

An Application for Reconsideration

- by -

Invermere Hotel Corp. operating as Best Western Invermere Inn
(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: M. Gwendolynne Taylor

FILE No.: 2003/20

DATE OF DECISION: July 8, 2003

DECISION

OVERVIEW

By Determination dated January 31, 2002, a Delegate of the Director of Employment Standards (the “Delegate”) ordered Invermere Hotel Corp., operating as Best Western Invermere Inn (the “Employer”) to pay \$12,264.81, including interest, to a former employee, then deceased. The Determination included findings that the complaint was filed within the required 6 months (s. 74 of the *Act*) and that the Employer had failed to pay overtime in accordance with s. 40 of the *Act*. The Employer appealed to the Employment Standards Tribunal (the “Tribunal”). In Tribunal Decision BC EST # D312/02 (the “Decision”), dated July 15 2002, the Tribunal Adjudicator (the “Adjudicator”) confirmed the Determination.

This is an application by the Employer pursuant to section 116 of the *Employment Standards Act* (the “*Act*”), for reconsideration of that Decision. The application was filed March 12, 2003. The grounds for the application are that the Adjudicator erred in law by accepting hearsay evidence and failed to understand certain factors in the evidence.

The Employer was represented by W. J. MacDonald, who was counsel before the Director and the Adjudicator; the employee was represented by Linda McCully, executrix of the estate, who was the legal representative throughout these proceedings; the Director was represented by the delegate, Joe LeBlanc.

ISSUES

1. Should the application for reconsideration be dismissed because it was not filed within a reasonable time?
2. If the application for reconsideration is accepted, has the Employer established grounds for varying or cancelling the adjudicator’s decision?

BACKGROUND

Briefly, the issue before the delegate and the adjudicator was whether the employee had resigned or was still employed as of his death. That issue affected whether the estate had filed a complaint with the Director within the 6 months required by s. 74. The evidence considered at both levels involved reports of conversations with the employee. The employer’s main issue on reconsideration is that the delegate and the adjudicator placed undue and improper reliance on the complainant’s hearsay evidence and should have preferred the employer’s evidence, including reports of conversation with the deceased.

I have determined that the employer has not established grounds for the tribunal to hear the application for reconsideration. The focus of this decision is on the issues around reconsideration. For a review for the facts and the way the delegate and the adjudicator handled the hearsay issue, please refer to the adjudicator’s decision.

Reconsideration issues

Section 116 does not set out the grounds on which the Tribunal may reconsider a decision. The Tribunal uses its discretion to reconsider with caution, to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *Act* detailed in Section 2 "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act."

In *Milan Holdings* (BC EST # D313/98) the Tribunal set out a principled approach in determining when to exercise its discretion to reconsider:

At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration: *Re British Columbia (Director of Employment Standards)*, BCEST #D122/98. In deciding this question, the Tribunal will consider and weigh a number of factors. For example, the following factors have been held to weigh against a reconsideration:

- (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)*, BCEST #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 BCEST #D007/97).
- (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.*, BCEST #D075/98 (Reconsideration of BCEST #D418/97); *Alexander (c.o.b. Pereguine Consulting)* BCEST #D095/98 (Reconsideration of BCEST #D574/97); *323573 BC Ltd. (c.o.b. Saltair Neighbourhood Pub)*, BC EST #D478/97 (Reconsideration of BCEST #D186/97);
- (c) Where the application arises out of a preliminary ruling made in the course of an appeal. "The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid multiplicity of proceedings, confusion or delay": *World Project Management Inc.*, BCEST #D134/97 (Reconsideration of BCEST #D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.

If the Tribunal finds that the request for reconsideration passes those threshold tests, the second stage is a consideration of whether to grant the request to vary or cancel the adjudicator's decision. The primary factor weighing in favour of varying or cancelling 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.

In *Zoltan Kiss* (BC EST # D122/96), the Tribunal set out a number of grounds for varying or cancelling a decision:

- The adjudicator failed to comply with the principles of natural justice;
- There is some mistake in stating the facts;
- The Decision is not consistent with other Decisions based on similar facts;

- Some significant and serious new evidence has become available that would have led the Adjudicator to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The Decision contains some serious clerical error.

While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.

