

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.:** 2000/870

**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. D440/99). The adjudicator varied the determination under appeal, ordering Durack to pay its former employee, Roderick Vander Wiel (“Vander Wiel”), the sum of \$8,053.14 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. Both Vander Wiel and the Director’s delegate submit that the Tribunal should not reconsider the adjudicator’s decision due to Durack’s lengthy delay in making the application.

### PRIOR PROCEEDINGS

On June 25th, 1999 a delegate of the Director of Employment Standards issued a determination under file number 032-705 (the “Determination”) ordering Durack to pay Vander Wiel a total amount of \$8,223.14 on account of unpaid statutory holiday pay, vacation pay, 2 weeks’ wages as compensation for length of service and a further \$395.61 for section 88 interest (total amount due under the Determination = \$8,618.75).

Durack appealed the Determination to the Tribunal. Following an oral hearing, the adjudicator essentially confirmed the Determination in all respects save for a \$170 adjustment on account of vacation pay that was paid by Durack to Vander Wiel but not credited to Durack in the delegate’s calculations. Thus, the adjudicator varied the Determination by reducing the amount due to Vander Wiel to \$8,053.14 (\$8,223.14 - \$170 = \$8,053.14) plus 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 5-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) as did Mr. Vander Wiel (dated March 11th, 2001).

Durack does not take issue with the adjudicator's decision to confirm the delegate's award on account of compensation for length of service. Durack's principal challenge to the adjudicator's decision relates to Vander Wiel's entitlement to statutory holiday and vacation pay. More particularly, Durack says it is entitled to "setoff" monies it says Vander Wiel 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 [Vander Wiel] on account of Vacation and Statutory Holiday pay, namely, the extra 3% of gross haul...By paying the statutory payments as a '3% of gross haul', [Vander Wiel] actually received **\$1,530.55 more than he was entitled to under the Act.**

[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 [Vander Wiel] 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 [Vander Wiel] in contemplation of those payments."

[December 13th, 2000 submission at p. 2; **boldface** in original]

## ANALYSIS

### *The Timeliness of the Application*

As previously noted, Vander Wiel submits that this application ought to be rejected out of hand as untimely. The Director says much the same thing. The Director's delegate's position as to the matter of timeliness 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 Vander Wiel as set out in the adjudicator’s decision, legal counsel for Durack forwarded a cheque to the delegate representing full payment of Vander Wiel’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 [Vander Wiel] and closing the file”.

In response, counsel forwarded a small claims writ and garnishing order having commenced a small claims court action against Vander Wiel 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 Vander Wiel 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 Vander Wiel 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 Vander Wiel] immediately. Further, I will be arguing before the Employment Standards Tribunal that *any further attempts to delay are prejudicial to [Vander Wiel] 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 [Vander Wiel 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 Vander Wiel. 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 did pay some monies to Vander Wiel on account of statutory holiday pay and vacation pay--that position was rejected by the delegate and, subject to a minor adjustment, by the adjudicator as well. 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 Vander Wiel'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 Vander Wiel 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 Vander Wiel have now been paid out; that payment was made only after express prior notice was given to Durack's counsel. Undoubtedly, the monies paid to Vander Wiel 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 Vander Wiel's wages (he was a logging truck driver) were based on a 33% gross commission (referred to as a "percentage of truck" payment scheme). Vander Wiel testified at the appeal hearing that "he was hired at the rate of 33% of the truck gross". Although Vander Wiel's wage statements indicated that a portion of the 33% gross percentage was being allocated to vacation pay (no monies were purportedly allocated to statutory holiday pay) that allocation appears to have been unilaterally undertaken by the employer so as to give the appearance of compliance with the vacation pay provisions of the *Act*.

Concerning this latter point, the delegate stated (at p. 2 of the Determination): "In other words, the Employer simply deems a portion of the percentage of the truck payment to be annual vacation pay and reflects this on the pay statements." For his part, the adjudicator merely noted, at page 6 of the Determination, the uncontentious fact that Vander Wiel's wage statements (prepared by Durack) purported to allocate a portion of Vander Wiel's commission earnings to vacation pay although nothing was similarly allocated for statutory holiday pay.

The adjudicator simply confirmed the delegate's finding (save for \$170 that was paid on account of vacation pay) that Durack did not pay Vander Wiel vacation pay or statutory holiday pay as required by the *Act*. 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  
Employment Standards Tribunal**