

An Application for Reconsideration

- by -

Cory Pratt
("Pratt" or "Employee")

- 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: Paul E. Love

FILE No.: 2001/58

DATE OF DECISION: May 18, 2001

DECISION

OVERVIEW

This is an application for reconsideration, made by Cory Pratt (“appellant” or “employee”) of a decision of the Employment Standards Tribunal (“Tribunal”) dated January 8, 2001 (the “original decision”). Mr. Pratt alleged that the Adjudicator erred in finding facts related to wages paid to him by the employer. The employer in its appeal of the Determination, alleged that a Delegate of the Director of Employment Standards (“Delegate”) erred in the finding that wages were owed to Mr. Pratt. The Delegate found Mr. Pratt was entitled to the sum of \$1,685.43. After an oral hearing, the Adjudicator found that Mr. Pratt was entitled to \$387.36. This was a case where neither the employer nor Mr. Pratt kept detailed records, and the Adjudicator attempted to sort out the issues at an oral hearing involving the claims of six former employees of Panstall Inc.

ISSUES TO BE DECIDED

As a threshold issue, is this a proper case for the exercise of the Tribunal’s discretion to reconsider under s. 116 of the *Employment Standards Act* (the “Act”)?

If this is a proper case, did the Adjudicator err in findings of fact related to wages received by Mr. Pratt?

FACTS

This reconsideration application is decided upon written submissions of the employee.

Cory Pratt was employed as a construction labourer with Panstall Inc. (“Panstall”). The complaint to the Delegate was that Mr. Pratt did not receive complete regular wages, overtime, and annual vacation pay on separation of employment. At the time of the issuance of the Determination (May 26, 2000) Panstall had ceased its business operations. The Determination dealt with the claims of Mr. Pratt and five other employees.

Mr. Pratt claimed employment between October 12, 1999 to December 20, 1999. Mr. Pratt claims that he is owed the sum of \$1,685.83 as found by the Delegate, and not the sum of \$387.36 found by the adjudicator. The Delegate says that the Adjudicator erred in failing to rely on written time sheets, and in failing to consider that a cheque paid was a replacement cheque.

Total Gross Wages	\$3,297.60	
Less wages paid	\$1,790.00	
Sub-Total	\$1,507.60	\$1,507.60
Annual vacation pay (4 % of 3,297.60)	\$131.90	\$131.90
Sub-Total		\$1,639.50
Plus interest pursuant to s. 88		\$46.33
Total		\$1,685.43

At the hearing, the employer alleged that the Determination was incorrect in that Panstall paid total wages to Mr. Pratt of \$3,589.21 not \$1,790.00 and that Pratt was over paid wages. The Delegate found that Pratt received wages of \$2,914.53, which had an affect on reducing the vacation pay entitlement and interest. The Adjudicator considered a number of cheques which were submitted by Panstall. Mr. Pratt says that a cheque stub (5646) in the amount of \$676.25 was for a replacement cheque to Money Mart. The Adjudicator characterized this as an amount received by Pratt. The Adjudicator indicated that Pratt said that he was not paid for overtime but that Pratt nor Panstall kept proper records. The Adjudicator said:

“Taking into account the fact that overtime may not have been paid and not having the benefit of contemporaneous payroll records, we can only conclude that Pratt did receive wages of \$2,914.53 which changes the Delegate’s calculation as follows:

Total gross wages calculated	\$3,297.00
Less wages paid	\$2,914.53
	\$372.47
Annual vacation pay (4 % of \$372.47)	\$14.89
	\$387.36

plus interest in accordance with s. 88 of the *Act*.

ANALYSIS

In an application for reconsideration, the burden rests with the appellant, in this case the employee to show that this is a proper case for reconsideration, and that the adjudicator erred such that I should vary, cancel or affirm the Decision. An application for reconsideration of a Tribunal’s decision involves a two stage analysis, as set out in *Milan Holdings Ltd., BCEST #D186/97*:

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);
- (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.

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. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": Zoltan Kiss, *supra*. As noted in previous decisions,

"The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons":

Khalsa Diwan Society (BCEST #D199/96, reconsideration of BCEST #D114/96).

After weighing these and other factors relevant to the matter before it, the Panel may determine that the application is not appropriate for reconsideration. If so, it will typically give reasons for its decision not to reconsider the adjudicator's decision. Should the Panel determine that one or more of the issues raised in the application is appropriate for reconsideration, the Panel will then review the matter and make a decision. The focus of the reconsideration panel "on the merits" will in general be with the correctness of the decision being reconsidered.

The very point of reconsideration being to provide a forum for sober reflection regarding questions which are considered sufficiently important to warrant such review, we consider it sensible to conclude that questions deemed worthy of reconsideration - particularly questions of law - should be reviewed for correctness.

The reconsideration power is one to be exercised with caution. A non-exhaustive list of grounds for reconsideration include:

- a. a failure by the adjudicator to comply with the principles of natural justice;
- b. a mistake of fact;
- c. inconsistency with other decisions which cannot be distinguished;
- d. significant and serious new evidence that has become available and that would have lead the adjudicator to a different decision;
- e. misunderstanding or failing to deal with an issue;
- f. clerical error.

Turning now to the application of the test to the facts in this test, Mr. Pratt alleges that the adjudicator erred in the fact finding process. Mr. Pratt's submission on the appeal consists of a two paragraph letter, without any supporting documentation. While the amount of the alleged error may be a significant amount to Mr. Pratt, the alleged error is not clear to me on the face of the appellant's submission. Mr. Pratt has not clearly identified with documents how the Adjudicator erred. This case does not involve any issues of interpretation of the *Act*. The appellant has not made out an arguable case of sufficient merit for me to proceed further with the reconsideration.

ORDER

Pursuant to section 116 of the *Act*, I order that the Decision in this matter, dated January 8, 2001 be confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal