

An application for Reconsideration

- by -

J.P. Drafting 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 (as amended)

TRIBUNAL MEMBER: Robert Groves

FILE No.: 2005A/151

DATE OF DECISION: November 15, 2005

DECISION

OVERVIEW

1. Pursuant to Section 116 of the *Employment Standards Act* (the “*Act*”), J.P. Drafting Ltd. (“JPD”) seeks reconsideration of a decision made by Tribunal Member John M. Orr (the “Member”) on May 18, 2005 under number D067/05 (the “Member’s Decision”). The Member’s Decision considered JPD’s appeal of a determination issued by a delegate (the “Delegate”) of the Director of Employment Standards dated February 16, 2005 (the “Determination”), following a complaint which had been filed by a former employee of JPD, one Boris Viher (“Viher”).
2. JPD delivered its application for reconsideration to the Tribunal on August 24, 2005. There is no issue concerning the timeliness of the application.
3. On August 25, 2005, the Tribunal wrote to the Delegate and Mr. Viher, enclosing copies of the application for reconsideration, and inviting submissions. The Delegate delivered a letter submission dated September 7, 2005. By letter dated September 19, 2005, the Tribunal forwarded copies of the Delegate’s submission to JPD and to Mr. Viher, and again invited submissions. No further submissions were received.
4. Pursuant to authority provided under Section 36 of the *Administrative Tribunals Act*, the Tribunal has decided that this application shall be decided on the basis of the written submissions of the parties.

ISSUE

5. Applying Section 116 of the *Act*, should I confirm, vary, or cancel the Member’s Decision, or refer the matter back to the Member, or to another panel of the Tribunal?

FACTS

6. The Determination found that JPD had contravened Sections 40, 46, and 58 of the *Act* in its dealings with Mr. Viher, a draftsman it had employed from June 15, 2001 until May 21, 2004, with the result that JPD was directed to pay a total of \$3,243.10, incorporating sums relating to overtime, statutory holiday pay, annual vacation pay, interest, and administrative penalties.
7. In its appeal, JPD challenged the findings in the Determination on three principal grounds. First, with respect to overtime, JPD argued that the extra hours Mr. Viher was found to have worked had arisen as a result of an informal averaging agreement which contemplated that he would only be paid straight time for all hours worked. Second, on the issue of statutory holiday pay, JPD asserted that certain of its corporate payroll records, submitted for the first time on the appeal, demonstrated that Mr. Viher had not, in fact, worked on the statutory holidays in respect of which the Delegate had given Mr. Viher credit for attendance in the Determination. Finally, JPD complained that Mr. Viher had made improper personal use of his company computer on company time.
8. The Member’s Decision confirmed the Determination on the issue of overtime, on the basis that the alleged averaging agreement, whereby Mr. Viher was said to have promised to work extra hours at

straight time, was invalid, at least because there was no evidence the agreement had been reduced to writing, or signed by Mr. Viher and a representative of JPD, as required by Section 37(2) of the *Act*.

9. On the issue of statutory holiday pay, the Delegate, in his submissions on the appeal, conceded that the further documentation presented by JPD gave cause for the Determination to be varied. In the absence of any submission to the contrary from Mr. Viher, the Member's Decision allowed the appeal to the extent of eliminating the amount of statutory holiday pay that was payable by JPD.
10. As for the matter of the alleged misuse by Mr. Viher of his computer, the Member decided that even if it might have given grounds for discipline, the time spent on unauthorized activities could not be set off against sums payable as wages under the *Act*, as a result of the operation of Section 21(1).
11. In the result, the Member's Decision allowed the appeal in part, and directed that Mr. Viher was entitled to receive the sum of \$2,095.81.

12. JPD's Reconsideration Application Form sets out the following reasons for its request:

We hired a lawyer to deal with this problem. The lawyer failed to submit additional information to the Tribunal.

We have evidence that Mr. Viher tampered with our payroll record, falsifying records, claiming hours of overtime, when working for another company. Receiving payment for hours he did not work, was not on the premises.

We only discovered his fraudulent action after he claimed to have work (sic) overtime.

13. In support, JPD appends the following documents:

- a memorandum from one John Philippon on stationery headed "State of Shock", directed to JPD stating that Mr. Viher performed paid work for State of Shock on occasions when he was supposed to be working for JPD, and in respect of which time he also received payment from JPD;
- a memorandum from one Lori Merritt, an employee of JPD, stating that a review of the JPD Hour Change Log recording the hours worked by employees indicated to her that Mr. Viher had edited the Log to cause it to show hours he had worked for JPD that he had not actually worked;
- copies of the Hour Change Log documents in question, with the alleged fraudulent entries identified.

14. In his submission filed on this application the Delegate observes that some of the Log information submitted by JPD refers to a period beyond the six month period of Mr. Viher's employment considered in the Determination. The Delegate also points out that the pages of the Hour Change Log within the six month period were submitted to the Delegate at the hearing he conducted prior to issuing the Determination, and also to the Tribunal on the appeal. The Delegate therefore argues that the allegation of fraud leveled at Mr. Viher constitutes nothing more than an effort to revisit an issue, Mr. Viher's entitlement to overtime, that has already been decided.

ANALYSIS

15. The jurisdiction of the Tribunal to reconsider one of its own decisions is contained within Section 116 of the *Act*, which reads:

116 (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) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.

(2) The director or a person named in a decision or order of the tribunal may make an application under this section.

(3) An application may be made only once with respect to the same order or decision.

