Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Mary O'Rourke
("O'Rourke")

- 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: David B. Stevenson

FILE No.: 2002/213

DATE OF DECISION: June 17, 2002

British Columbia

DECISION

OVERVIEW

Mary O'Rourke ("O'Rourke") seeks reconsideration under Section 116 of the *Employment Standards Act* (the "*Act*") of a decision of the Tribunal, BC EST #D089/02, dated March 11, 2002 ("the original decision") which considered an appeal by O'Rourke from a Determination by a delegate of the Director of Employment Standards (the "Director"). O'Rourke says the original decision contains a serious mistake in applying the law in deciding O'Rourke's claim for overtime fell outside the time limits set out in Section 80 of the *Act* for recovering unpaid wages. O'Rourke also says the original decision wrongly concluded that the Director had made reasonable efforts to give her an opportunity to respond on the timeliness of her claim for overtime.

ISSUE

In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case is appropriate for reconsideration, the substantive issues raised in this application are whether the original decision contained serious errors of law in its interpretation and application of Sections 95 and 96 of the *Act* and whether, in the circumstances. the original panel committed a jurisdictional error.

ANALYSIS OF THRESHOLD ISSUE

The legislature has conferred an express reconsideration power on the Tribunal in Section 116, which provides:

> 116 (1) On application under subsection (2) or on its own motion, the tribunal may
>
> (a) reconsider any order or decision of the tribunal, and
>
> (b) cancel or vary the order or decision or refer the matter back to the original panel.
>
> (2) The director or a person named in a decision or order of the tribunal may make an application under this section.
>
> (3) An application may be made only once with respect to the same order or decision.

Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is "to provide fair and efficient procedures for resolving disputes over the interpretation and application" of its provisions. Another stated purpose, found in subsection 2(b), is to "promote the fair treatment of employees and employers". The general approach to reconsideration is set out in *Milan Holdings Ltd*., BC EST #D313/98 (Reconsideration of BC EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. An assessment is also made of the merits of the Adjudicator's decision. Consistent with the above considerations, the Tribunal has accepted an

approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration have been identified by the tribunal as including:

- 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.

If the matters warrant reconsideration, the second stage is a full analysis of the substantive issue or issues raised in the application for reconsideration. While the above list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very limited circumstances. The reconsideration process was not meant to allow parties another opportunity to re-argue their case. As stated in *Milan Holdings Ltd.*, supra:

> It would be both unfair and inefficient if the Tribunal were to allow, in effect, two hearings of each appeal where the appeal hearing becomes nothing more than a discovery process for a reconsideration application.

I am not satisfied there is any matter that warrants reconsideration. I shall briefly respond to each of the grounds raised in this application:

1. Failure to comply with principles of natural justice.

There is no evidence of a failure by the Adjudicator of the original decision to comply with principles of natural justice. This ground does nothing more than attempt to express O'Rourke's disagreement with the conclusions reached in the original decision in terms that might justify the Tribunal exercising its discretion in favour of the application for reconsideration.

2. Error of law in interpreting the effect of Section 80 and subsection 42(4) of the Act on the complaint.

No error has been shown. The interpretation of the relevant provisions of the Act are correct. O'Rourke's argument, that the interpretation allows her employer to use its continuing breach of the Act as a defence to her claim, was answered in the original decision:

> . . . the statute clearly prevents her from recovering wages for the period 1991 to 1994. The Act is remedial legislation, but the remedies set out in it have limits. O'Rourke's remedy under the Act is limited to recovering wages that were payable in her last two years of employment.

In the face of subsection 42(4), there is no logical basis for suggesting, as O'Rourke does, that the Tribunal was wrong not to have concluded her banked overtime was not 'payable' until she was laid off in December, 2000. Statutory interpretation is not dictated by the circumstances of the particular case,

but by a grammatical and ordinary sense reading of the language used in the statute. As the Court of Appeal stated in *Biller v. British Columbia (Securities Commission),* [2001] B.C.J. 515; [2001] BCCA 208:

> The first step in statutory interpretation is to determine if there is a plain meaning of the statutory provision in question. This determination must be made after consideration of the statute as a whole.

The language of the *Act* is clear. O'Rourke is seeking a remedy under the *Act* and that remedy must be governed by its provisions. Nothing in this application indicates how O'Rourke can get where she wishes to be based on the clear language of the applicable statutory provision.

3. Failure by the Director to make reasonable efforts to allow response.

In the circumstances, I am not convinced that the Director failed to comply with Section 77 of the *Act* on the issue of the timeliness of O'Rourke's overtime claim or that the adjudicator of the original decision was wrong in her conclusion on that point. Once again, this ground expresses no more than a difference of opinion concerning whether the communications between O'Rourke and the Director satisfied the requirements of Section 77. The adjudicator says O'Rourke was allowed reasonable opportunity to respond; O'Rourke says she wasn't, although she does not suggest what would have been enough or how the Tribunal should view the fact that this application represents the third occasion, all unsuccessful, she has had to persuade or compel the Director to process her overtime claim. In any event, it is not the function of the Tribunal on reconsideration to second guess conclusions made in the original decision without some valid reason for doing so. None has been provided.

ORDER

Pursuant to Section 116 of the *Act*, I order the original decision, BC EST # D089/02, be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal