Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Henry Tung
("Tung" or "appellant")

- 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.: 2001/117

DATE OF DECISION: May 22, 2001

DECISION

OVERVIEW

This is an application for reconsideration, made by Tung of a decision of the Employment Standards Tribunal ("Tribunal") dated January 23, 2001 (the "original decision"). The Delegate issued a Determination, dated July 12, 2000, finding that the employer was liable to the employee in the amount of $10,793.21, for an amount consisting largely of overtime wages. Counsel for the employer alleges that the Adjudicator erred in a matter of fact finding concerning the hours worked each day, but this is not an issue which meets the threshold test for reconsideration set out in *Milan Holdings Ltd., BCEST #D186/97*. As a result of comments made by the Adjudicator concerning lack of jurisdiction to hear a delay argument, Counsel for the employer did not lead evidence or argue the issue of delay and laches, in a case which involved a 4 year delay from the filing of the complaint until the issuance of the determination. Counsel for the employer, seeks a further rehearing on this issue. In this case the Adjudicator's comments about jurisdiction had an effect on the fairness of the hearing, where there was "divergent" Tribunal authority on the issue of delay, and the parties appeared to be unaware of a recent decision from the Supreme Court of Canada involving delay. Counsel for the employer sought a hearing to address the issues of delay and prejudice. I confirmed the portion of the decision dealing with the length of the working day, and remitted the issue of delay and prejudice to the original Adjudicator for a rehearing. It is often a delicate balance between the values of fairness and efficiency, and a rehearing on this matter will cure any breach of procedural fairness or natural justice.

ISSUES TO BE DECIDED

Is this a matter which should be reconsidered?

FACTS

This reconsideration application is decided upon written submissions of Mr. Tung and Ms. Labuguen. Ms. Labuguen was employed as a domestic by Mr. Tung for the period March 1, 1995 to June 14, 1996. The Director found that Mr. Tung was liable in the amount of $10,793.21 on account of unpaid wages to Edna Labuguen for the period March 1, 1995 to June 14, 1996. The claim consisted principally of overtime pay.

The Adjudicator conducted an oral hearing dealing with an appeal by Mr. Tung, from a Determination dated July 12, 2000. There was a substantial delay in the investigation of the complaint, which the Adjudicator found was not attributable to the employer. The Adjudicator confirmed the Determination. The Director did not appear at the hearing, and both the parties were represented by counsel.

The employer advances two grounds for appeal. The first ground is that the Adjudicator should have found that there was an agreement between the parties that the overtime calculations should be based on a 12.5 hour work day, and not a 13 hour work day as alleged by the employee. The employer did not record the hours worked by the employee. The Adjudicator found that there was no evidence of an agreement, and Ms. Labuguen rejected a settlement offer on that basis. The Adjudicator found that there was evidence to support a 13 hour work day.

The second ground of appeal was that Mr. Tung was " wrongfully and unfairly prejudiced" by reason of unconscionable, inexplicable and/or wholly improper delays, and that as a result of a ruling by the Adjudicator that there was no jurisdiction to hear the issue of delay, the employer did not argue properly the issue of delay or adduce evidence. This case dealt with delay in the investigation of a complaint, which was filed in a timely manner by the complainant. It is unclear from the facts before me whether the fault for the delay can be laid at the feet of the complainant or the Director. The Adjudicator analyzed the issue of delay and prejudice in his decision and determined that Mr. Tung had not shown delay of the nature required for the matter to be stayed. The Adjudicator found that there was no prejudice. The Adjudicator also found that:

Accordingly, although I consider the delay here to be excessive, in the absence of evidence of "actual prejudice of such magnitude that he public's sense of decency and fairness is affected (Blencoe at para 133), the Determination cannot be cancelled solely on the basis of unreasonable delay"

Employer's Argument

Counsel for the employer says " The clear finding of no prejudice in the Decision cannot be concluded or determined from the evidence when the complainant was prevent from proceeding with the delay and laches issue." The employer says that the Adjudicator's comments regarding lack of jurisdiction to deal with delay caused him not to proceed with the delay and laches evidence and argument.

Employee's Argument:

Counsel for the employee submits that delay, in and of itself is not enough upon which to allow a reconsideration of an employment standards determination. Counsel for the employee agrees that the employer did not "address the issue of laches" at the January 8, 2001 hearing, and questions what evidence would have been presented given the simplicity of the case. Counsel for the employee points out that nowhere in the record including the Determination or written submissions of the employer is there evidence which would lead one to believe that the employer suffered prejudice as a result of the delay. The employee submits that the finding of a 13 hour work day be upheld as a finding of fact.

