

An Application for Reconsideration

- by -

Durack Contracting Co. Ltd.
("Durack")

- 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, Panel Chair
Fern Jeffries
John M. Orr

FILE No.: 2000/869

DATE OF DECISION: May 4, 2001

DECISION

OVERVIEW

This is an application filed by Durack Contracting Co. Ltd. (“Durack”) pursuant to section 116 of the *Employment Standards Act* (the “Act”) for reconsideration of an adjudicator’s decision issued on November 8th, 1999 (B.C.E.S.T. Decision No. D439/99). The adjudicator varied the determination under appeal, ordering Durack to pay its former employee, Milton Christensen (“Christensen”), the sum of \$4,276.31 and interest payable pursuant to section 88 of the *Act*.

Durack’s application for reconsideration, dated December 13th, 2000, was filed with the Tribunal on December 18th, 2000, some 13 months after the adjudicator’s decision was issued. The Director’s delegate submits that the Tribunal should not reconsider the adjudicator’s decision due to Durack’s lengthy delay in making the application. Unfortunately, we do not have any submissions from Mr. Christensen. Some time after his unpaid wages, as calculated by the adjudicator, were distributed to him by the Director’s delegate (in mid-February 2000), Christensen moved and letters to his former address have been returned with an indication that he did not leave any forwarding address.

PRIOR PROCEEDINGS

On June 22nd, 1999 a delegate of the Director of Employment Standards issued a determination under file number 032-705 (the “Determination”) ordering Durack to pay Christensen a total amount of \$6,259.73 on account of unpaid statutory holiday pay (\$1,807.19), vacation pay (\$2,071.64), one week’s wages as compensation for length of service (\$1,905.92) and section 88 interest (\$474.98).

Durack appealed the Determination to the Tribunal. Following an oral hearing, the adjudicator varied the Determination by reducing the amount awarded on account of statutory holiday pay (reduced to \$1,617.68) and vacation pay (reduced to \$752.71). The \$1,905.92 award for compensation for length of service was confirmed. Thus, the adjudicator held that Durack was obliged to pay Christensen \$4,276.31 plus section 88 interest.

THE APPLICATION FOR RECONSIDERATION

Durack’s application for reconsideration consists of a letter to the Tribunal from Durack’s legal counsel, dated December 13th and filed December 18th, 2000, together with an appended 4-page submission. We also have before us a further 2-page submission dated and filed January 12th, 2001 and a 5-page reply submission (to the delegate’s submission) from Durack’s legal counsel dated and filed February 6th, 2001. As noted, the Director’s delegate

filed a submission (dated January 15th, 2001) and, by reason of the fact that the whereabouts of Mr. Christensen is presently unknown, Christensen is unaware of these proceedings and thus, obviously, has not filed any submission with the Tribunal in response to Durack's application for reconsideration.

Durack does not take issue with the adjudicator's decision to confirm the delegate's award on account of compensation for length of service nor does Durack disagree with the amounts calculated by the adjudicator on account of statutory holiday pay and vacation pay. However, Durack says it is entitled to "setoff" monies it says Christensen received on account of statutory holiday and vacation pay against its overall liability for these latter two items:

"[Durack] applies for reconsideration on the grounds that the Tribunal failed to credit [Durack] with payments already made to [Christensen] on account of Vacation and Statutory Holiday pay, namely, the extra 3% of gross haul.

[Durack] accepts that the method of payment did not meet the provisions of the *Act* and accepts the Tribunal's calculations of the amounts that were due [Christensen] on account of Vacation Pay and Statutory Holiday Pay as calculated in the manner prescribed in the *Act*. However, [Durack] says it is entitled to offset those amounts with the advances already given to [Christensen] in contemplation of those payments." [December 13th, 2000 submission at p. 2]

ANALYSIS

The Timeliness of the Application

As previously noted, the Director's delegate submits that this application ought to be rejected out of hand as untimely. The Director's delegate's position is set out below:

"The Director's position on this issue is that a reconsideration request should be rejected where the delay has caused prejudice to the parties opposing the reconsideration. In the present case, the Director submits, there is sufficient evidence of prejudice to the other parties such that the Tribunal should reject the application. In addition, the Director raises the question of whether Durack has operated in good faith with regards to this application and submits that the lack of good faith provides additional grounds on which to reject the application."