16. In the many decisions of the Tribunal following *Milan Holdings Ltd.* BCEST #D313/98 it has oft been stated that Section 116 bestows a discretionary power to reconsider, but one that must be exercised with restraint. This approach is consistent with the stated purposes of the *Act*, one of which is to provide fair and efficient procedures for resolving disputes over the interpretation and application of its provisions, and another is to promote the fair treatment of both employees and employers. Key to both those purposes is the principle that the Tribunal's appeal proceedings should be final, and that there should be no rehearings absent exceptional circumstances.

17. Having regard to this analytical framework, the Tribunal has developed a two-stage approach for the consideration of applications for reconsideration. In the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. One of the factors the panel will consider at this point in the process is whether the focus of the application amounts to a request to have the panel consider significant new evidence that was not reasonably available to the original panel hearing the matter, or whether its purpose is merely to have the panel "re-weigh" evidence previously tendered.

18. If the reconsideration panel determines that the application raises an issue that is appropriate for reconsideration, the panel proceeds to the second stage of the process, which involves an examination of the issue on its merits, with a view to determining the correctness of the original decision.

19. In my view, the application before me does not meet the requirements of the first stage of the process. I have decided, therefore, that the Member's Decision does not warrant reconsideration.

20. JPD's application combines evidence from John Philippon that is tendered as "new", in the sense that it was not presented at any previous stage in these proceedings, and an assertion of fraud made now for the first time, but in reliance on the extracts from the Hour Change Log that had originally been provided to the Delegate before he made the Determination.

21. In my opinion, the evidence of John Philippon submitted in support of this application is not "new" for the purposes of the test which I must apply in order to decide whether the Member's Decision warrants reconsideration. In order for that evidence to be considered "new" for that purpose JPD would have to show that it was significant new evidence that was not reasonably available to the original panel. Evidence which is tendered in support of an allegation of impropriety must always be considered very carefully by the Tribunal before it determines whether the evidence is "significant". In this case,

however, I have decided that any significance which may be attached to the evidence is outweighed by the fact that I remain unconvinced the evidence was not reasonably available to JPD prior to the time the Member's Decision was issued.

22. It is obvious from the Reasons for Determination that the Delegate was aware that Mr. Viher was working for State of Shock in addition to JPD, and that there was some overlap in the hours he had worked for both employers. On this point, the Delegate said this in his Reasons, at page 8:

During time when Viher was being paid by the employer, he also worked as a web designer for a band in which the employer's son, who is also company Vice-President, is a member. This "independent job" claimed 30 minutes per day or 2.5 hours per week of the employer's time. During times leading up to a band concert or show, time devoted by Viher to band-related tasks as much as doubled or tripled. In the result, Viher was simultaneously in receipt of regular wages from the employer and payment for time worked for the band.

23. As will be seen from this passage, a member of State of Shock, who I assume to be John Philippon (as he has the same last name as the principal of JPD over whose signature the application for reconsideration was filed) is also the Vice-President of JPD. If there was any discrepancy in the hours Mr. Viher was working for State of Shock, and the hours he should have been working for JPD, one would expect that such information would have been reasonably available to JPD long before this matter came before the Member, particularly as it was Mr. Viher's claim for overtime, based on the number of hours he worked for JPD, which was the main issue in these proceedings from the time he filed his original complaint.

24. As for Ms. Merritt's suggestion that the Hour Change Log showed fraudulent entries by Mr. Viher, this is also a position JPD should have taken at the original hearing before the Delegate. The extracts from the Hour Change Log in question were tendered by JPD at that time. Yet no argument from JPD that Mr. Viher had altered them appears to have been made, either then, or when the matter came before the Member on appeal.

25. Ms. Merritt's memorandum filed in support of the application for reconsideration purports to explain JPD's dilatory allegation of fraud by stating that it was not a part of the normal practice in JPD's daily business operations to check for edits in the Log. In my view, such an explanation is entirely inadequate. Mr. Viher's complaint related to overtime, which of necessity involved an examination of the number of hours he had worked for JPD. The edits attributed to Mr. Viher are plainly visible on the extracts from the Log tendered as evidence by JPD at the hearing before the Delegate. The Log documents were prepared at the behest of JPD. The relevant personnel at JPD must be deemed to have known what the various entries were meant to show. Any concerns as to the validity of the entries of the type expressed on behalf of JPD at this late stage should have been apparent to anyone familiar with the Log and who examined it the moment Mr. Viher filed his complaint. In these circumstances, JPD's allegation that Mr. Viher fraudulently edited the Log is nothing more than attempt to persuade this Tribunal to re-weigh the evidence tendered by JPD to the Delegate, in light of an argument that should have been made to him at the very same time, and certainly at no later time than the date on which JPD filed its appeal with this Tribunal.

26. There is one further reason why I have concluded that the grounds on the basis of which JPD says the Member's Decision should be reconsidered cannot be characterized as "new". As set out above, in its Reconsideration Application Form JPD states that it hired counsel to submit additional information to the tribunal, but that the lawyer failed to do so. I infer from this statement that some part, or perhaps all, of the Philippon and Merritt information was available to JPD when it filed its appeal, or at least at some

point prior to the issuance of the Member's Decision, but it was not submitted. This failure, which must be attributed to JPD alone, fatally undermines JPD's position on this application.

ORDER

27. Pursuant to Section 116 of the *Act*, I order that the Member's Decision be confirmed.

Robert Groves
Member
Employment Standards Tribunal