

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

- by -

Jugraj Singh Sidhu

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal ")

ADJUDICATOR: John M. Orr

FILE No.: 2000/036

DATE OF DECISION: May 15, 2000

DECISION

OVERVIEW

This is an application by Jugraj Singh Sidhu ("Sidhu") under Section 116 (2) of the *Employment Standards Act* (the "Act") for a reconsideration of a Decision #D002/00 (the "Original Decision") which was issued by the Tribunal on January 13, 2000.

Sidhu was employed as a tree planter by Cariboo Tree Service Ltd. ("Cariboo") or ("the employer") and after the termination of his employment he made a claim for unpaid wages, including overtime and holiday pay. The Director of Employment Standards ("the Director") issued a determination on September 17, 1999 (ER #087252) which found that Sidhu was not entitled to any unpaid wages from his employer, Cariboo, in relation to the tree planting work done by Sidhu.

Sidhu appealed to the tribunal in regard to (*inter alia*) the hourly rate of pay applied by the Director's delegate in calculating the amount of wages that should have been paid. The appeal was heard by the Tribunal on January 5, 2000 and the original decision was issued on January 13, 2000. In the original decision the adjudicator found that the hourly rate claimed by Sidhu was correct and that the sum of \$604.12 was owed to Sidhu by the employer. This amount was calculated by applying the corrected hourly rate to the hours of work recorded by the employer. The calculation had been provided by the Director's delegate in the determination.

Sidhu has now asked the Tribunal to reconsider the original decision on the basis that, while the Tribunal found in his favour in increasing the hourly rate, it did not consider his argument that the recorded hours as reported by the employer were not accurate. Sidhu claims that he worked many hours of overtime that were not properly recorded by the employer and were not given due consideration by the Director's delegate.

ANALYSIS

The current suggested approach to the exercise of the reconsideration discretion under section 116 of the *Act* was set out by the Tribunal in *Milan Holdings Ltd.*, BC EST #D313/98 (applied in decisions BC EST #D497/98, #D498/98, et al). In *Milan* 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 and weigh 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 that "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

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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 Tribunal's decisions should not be open to reconsideration unless there are compelling reasons: *Khalsa Diwan Society*, BC EST #D199/96.

The circumstances in which an application for reconsideration will be successful will be limited. In a Reconsideration decision dated October 23, 1998, *The Director of Employment Standards*, BC EST #D475/98, the Adjudicator sets out those limits as follows:

Those circumstances have been identified in several decisions of the Tribunal, commencing with Zoltan Kiss, BCEST #D122/96, and include:

- * *failure to comply with the principles of natural justice;*
- * *mistake of law or fact;*
- * *significant new evidence that was not reasonably available to the original panel;*
- * *inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;*
- * *misunderstanding or failure to deal with a serious issue; and*
- * *clerical error*

In this case Sidhu claims that the Tribunal failed to consider a significant ground of appeal, the unreliability of the employer's record of the hours of work, that was before it at the time of the hearing and the original decision. If this is correct it seems that this is a proper case for reconsideration. Therefore I find that the request for reconsideration meets the initial burden of showing that there is a significant issue that warrants review.

In the original decision the only reference to the hours of work is a statement that "*Hours of work was not in dispute*". There is no clarification as to whether the parties had agreed that the hours of work were not in issue or whether this was stipulated by Sidhu at the time. It does not appear to be a finding of fact by the adjudicator as there is no discussion about the positions of the parties or analysis of divergent view points. It seems to have been assumed by the adjudicator for the purpose of the original decision.

The question then arises as to whether Sidhu had raised the issue of his hours of work with the Director's delegate or on his appeal.

I have reviewed the file and conclude that hours of work were always in issue. The original complaint form dated November 4, 1997 alleged that money was owed for wages and overtime and Sidhu attached to that complaint his record of hours worked. Those hours always varied from the hours recorded by the employer.

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The Director's delegate used the hours recorded by the employer as the basis for all of his calculations. But it is clear from the submissions made by Sidhu to the Tribunal that he disagreed with the hours as recorded by the employer. In his letter to the Tribunal dated November 29, 1999 Sidhu specifically challenges the hours as calculated by the Director's delegate. He says:

In the decision by Mr Steve Mattoo the hours given by me are not reflected. The employer has not shown many hours work done by me. I believe that my figures are correct.

In the original decision the adjudicator found that the Director's delegate was wrong to have presumed that the employer's records (in regard to the rate of pay) were conclusive. The adjudicator preferred Sidhu's evidence and found that the employer's evidence was "much more equivocal". The adjudicator noted that there was nothing in the determination as to whether and how the information in the payroll record had been translated into the pay statements required under the *Act*. The adjudicator concluded that:

In my view, and in the circumstances, the delegate erred when he accepted the payroll record as conclusive of the issue of the applicable hourly rate.

It seems to me that the Director's delegate not only accepted the employer's record of the hourly rate as conclusive, but also accepted the employer's record of hours worked as conclusive. I am satisfied on reviewing the file that Sidhu never accepted the hours worked as recorded by the employer and that this was a significant issue that needed to be resolved at the hearing.

I am not in a position to know if there was some agreement at the hearing that the hours worked were not in issue. If so, the adjudicator in the original panel will be in a position to deal with that issue appropriately. If there was no such understanding then it is clear that the hours worked were very much a live issue that still requires some resolution.

ORDER

Pursuant to Section 116 (1)(b) of the *Act* the Tribunal orders that this matter is referred back to the original panel.

John M. Orr
Adjudicator
Employment Standards Tribunal