ANALYSIS

In an application for reconsideration, the burden rests with the appellant, in this case the Director, to show that this is a proper case for reconsideration, and that the Adjudicator erred such that we 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:
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> (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).
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> (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);
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> (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).
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> 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 deem 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.

Dealing first with the length of the work-day issue, in my view this is not a matter that merits reconsideration. The submission amounts to a submission that the Adjudicator should have preferred the employer's evidence over the evidence of the employer. I find that this ground does not survive the first branch of the *Milan Holdings Ltd.* test.

Evidence of Prejudice:

On the issue of delay and prejudice, Counsel for Mr. Tung has raised a serious issue, which falls within the proper scope for reconsideration. At the time of the hearing of this matter the Tribunal had ruled on the delay issue in two cases, and there was some divergence in the views of the Adjudicators. In *Westhawk Enterprises Inc, BCEST #D 302/98 (Lawson)* the Adjudicator cancelled a decision involving a simple complaint which was dealt with within 20 months, without any explanation of the reasons for the delay. This case relied upon the Court of Appeal decision in *Blencoe v. British Columbia Human Rights Commission, 49 B.C.L.R. (3d) 216 (B.C.C.A.))*, which was reversed by the Supreme Court of Canada. In *Ecco II Pane Bakery Inc., BCEST #D 3022/98 (McCabe)* the Adjudicator was not prepared to set aside a determination issued three years after complaint, in the absence of any evidence of prejudice flowing from the delay.

The Adjudicator appears to have been alert to a recent case dealing with the delay issue (*Blencoe v. British Columbia Human Rights Commission, 2000 SCC 44, reversing (10989), 49 B.C.L.R. (3d) 216 (B.C.C.A.))*, which appears to make the employer's submission "an uphill battle" on this point. Neither party referred to *Blencoe* in written and oral submissions. I do not know what the evidence is concerning the prejudice. This is not disclosed in the appellant's material. I am relying on the advice of Counsel for Mr. Tung when he says, in effect, that an inadequate opportunity was afforded to him to develop this argument. This appears to be caused by the comments of the Adjudicator with regard to having no jurisdiction to hear a delay argument.

An adjudicator has to balance the values of fairness and efficiency in managing the conduct of a hearing. These principles are set out in s. 2 of the *Act*. It is often a delicate balancing act, and the only method that I have to deal with this point is to review the decision and review the arguments and evidence of the parties. There is no recording of Tribunal hearings, and in this particular case a review of such a recording might have been of assistance in resolving the employer's allegation which goes to the fairness of the hearing. Ordinarily, in applying the *Milan Holdings Ltd.* test, there is a conservative approach to the hearing of reconsideration matters. A party, however, meets that test when it can show a breach of natural justice. Procedurally fair hearings are important, and parties can often "swallow" a decision which concludes the case against them, provided they have been given a fair opportunity to adduce evidence and persuade the decision maker. I am concerned that Counsel for the employer is alleging a lack of opportunity to develop his case, on the very issue which was the subject of detailed analysis by the Adjudicator, on the basis of case law of which the parties do not appear to have been aware. Counsel for the employee appears to

confirm that employer's Counsel did not address the issue of laches, but surmises that the evidence would not have been substantial. There is certainly an appearance of an unfair hearing, as reflected in the submission of the employer. I have no recourse to any transcript or tape of proceedings to weigh in the balance.

The employer should have been given an opportunity to develop the "prejudice and delay argument", lead evidence on this point, and should have been given an opportunity to consider and comment upon *Blencoe*. I find that the Adjudicator should have permitted "more scope" to the appellant to develop this argument, and that this is a breach of natural justice. I set aside the portion of the decision was deals with delay. There is no suggestion before me that the original Adjudicator, should not hear the delay argument. I refer this matter back to the original Adjudicator to hear and rule on the issue of prejudice and delay by way of an oral hearing. It is often a delicate balance between the values of fairness and efficiency, and a rehearing on this issue will cure any breach of procedural fairness or natural justice, arising from the comments of the Adjudicator concerning his jurisdiction. I ask that the Registrar give this matter urgent attention in the scheduling of the hearing given the age of the matter.

ORDER

Pursuant to section 116 of the *Act*, I order that the Decision in this matter, dated January 23, 2001 be set aside, pending an oral hearing in which the appellant will be permitted to tender evidence of "prejudice", and make argument that delay "prejudiced" the hearing. The Decision, is otherwise confirmed.

Paul E. Love

Paul E. Love
Adjudicator
Employment Standards Tribunal