Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Richard A. Mott, a Director or Officer of United Used Auto & Truck Parts Ltd.
("Mott")

- 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: Fern Jeffries, Chair

FILE No.: 2002/133

DATE OF DECISION: May 24, 2002

DECISION

OVERVIEW

This is a request to reconsider a decision pursuant to Section 116 of the *Employment Standards Act* (the "*Act*") that provides:

> (1) On application under subsection (2) or on its own motion, the tribunal may
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> (a) reconsider any order or decision of the tribunal, and
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> (b) cancel or vary the order or decision or refer the matter back to the original panel.

The applicant, Richard A. Mott, a director of officer of United Used Auto & Truck Parts Ltd. ("Mott") seeks reconsideration of a decision that confirmed a personal Determination awarding former employees unpaid wages.

FACTS

A corporate Determination was issued against United Used Auto & Truck Parts Ltd. on October 20,2000 in favour of former employees. The amount owing, including interest accrued to that date was $261,199.39. There was no appeal of that Determination. A personal Determination was issued against Richard A. Mott, a director or officer of United Used Auto & Truck Parts Ltd. in the amount of $75,445.44 on December 1, 2000. The Director of Employment Standards issued a new personal Determination on December 14, 2000, correcting the amount owing to $76,445.44, not $75,445.44 as calculated on the original personal Determination.

An appeal of this Determination was filed by Richard A. Mott. The grounds for this appeal were first, that Mr. Richard Mott was not really a director in that his brother Mr. Ian Mott made all the decisions, and second that the liability of a director ceases when a receiver is appointed, and that vacation pay was incorrectly included as "wages", and that there were other errors in the calculations. Further, the appellant urged that the Tribunal set aside the Determination on compassionate grounds given his personal circumstances. The Decision on this appeal was issued On June 21, 2001.

The application for reconsideration was filed on March 18, 2002. As is usual in a situation where there has been a considerable delay between the date of the Decision and the reconsideration application, the parties were advised in a letter of that same date that: "*…the parties are invited to respond to the issue of whether the Tribunal should accept this reconsideration application, given it was filed almost nine months after Adjudicator Love rendered his decision*". The letter goes on to provide parties with reference to the Tribunal's leading cases on the issue of timeliness, i.e. BC EST # D279/00, BC EST # D366/00, and BC EST # RD046/01.

ISSUE

Does this application meet the threshold established by the Tribunal for reconsideration? If so, should the Decision of the Adjudicator be cancelled, varied or referred back because of a serious error in law or breach of the principles of natural justice.

ANALYSIS

The *Act* intends that the adjudicator's Appeal Decision be "final and binding". Therefore, the Tribunal only agrees to reconsider a Decision in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This reflects the purposes of the *Act* detailed in Section 2.

As established in Milan Holdings (BC EST # D313/98) the Tribunal has developed a principled approach in determining when to exercise its discretion to reconsider. 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.

Milan Holdings specifies that:

> "the following factors have been held to weigh against a reconsideration:
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> (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), BC EST # 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 BC EST # D007/97).
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> (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., BC EST # D075/98 (Reconsideration of BCEST #D418/97); Alexander (c.o.b. Pereguine Consulting) BC EST # D095/98 (Reconsideration of BC EST # D574/97); 323573 BC Ltd. (c.o.b. Saltair Neighbourhood Pub), BC EST #D478/97 (Reconsideration of BC EST # D186/97);…"

In my view, this application does not meet the threshold test in that there has been considerable delay in filing this application and the request for reconsideration essentially re-argues the case that was before the adjudicator.

As stated by the Tribunal in BC EST # D279/00 (a case in which an application for reconsideration was made by the Director 9 months after the decision)

> "In our view, an application for reconsideration under the *Act* must be filed within a reasonable time. What constitutes a "reasonable time" depends on the circumstances of each particular case. While we agree that the Tribunal may be guided by the principles applied by the courts, we do not agree that we must follow the approach developed by the courts in judicial review applications.