(January 15th, 2001 submission at p. 1)

The Tribunal's authority to reconsider its decisions (section 116) is a *discretionary* authority. As the Tribunal has noted in a number of decisions, most recently in *Director of Employment Standards and Valorosos* (B.C.E.S.T. RD046/01), the timeliness of the application is an important, though hardly the only, factor that the Tribunal will take into account when determining whether it will exercise its discretion to reconsider a particular case. The governing principles with respect to the timeliness of reconsideration applications are set out in *Valorosos* (at p. 10) as follows:

- “1. The Tribunal will properly consider delay in deciding whether to exercise the reconsideration discretion.
2. Where delay is significant, an applicant should offer an explanation for the delay. A delay which is not explained will militate against reconsideration.
3. Delay combined with demonstrated prejudice to a party will weigh even stronger against reconsideration. In some cases, the Tribunal may presume prejudice based on a lengthy unexplained delay alone.
4. Even in cases of unreasonable delay, the Tribunal ought to consider the merits, and retains the discretion to entertain and grant a reconsideration remedy where a clear and compelling case on the merits is made out.”

With the foregoing principles in mind, we now turn to the circumstances surrounding the instant application.

The delay here is considerable, over 13 months. The adjudicator's decision was issued on November 8th, 1999. On December 2nd, 1999, and in response to a demand for payment of the wages and interest due to Christensen as set out in the adjudicator's decision, legal counsel for Durack forwarded a cheque to the delegate representing full payment of Christensen's claim. Counsel's December 2nd letter made specific reference to a possible reconsideration application and thus a request was made that the monies be held by the delegate for 2 weeks while counsel finalized his instructions.

On January 12th, 2000--following several other interim telephone communications between the delegate and Durack's counsel--the delegate faxed a letter to Durack's counsel in which, after observing that 2 weeks had long since passed, he advised:

“If I have not been informed formally by the Employment Standards Tribunal by 8:30 a.m. tomorrow morning, 13 January 2000, that they have received a request for reconsideration, I shall be disbursing the money to [Christensen] and closing the file”.

In response, counsel forwarded a small claims writ and garnishing order having commenced a small claims court action against Christensen to recover an alleged “overpayment” of wages on January 4th, 2000.

On January 13th, 2000 counsel wrote the Tribunal and stated that he had been instructed to file a reconsideration application but was “unable to complete the argument for the application yet” although he anticipated “provid[ing] the complete argument within the upcoming month”. As we know, of course, the reconsideration application was not filed until over 11 months later, December 18th, 2000.

In the meantime, on January 19th, 2000, the delegate yet again faxed a letter to Durack’s counsel advising that the funds would be disbursed to Christensen unless a reconsideration application was filed on or before February 14th, 2000. No such application was filed and thus, on February 16th, the funds were disbursed to Christensen and counsel was so advised. We think it important to note that in the delegate’s January 19th letter to Durack’s counsel, the delegate specifically raised the matter of delay in applying for reconsideration:

“...if I have not been informed by the Employment Standards Tribunal that a formal reconsideration application has been filed by the close of business on 14 February 2000, I intend to disburse the monies held [for Christensen] immediately. Further, I will be arguing before the Employment Standards Tribunal that *any further attempts to delay are prejudicial to [Christensen] to the extent that the Employment Standards Tribunal should consider refusing to hear any eventual application on the grounds that it is not timely.*”

(our *italics*)

An explanation for the late application is contained in Durack’s counsel’s January 12th, 2001 submission to the Tribunal:

“The reason we did not apply for reconsideration earlier was because we had taken the matter of the double payment to small claims court. We filed Claims against [Christensen and another employee] on January 4, 2000 claiming damages for the employees’ breach of their contract which resulted in the employees obtaining more than they were entitled to under both their employment contract and the *Employment Standards Act*. The past two adjudicators [*sic*] did not address the issue of offset or overpayment and the *Act* makes no provision for circumstances where an employee has been overpaid for statutory holidays and vacation pay. We therefore believed that it was beyond the jurisdiction of the Tribunal to order an employee to reimburse his employer for funds already advanced to meet statutory requirements that later turned out to be short or miscalculated. It was our position that as a matter of law only the

provincial court could make such a repayment order as a matter of *contract law* rather than under the authority of the *Act*. We initially did not appeal [*sic*] the decision of [the adjudicator] because we felt the breach of contract issue did not fall within the Tribunal's jurisdiction."

Several points are to be noted with respect to the above explanation regarding the tardy reconsideration application.

First, the B.C. Provincial Court (Small Claims division) action was commenced on January 4th, 2000 apparently because counsel took the view that the Tribunal lacked jurisdiction to make the order Durack was seeking as against Christensen. However, on January 13th, 2000 counsel wrote to the Tribunal stating that he had been instructed to apply for reconsideration and that the reconsideration application would be filed "within the upcoming month". If counsel was of the view, in January 2000, that the Tribunal lacked jurisdiction, we fail to appreciate why counsel was purporting to invoke the Tribunal's jurisdiction by way of an intended application for reconsideration.

