indicated, as did the Delegate, that once an employee reports to work that employee is entitled to be compensated for four hours pay, and that an employer must arrange its affairs to provide for four hours of work or pay the four hour minimum pay. An employer, is, however free not to require an employee to report to work if there are not four hours of work available. The adjudicator indicated that the employer's weekly time sheets required employees to record hours worked between 9:00 am and 4:00 pm, and that the time sheet had no place to report hours worked after 4:00 pm until 6:30 pm. The employer alleged that the school was open until 6:30 pm on a daily basis, and that the school was open for curriculum development purposes.

On December 11, 2000, after receipt of the decision, the employer alleged that there was a breach of natural justice, as follows:

> With respect, I believe that the above did not take place in regards to this particular case. Approximately one month and a half ago the Tribunal Administrator, Susan Atkinson, spoke to me in a telephone conversation. During this conversation she indicated to me that she would be sending me information on our upcoming hearing. She asked me whether I would prefer the hearing to be in two weeks or in 6 - 8 weeks. She told me that based on my preference the hearing would take place in mid December 2000. On November 30th, I received a letter from Norma Edelman stating that a decision had already been made. I believe that I was entitled, as discussed with Ms. Atkinson, to a fair oral hearing. I

> was not given an opportunity to dispute against claims made by the other party. In reference to the above matter it is my belief that the adjudicator failed to comply with the principles of natural justice.

The Tribunal wrote to the employer and advised that there was no information on file to confirm his allegations, but that the material on file confirmed that the Tribunal had decided to proceed by way of a decision based on written submissions and that the employer was notified of this process, and had an ample opportunity to participate in the process.

The employer then issued a petition for judicial review. Unfortunately, it is necessary for me to refer to the petition, and the affidavit filed, because the appellant, rather than making a self contained reconsideration submission, refers to and incorporates by reference a number of paragraphs of fact in the petition. The first issue deals with an issue of natural justice which is convenient to deal with as a matter of fact, because the facts alleged by the appellant do not support his allegation of a breach of natural justice. The second issue deals with the substance of the appeal, that the Delegate and Tribunal erred in its decision with regard to minimum pay for days worked. After counsel for the Tribunal indicated to the employer that his position at a hearing of the petition was that the petition should be dismissed because the employer had not exhausted alternative remedies, the employer applied for reconsideration.

Facts as Alleged by the Employer

The employer argues that it was never advised by the Tribunal that this appeal would be decided on the basis of an oral hearing, and therefore was denied an opportunity to make further submissions.

The Tribunal has a discretion with regard to whether an appeal matter will be decided upon written submissions or an oral hearing, as set out in s. 109 of the *Act*. As has been indicated in other cases, the Tribunal does not have the luxury of affording each appellant an oral hearing. The Tribunal is not required to hold an oral hearing, because it is requested by one or more of the appellants. Some issues, particularly where the findings depend on significant issues of credibility will require an oral hearing. I am particularly concerned by Mr. Yun's submission that the employer was unaware that the Tribunal would determine the appeal without an oral hearing, and thus was not afforded the opportunity to make full submissions. This is a serious allegation, but an allegation without substance.

Attached to the Determination was a "procedure information sheet" which indicates that the Tribunal does not always hold oral hearings, and that the Registrar or Chair of the Tribunal may decide that a hearing is not necessary and ask for written submissions only. Mr. Yun signed an appeal form. On the appeal form under section D, Documents Required, is contained the statement:

> " You must attach to this form all documents which support your appeal. The Tribunal may decide this appeal based solely on written submissions."

By letter dated September 12, 2000, the Registrar of the Tribunal indicated that this matter may be decided on the basis of written submissions, without an oral hearing and fixed a date for receipt of submissions. The employer filed a written submission dated October 4, 2000 which attached a statement from Lucas Wright and from another person, whose name I cannot read. The employer filed a written submission dated October 19, 2000. That submission attached a letter from Sheri Johnson dated October 19, 2000. By letter dated October 24, 2000, the appellant was advised by the Registrar that the appeal would be dealt with by way of written submissions. The adjudicator rendered a written decision more than one month after the notice of October 24, 2000, on the basis of the written submissions received.

Mr. Yun swore an affidavit on January 20, 2001, (filed January 11, 2001) swearing that the allegations of fact contained in the petition of the employer were true. It is clear, from a reading of that affidavit, and paragraphs 12 and 20 of the petition, that Mr. Yun was aware of the Registrar's decision to proceed with the employer's appeal on the basis of written submissions, although he may have spoken with a Tribunal employee concerning oral hearing dates at an earlier time. The employer has had a full opportunity to participate in the appeal. If there was information which he chose not to provide to the Tribunal in writing, he did so at his peril, given the many notices that he received that this matter could be dealt with on written submissions.

I have decided that Mr. Yun's allegation in paragraph 23 of the petition, that Pacific was unaware that the adjudicator would proceed on written submissions, is inaccurate. Since there is not a proper factual foundation supporting Mr. Yun's allegations, this is not a proper case to address whether the Registrar's decision to proceed on the basis of written submissions, without an oral hearing, was a breach of natural justice. I note that counsel for the Director of Employment Standards has limited her submission to the issue of whether the s. 32 argument should be reconsidered, and has not addressed the "oral hearing" issue in her submission.

In essence the employer asks this reconsideration panel to re-weigh the evidence and find on a balance of probabilities that the parties had a contract where Ms. Chang was afforded an opportunity to work four hours per day, and Ms. Chang chose not to work four hours per day.

ANALYSIS

An application for reconsideration of a Tribunal' s decision involves a two stage analysis, as set out in *Milan Holdings Ltd., BCEST #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), BCEST #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);
>
> (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).
>
> 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.
>
> 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.

This case falls to be determined on the threshold question of whether the Tribunal should exercise its discretion to reconsider the Decision. As indicated earlier, while the appellant has alleged a breach of natural justice with regard to a the lack of an oral hearing, this allegation is without foundation, as the employer knew that the matter would be decided upon written submissions, was afforded an opportunity and did make written submissions.

The employer seeks to have this panel re-weigh the evidence concerning the contractual relations and work available to the employee, and come to a different conclusion than that of

the Delegate and Adjudicator. I note in this case the employer is not suggesting that there is any fresh compelling new evidence, and it cannot be said that the adjudicator's findings of fact were made without a rational basis. I agree with the submission made by counsel for the Director that the question is whether the employer had any agreement in place with Ms. Chang that she would work after teaching the classes to make up four hours of work. This question was addressed by the Delegate, and by the adjudicator. It is not a question of sufficient import or importance that it meets the first stage of the test in *Milan Holdings Ltd*. This case does not raise any issue or error of law, application of law, or concerns regarding the fairness of the determination or the appeal process.

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

ORDER

Pursuant to section 116 of the *Act*, I order that the Decision in this matter, dated November 29, 2000 be confirmed.

PAUL E. LOVE

Paul E. Love
Adjudicator
Employment Standards Tribunal