> The *Judicial Review Procedure Act* specifically deals with the issue of timeliness and states that applications are not time-barred unless "substantial prejudice or hardship will result to any other person affected by reason of delay." The jurisprudence sought to be relied upon by counsel for the Director is based on that statutory language. While "substantial prejudice or hardship" is one of the factors considered by the Tribunal, in making its decision with respect to timeliness, we are of the view that a party making an application for reconsideration after a long delay must show "good cause", i.e., a reasonable explanation for the delay. We agree that the length of the delay may not be determinative. If good cause can be shown for a long delay, the Tribunal may exercise its discretion to reconsider. In our view, it would be contrary to the purposes of the Act to permit a person to apply for reconsideration where there is no explanation for the delay and, as noted by counsel for the Employer, in this case there is none. A nine month delay is an unreasonable delay, particularly where there is no explanation for that delay. It is inconsistent with the principles of "fair and efficient procedures" contemplated by the Act if a party is allowed to file an application for reconsideration months or years—and that would follow from the Director's argument—after the Tribunal had rendered a decision and then place the onus on the party opposing the application to show prejudice without an explanation of why the party did not file the application promptly. In our view, the application for reconsideration must be dismissed."

The applicant provides a reason for delay, that Mr. Mott, on or about February 22, 2002, "received word that the CCRA varied its assessment of him for unpaid GST to $0.00. This was in large part due to Mr. Mott's argument that he was not a "director" for the purposes of the *Excise Tax Act*. This decision convinced Mr. Mott than an appeal from the Adjudicator's Decision may be successful and he chose to proceed with this request for a reconsideration immediately." The application for reconsideration was filed on March 18, 2002.

Employees' submissions oppose this application. They point out that the purpose of the *Excise Tax Ac*t is very different from the purpose of the *Employment Standards Act*. They argue that they have been denied wages to which they were entitled in June 2001 and indicate that they are anxious to receive this money.

I agree with the employees that the reason provided for the delay is not sufficient. In BC EST # RD046/01, the panel held that:

> "the Tribunal ought to remain open in principle to reconsidering decisions where, even in the case of a lengthy and unexplained delay such as we have here, the other circumstances cry out for reconsideration. Indeed, there may even be cases such as this one where, despite unreasonable delay and a correct adjudicator's decision, comment by a reconsideration panel is warranted."

In my view, this is not the type of situation envisioned in the above leading case..

Vacation Pay as Wages

The Director argues that Mott's application for reconsideration merely re-argues the case made at appeal. I must agree. In his decision, the adjudicator considered the question of whether "wages" includes "vacation pay". He considered the Tribunal's leading case BC EST # D068/99 which states:

> "The definition of "wages" under the Act is inclusive. Vacation pay falls within the definition, as it is "money, paid or payable by an employer to an employee for work". I agree with the submission of the Director that all the employees of Xinex were terminated by operation of law on June 5, 1998, the date Xinex was placed in receivership. Any vacation pay owed at the time of

> termination became payable to the employees within 6 days of termination by application of Section 58(3) of the Act, which says:
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> > 58. (3) Any vacation pay an employee is entitled to when the employment terminates must be paid to the employee at the time set by section 18 for paying wages."

The adjudicator correctly confirmed the extensive line of Tribunal jurisprudence that holds that vacation pay is wages as defined in the *Act*.

A Director of the Company

As at appeal, the applicant for reconsideration argues that Mr. Mott was not really a Director of the Company. Again this is a matter fully canvassed by the Adjudicator in his appeal decision. I find no error. In response to this application, numerous employees filed submissions with the Tribunal indicating that in fact Mr. Mott was an active director/officer in that he "went to the office on a daily basis… During this time he acted like a director and as former employees, we believed he was one and even at times went to him with questions and concerns. Richard Mott controlled the money opened the safe every morning and signed pay checks (sic)"

SUMMARY

This application fails to meet the threshold test established by the Tribunal. The application is brought some 9 months after the decision was rendered. The fact that the Director has not yet acted upon the original decision is irrelevant to my consideration that the reason provided for the delay is not sufficient to overcome the prejudice to the employees.

Further, there is no significant error that would mitigate against this delay. In my opinion, both substantive grounds in the reconsideration request were adequately and correctly dealt with in the original appeal decision.

ORDER

The request for reconsideration is denied and I confirm the original Tribunal Decision BC EST # D334/01.

Fern Jeffries, Chair
Adjudicator
Employment Standards Tribunal