An Application for Reconsideration

- by -

F. Butcher Sign & Display Service Ltd. operating as Conventions Unlimited
(the “employer”)

- 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: Kenneth Wm. Thornicroft

FILE No.: 2001/44

DATE OF DECISION: May 1, 2001

DECISION

OVERVIEW

This is an application filed by F. Butcher Sign & Display Service Ltd. (the "employer") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of a decision (B.C.E.S.T. Decision No. D491/00) issued by a Tribunal Adjudicator on November 30th, 2000. The Adjudicator confirmed a determination that was issued by a delegate of the Director of Employment Standards (the "delegate") on August 14th, 2000 under file number ER 004-761 (the "Determination").

BACKGROUND FACTS

By way of the Determination, the employer was ordered to pay its former employee, Scott Greene ("Greene"), the sum of $2,717.06 on account of unpaid overtime wages payable pursuant to section 40 of the *Act* ($2,459.81) and interest payable pursuant to section 88 of the *Act* ($257.25). The principal issue in the delegate's investigation was whether or not Greene was a "manager" as defined by section 1 of the *Employment Standards Regulation;* "managers" are excluded from, *inter alia,* the overtime pay provisions of the *Act* [see section 34(1)(f) *Regulation*]. The employer also challenged the number of overtime hours Greene claimed to have worked and whether or not such hours had been explicitly or implicitly authorized.

The employer appealed the Determination to the Tribunal (E.S.T. File No. 2000/617) and the Adjudicator, after considering the employer's and delegate's extensive written submissions, confirmed the Determination. The central issue on appeal was, as it had been in the original investigation, whether or not Greene was a "manager" (more particularly, whether Greene was "employed in an *executive capacity*") and, therefore, excluded from the overtime pay provisions of the *Act.* In addition, the employer also alleged--as it had before the delegate--that even if Greene was entitled to overtime pay, the claim itself was inflated. As noted above, the Adjudicator confirmed the Determination in its entirety.

The employer's initial request for reconsideration is contained in a 5-page letter to the Tribunal dated January 8th, 2001. This latter submission was supplemented by a further 3-page letter (replying to the Director's February 2nd, 2001 submission) dated March 12th, 2001.

The employer advances three grounds for reconsideration, namely:

• first, whether the correct definition of "executive capacity" was applied to the facts at hand;

• second, the appeal decision should be overturned based on "new evidence not presented which was that Scott Greene had a verbal contract with [the employer's principals] since the date of hire"; and

• third, even if Greene was entitled to overtime pay (*i.e.*, he was not a "manager"), "a fair settlement must come from a combination of reliable evidence from both parties not just one party".

ANALYSIS

This application for reconsideration, having been filed approximately one month after the employer's receipt of the original appeal decision, is not untimely (see *Unisource Canada Inc.*, B.C.E.S.T. Decision No. D122/98 and *MacMillan Bloedel*, B.C.E.S.T. Decision No. D279/00).

However, even timely applications for reconsideration do not proceed as a matter of statutory right. Section 116 is a discretionary power--"...the tribunal *may* reconsider...". The Tribunal will exercise its discretion to reconsider a previous appeal decision only when the issue(s) raised in the reconsideration request are sufficiently significant to warrant further inquiry. In other words, the applicant must raise, as a threshold requirement, a serious question "of law, fact or principle or procedure [that is] so significant that [the adjudicator's decision] should be reviewed" (see *Milan Holdings Ltd.*, B.C.E.S.T. Decision No. D313/98 at p. 7).

In my view, this application does not raise a serious question of law, fact, principle or procedure. It is very obvious that the employer is quite dissatisfied with the result of the proceedings had and taken to date under the *Act*. Nevertheless, mere dissatisfaction with an appeal decision does not justify proceeding to examine the merits of the reconsideration application.

The Tribunal has issued several decisions regarding the permissible scope of review under section 116 of the *Act* (the "reconsideration" provision). In essence, the Tribunal has consistently held that applications for reconsideration should succeed only when there has been a demonstrable breach of the rules of natural justice, or where there is compelling new evidence that was not available at the time of the appeal hearing, or where the adjudicator has made a fundamental error of law. The reconsideration provision of the *Act* is not to be used as a second opportunity to challenge findings of fact made by the adjudicator, unless such findings can be characterized as lacking any evidentiary foundation whatsoever.

This is a simple case where the applicant has merely reiterated arguments that have previously been considered and rejected (twice over, as matters now stand). As for three

specific grounds advanced, I see no merit whatsoever to any of them. Although, in my view, this application ought to be dismissed out of hand as it fails to raise even *prima facie* grounds for reconsideration, I will nonetheless briefly address the three grounds advanced.

First, in my view, both the delegate and the Adjudicator applied the correct "test" of executive capacity (see, *e.g., Sunshine Coast Publishers,* B.C.E.S.T. Decision No. D244/96) to the relevant facts. The employer's submission that Greene--who was an ordinary salesman in a small closely-held firm controlled by others)--was an "executive" (*i.e.,* a senior officer responsible for key strategic decisions taken by the firm) trivializes that latter term to a point beyond legal recognition.

Second, the so-called "new evidence" (which, in my view, is neither "new" nor "evidence"--a restatement or repackaging of prior submissions would be more a accurate characterization) relates to whether or not there was a valid time bank. However, neither the delegate's nor the Adjudicator's decision ordered the employer to pay out hours standing to Greene's credit in a lawfully instituted "time bank" [section 42(5) of the *Act*]--see pages 17-18 of the Determination. The basis of the order in Greene's favour was simply that he had worked overtime hours for which he had not been paid. The question of whether there was a lawful "time bank" was not addressed by either the delegate or the Adjudicator.

Third, given that the employer failed to meet its legal obligation with respect to the maintenance of time records, both the delegate and the Adjudicator accepted, for the most part, the time records submitted by Greene. However, it should be noted that: i) Greene's records were not unequivocally accepted; ii) Greene's time records were corroborated by other independent evidence and iii) the employer knew, or at the very least, ought to have known, that Greene was working overtime hours.

ORDER

The application to cancel the decision of the Adjudicator in this matter is refused.

KENNETH WM. THORNICROFT

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal