Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Payless Paving 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

TRIBUNAL MEMBER: John M. Orr

FILE No.: 2004A/145

DATE OF DECISION: November 15, 2004

DECISION

OVERVIEW

This decision responds to an application by Payless Paving Ltd. ("Payless" or "the employer") pursuant to Section 116 (2) of the *Employment Standards Act* (the "*Act*") for reconsideration of a Tribunal decision #D142/04 (the "Original Decision") which was issued by the Tribunal on August 11, 2004.

The Director of Employment Standards ("the Director") determined that Payless was liable to pay wages to Apninder Singh Bahniwal ("Bahniwal" or "the employee") and also imposed administrative penalties. Payless appealed on the basis of the failure of the Director to observe principles of natural justice in making the Determination. Payless claimed that the Director "refused to accept" evidence submitted by Payless and failed to properly examine evidence presented.

The appeal was addressed by way of written submissions. The adjudicator in the original decision found that there was some evidence to support the findings and conclusions of fact made by the Director and that he could not conclude that the Directors findings could not be reasonably entertained from the evidence presented at the oral hearing. The Determination was confirmed.

Payless has applied to the Tribunal for a reconsideration of the original decision on very much the same grounds as set-out in his appeal, although Payless submits the adjudicator made the same error in "not accepting" the evidence of Payless.

ANALYSIS

The test for the exercise of the reconsideration power under section 116 of the *Act* is set out in *Milan Holdings Ltd.,* BCEST #D313/98. 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 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.

In my opinion there are not compelling reasons to warrant the exercise of the reconsideration discretion. All of the arguments submitted by Payless on this application for reconsideration have been made

previously in the process and both the delegate and the adjudicator provided reasons for finding against Payless and made rational findings of fact and law in regard to the submission. It is not the purpose of the reconsideration procedure to simply re-argue the points already properly and fairly dealt with. There is no new information or legal submission made in regard to the evidence that was presented at the previous adjudications.

That being said, however, it appears to me that the essence of the appeals by Payless is a misunderstanding of certain words used by the delegate in the Determination. In the document entitled "*Reasons for the Determination*", the delegate fully sets out the argument and evidence presented by both the employee and the employer. However, when it comes to the crucial analysis of the disparities between the documents and oral evidence submitted by both parties the delegate disposes of all of the issues of reliability and credibility in one short paragraph in which he uses such language as saying that he "preferred" the record submitted by the complainant or that he "accepted" the evidence of a party on a point or "did not accept" the evidence of a party on another point. It is this language that has created the chain of appeals in this case.

Payless has interpreted those words to mean that some of their evidence was "not accepted" and therefore not even considered by the delegate. But is clear on a full reading of the file that the delegate did consider all of the evidence and submissions made by Payless. When the delegate says that he did not "accept" certain evidence it is clear that he considered the evidence but found it either not credible or not reliable. This is a task that decisions makers undertake when there is conflicting evidence. When the delegate says that he "preferred" certain evidence it is not an indication of personal choice but rather a shorthand way of saying that he had assessed the evidence and come to the conclusion that certain evidence was more likely to be true that other conflicting evidence.

While these terms have been used in courts and legal decisions they are not always clearly understood by unrepresented parties. The parties may not understand that, in fact, all relevant evidence is "accepted" but when the evidence of two parties conflicts the delegate or other adjudicator must then assess the credibility and reliability of that evidence. It is often difficult for unrepresented parties to understand how that assessment has been done if the decision maker simply says that he "accepts" or "doesn't accept" evidence. It may seem strange to an inexperienced party when a decision maker simply says he "prefers" some evidence over other evidence. It is important that the decision maker sets out clearly the reasons why some evidence is considered more credible or reliable. There should be a fair and reasonable analysis of all of the evidence and a careful weighing of that evidence in accordance with established legal principles so that even the least experienced party can understand why the findings were made. Cultural and language barriers should also be taken into account in ensuring that the determination and the reasons for the determination are simple clear and understandable.

In this case, despite the use of the terms "accept" and "prefer", the delegate obviously made an effort to hear and understand the positions and evidence presented by the parties. Although he said that he "did not accept" certain evidence it is clear that he did, in fact, accept and "consider" the evidence. While the delegate said he "preferred" certain evidence this was not an indication of bias but rather he intended to say that he had come to a conclusion based on his analysis of the evidence that certain facts were established to the appropriate level of proof.

As pointed out by the adjudicator in the original decision there was certainly some evidence to support the ultimate findings and conclusions of fact made by the delegate. The adjudicator correctly noted that the appellant must show that those findings could not reasonably be entertained based on the evidence that

was before the Director's delegate. Payless has not provided any sound argument as to why those findings were not reasonably on all of the evidence submitted.

I am not persuaded that there is any substantial reason for me to vary or cancel the original decision or to refer the matter back for further consideration. Accordingly the application for reconsideration is dismissed.

ORDER

The application to reconsider the decision of the adjudicator in this matter is dismissed and the original decision is confirmed.

John M. Orr
Member
Employment Standards Tribunal