THRESHOLD ISSUES

Both the Respondent and the Director object to the application for reconsideration on the grounds that it is not timely, having been filed 8 months after the Adjudicator's decision.. The Employer submits that the issue of timeliness is confusing because they were not advised of their "right to reconsideration " until after the garnishing had occurred. The Employer submits that it was not until a telephone conversation with the Delegate on March 7, 2003 that the employer became aware of a deadline for filing for reconsideration. The Employer also submits that the Tribunal imposed a further deadline of April 23, 2003.

The Director has provided documentation that shows the following chronology;

July 15, 2002	Adjudicator's decision
September 9, 2002	Director's Notice to Employer that unless payment is received the Director will file with the Supreme Court
September 23, 2002	Writ of Seizure and Sale
October 9, 2002	Cheque for full amount of the award forwarded to the Director by Okanagan Court Bailiffs Inc.
October 17, 2002	Letter from delegate to the Director's Trust Administrator directing that funds not be released. The Delegate notes that the Employer had advised they will seeking a reconsideration of the adjudicator's decision
February 17, 2003	Letter from the delegate to the Employer advising that the Director plans to disburse funds and noting it had been 3 months since the employer indicated an intention to file a reconsideration
March 12, 2003	Employer filed application for reconsideration.

The Employer's reference to April 23, 2003 is contained in Tribunal correspondence to the parties providing copies of the submissions from the Respondent and the Director, allowing an opportunity for reply.

The Respondent's submission notes that there is information on reconsideration contained in the Tribunal's pamphlet. I note that it is also contained on the Tribunal's website. The Tribunal has advised the public through the publications and website that

- reconsideration is not a right, but is at the discretion of the Tribunal,
- the Tribunal will not normally reconsider a Decision if the applicant's intent is simply to have the Tribunal "re-weigh" evidence previously considered or dismissed by the Adjudicator or to seek a "second opinion" when a party simply does not agree with the Adjudicator's Decision.
- the reconsideration process was not meant to allow parties another opportunity to re-argue their case.
- the Tribunal may reconsider a Decision if the Adjudicator failed to comply with the principles of natural justice or made a serious mistake in applying the law, or some significant new evidence has become available that would have led the Adjudicator to a different decision.
- while there is no specific time limit for making a reconsideration request, the Tribunal expects that a request will be made in a timely manner following the Adjudicator's Decision.
- unless there is a compelling explanation for the delay, the Tribunal is unlikely to reconsider its Decision.

I have reviewed all of the submissions from the parties and the Director. I find that the Employer has not presented a compelling explanation for the delay in filing the application for reconsideration. The explanation amounts to – you did not tell me there was a time limit. With respect, this is not a worthy submission, even if the Employer had not been represented throughout by counsel. The Tribunal's information on reconsideration is readily available. It was approximately 5 months from the time the Employer told the Delegate of the intention to file until the application was filed. It does not take legal advice to appreciate that a lengthy delay is unreasonable. I find that the Employer's submission on timeliness is entirely lacking in substance.

I find that the Employer has failed to meet one of the other threshold tests. The employer's grounds for reconsideration amount to a request to have the same evidence tested and weighed anew. It is the same argument that was presented and rejected by the Adjudicator. Appeals and reconsideration are not just opportunities to argue the case again. There must be some compelling basis on which to suggest that the Delegate or Adjudicator erred in law. Administrative tribunals are not bound by the formal rules of evidence and may admit hearsay evidence. In this instance, the Delegate and the Adjudicator considered hearsay evidence presented by both parties – there is nothing wrong with that.

It appears that the Employer's counsel is of the view that his witness' recitation of what the deceased said is not hearsay (submission April 17, 2003). The following is a definition of 'hearsay' from Black's Law Dictionary:

A statement, other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted.

The declarant in this case is the deceased. Clearly, any report of what the deceased said is hearsay. There are exceptions to the hearsay rule, including one for declarations of a deceased person. The adjudicator referred to this at p. 7 of the Decision.

The Delegate accepted hearsay evidence, weighed the evidence and made findings of fact. The Adjudicator properly did not interfere with those findings of fact.

I find that this application for reconsideration is without merit.

ORDER

Pursuant to s. 116 of the *Act*, I dismiss the application for reconsideration. Accordingly, the Adjudicator's decision dated July 15, 2002 remains in force.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal