



An Application for Reconsideration

- by -

John Cottam and Oliver Cottam and John Cottam o/a Dakota Transportation Services and Oliver Cottam o/a Dakota Transportation Services and John and Oliver Cottam o/a Dakota Transportation Services

- 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: John M. Orr

FILE No.: 2001/177

DATE OF DECISION: May 18, 2001

DECISION

OVERVIEW

This is an application by John and Oliver Cottam operating jointly or severally as Dakota Transportation Services (the "Cottams") under Section 116 (2) of the *Employment Standards Act* (the "Act") for a reconsideration of a Decision #D068/01 (the "Original Decision") which was issued by the Tribunal on February 12, 2001.

The Cottams operated a salvage business and an employee, Robert Pepler, made a complaint to the Employment Standards Branch for unpaid wages and overtime. A determination was issued on November 16, 2000 in which the Director found that Pepler was owed a total of \$4,313.41 in unpaid wages and overtime. The Cottams appealed and on February 12, 2001 an adjudicator of the Tribunal dismissed the appeal on the basis of the written submissions and confirmed the determination.

The Cottams have now applied for reconsideration of the original decision. They state 11 grounds for the application. The first 5 grounds and grounds 9 and 10 deal with arguments about the disclosure of information from the complainant. Grounds 6 and 7 refer to the lack of an oral hearing and ground 11 states that, "Our company has been treated with nothing but disrespect and has had no rights what so ever given to us".

ANALYSIS

The current approach to the exercise of the reconsideration discretion under section 116 of the *Act* was set out by the Tribunal in *Milan Holdings Ltd.*, BCEST #D313/98. In *Milan* the Tribunal sets out a two-stage analysis in the reconsideration process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. In deciding this question the Tribunal should consider and weigh a number of factors such as whether the application is timely, whether it is an interlocutory matter, and whether its primary focus is to have the reconsideration panel effectively "re-weigh" evidence tendered before the adjudicator.

The Tribunal in *Milan* went on to state that the primary factor weighing in favour of reconsideration is whether the applicant has raised significant questions of law, fact, principle or procedure of sufficient merit to warrant the reconsideration. The decision states, "at this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general". Although most decisions would be seen as serious to the parties this latter consideration will not be used to allow for a "re-weighing" of evidence or the seeking of a "second opinion" when a party simply does not agree with the original decision.

It is one of the defined purposes of the *Act* to provide a fair and efficient procedure for resolving disputes and it is consistent with such purposes that the Tribunal's decisions should not be open to reconsideration unless there are compelling reasons: *Khalsa Diwan Society* BCEST #D199/96.

The circumstances in which an application for reconsideration will be successful will be limited. In a Reconsideration decision dated October 23, 1998, *The Director of Employment Standards*, BCEST #D475/98, the Adjudicator sets out those limits as follows:

- *failure to comply with the principles of natural justice;*
- *mistake of law or fact;*
- *significant new evidence that was not reasonably available to the original panel;*
- *inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;*
- *misunderstanding or failure to deal with a serious issue; and*
- *clerical error*

In my opinion this is not a case that warrants the exercise of the reconsideration discretion. The submission made by the Cottams on this reconsideration application only reiterates the arguments that have already been decided by the director and by the adjudicator in the original decision. The arguments about disclosure were dealt with by the adjudicator as follows:

The submissions made by Dakota on the appeal also include allegations which, if valid, would raise concerns about whether there was a denial of natural justice during the investigation. However, the allegations, that the investigating officer failed to provide them with any information about the complaint are, in fact without foundation and are entirely discounted by the material filed by the Director in reply to the appeal.

The absence of an oral hearing in and of itself is not a matter for reconsideration and there is no substantial reason shown that a hearing would have resulted in any different decision. It is always unfortunate if a party feels that they have not been respected in the process of the investigation, and the appeal, as fairness to both the employer and employee is one of the founding principles of the legislation. Although the Cottams feel they have not been respected I can see no basis for this feeling in the documentation on the file or that a different approach would have resulted in a different decision.

It is fully within the intent and purposes of the act that there be some finality to the decisions of the Tribunal. As stated above, reconsideration should be used sparingly and should not be used to substitute my analysis and my opinion for that of the adjudicator who wrote the original decision.

The adjudicator clearly was cognisant of the argument put forward by the Cottams. He analysed the material presented carefully and obviously rejected the notion that the investigation was conducted in any way that breached the rules of natural justice or that the Cottams were denied a reasonable opportunity to present their case to the Director's delegate. Likewise there is no indication that they were not fully able to present their case to the adjudicator.

I am not persuaded that there is a sufficient basis in fact or in law to warrant any interference in the decision made by the adjudicator in the original decision. Therefore I am not prepared to exercise my discretion to reconsider the original decision.

ORDER

The application to reconsider the decision of the adjudicator in this matter is dismissed.

John M. Orr
Adjudicator
Employment Standards Tribunal