Second, we fail to appreciate (as did the Provincial Court) how a payment order made in favour of an employee by a statutory body--ordering the payment of statutory entitlements (statutory holiday pay and vacation pay)--can be characterized as a *breach of contract* by the employee. Such an assertion is quite untenable. As we conceive the argument, the employer simply argued that it paid Christensen all of the statutory holiday pay and vacation pay to which he was entitled under the *Act*--that position was rejected by the delegate and also by the adjudicator. Had Durack's position not been rejected, Durack's liability would have been reduced accordingly.

Third, in our view, there was no legal imperative for filing the small claims court action. In our view, Durack ought to have exhausted its remedies under the *Act* (*i.e.*, by applying for reconsideration) prior to filing the small claims court action. Indeed, if Durack succeeded on reconsideration, the small claims action would have been entirely unnecessary.

We do know that once the small claims action was commenced, a garnishing order was sought against the Director. It appears that Durack was attempting, via the garnishing order, to obstruct the delegate's stated intention of paying out the monies standing in the Director's trust account to Christensen's credit. Further, it should be noted that the delegate expressly indicated to Durack's counsel that he would be not pay out the monies held in trust for Christensen so long as a reconsideration application was filed on or before February 14th, 2000.

Fourth, even if there was a *bona fide* reason for commencing the small claims action, surely the commencement of that action did not, in any way, bar Durack from *filing* a contemporaneous reconsideration application.

Finally, the small claims action was summarily dismissed on September 8th, 2000 and yet over 3 more months passed by before the reconsideration application was actually filed with the Tribunal. Counsel for Durack says that they delayed pending receipt of a ruling on costs in the small claims court matter; we find that explanation to be wholly unsatisfactory. We simply cannot see any nexus between the issuance of a costs order in the small claims action and the filing of an application for reconsideration.

To summarize, in our view, there is extraordinary unexplained (or, at the very least, inadequately explained) delay in this case. There is evidence before us of persistent dilatory conduct by Durack and its counsel. The monies ordered to be paid to Christensen have now been paid out; that payment was made only after express prior notice was given to Durack's counsel. Christensen has apparently moved without any forwarding address and thus is unable to participate in the reconsideration proceedings.

Undoubtedly, the monies paid to Christensen have now been expended and thus he would suffer prejudice if he was somehow (we are not quite sure how) legally required to reimburse Durack for some or all of those monies. At some reasonable point, proceedings under the *Act* must be considered concluded--that notion is entirely consistent with the dictates of subsections 2(b) and (d) that parties be treated fairly and that disputes under the *Act* be resolved in fair and efficient manner.

Finally, while we do not intend to address the merits of this reconsideration application in any detailed fashion, we wish to note that the case advanced by Durack is of dubious merit. The bulk of Christensen's wages (he was a logging truck driver) were based on a 33% gross commission (referred to as a "percentage of truck" payment scheme). Christensen testified at the appeal hearing that "he was hired at the rate of 33% of the truck gross" and that he was never advised "that annual vacation pay and statutory holiday pay was to be included in the percentage rate of pay".

The adjudicator merely noted, at page 6 of the Determination, the uncontentious fact that Christensen's wage statements (prepared by Durack) purported to allocate a portion of Christensen's commission earnings to vacation pay although nothing was similarly allocated for statutory holiday pay. The adjudicator then observed that a unilateral allocation by an employer of a portion of an employee's commission earnings to vacation pay is impermissible. There is nothing remarkable about the adjudicator's finding in this latter regard--the Tribunal has consistently held that an employer's unilateral allocation of some portion of an agreed commission percentage to vacation pay and/or statutory holiday pay does not comply with the *Act*: *W.M. Schultz Trucking Ltd.*, B.C.E.S.T. Decision No. D127/97; *Kirkham Silviculture Ltd.*, B.C.E.S.T. Decision No. D260/97; *Bauchman*, B.C.E.S.T. Decision No. D222/98; *Monday Publications Ltd.*, B.C.E.S.T. Decision No. D296/98; *Specialty Motor Cars (1970) Ltd.*, B.C.E.S.T. Decision No. D570/98).

ORDER

Durack's application to reconsider the decision of the adjudicator in this matter is refused.

KENNETH WM. THORNICROFT

**Kenneth Wm. Thornicroft
Adjudicator, Panel Chair
Employment Standards Tribunal**

FERN JEFFRIES

**Fern Jeffries
Chair
Employment Standards Tribunal**

JOHN M. ORR

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Adjudicator
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