



An Application for Reconsideration

- by -

Cariboo Tree Service Ltd.
("Cariboo" or "employer")

- 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.: 2000/879

DATE OF DECISION: May 25, 2001

DECISION

OVERVIEW

This is an application for reconsideration, made by Cariboo Tree Services Ltd. (“appellant” or “employer”) of a decision of the Employment Standards Tribunal (“Tribunal”) dated December 6, 2000 (the “original decision”). The employer alleged that the Adjudicator erred in finding that the employee was entitled to pay for 5 days (4 at 8 hours per day and one at 5 hours per day). The employer alleged bias on the part of adjudicator, in that the adjudicator preferred the evidence of the employee rather than the employer’s two witnesses, and that the adjudicator’s failure to question the employer’s witnesses, and the granting of a recess to the employee for the purpose of the employee’s consideration of his notes and records. The hearing of a matter is within the discretion of the adjudicator, provided that the process is not unfair, the adjudicator has a wide latitude with regard to the conduct of a hearing.

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 *Act*?

If this is a proper case for reconsideration, did the Tribunal err in finding an entitlement to wages?

FACTS

This reconsideration application is decided upon written submissions of the Cariboo Tree Service Ltd. (“employer” or “appellant) and Jugraj Singh Sidhu (“employee”).

Jugraj Singh Sidhu was employed as a tree planter with Cariboo Tree Service Ltd. between May 17 and August 14, 1997. Part of the services involved “brushing” and part of the services involved “planting”. This matter has some history. In decision *Sidhu, BC EST #D002/00 (Petersen)*, a decision issued on January 13, 2000, the Adjudicator determined the hourly rate of Mr. Sidhu was \$13.00 per hour. In *BC EST #D198/00 (Orr)*, the Adjudicator on reconsideration referred back to the Adjudicator to assess the hours to which the \$13.00 rate applied. The Adjudicator did not deal with an issue of the number of hours worked.

In *BC EST #D2000/373 (Petersen)*, the Adjudicator found that Mr. Sidhu was entitled to the \$13.00 per hour rate for May 18, 25, June 8, 22, July 13 and 5 hours on July 30. The sole issue before the Adjudicator was the number of hours worked. In finding an entitlement to the rate on these dates, the Adjudicator did not place much weight of the testimony of the two employer witnesses. The Adjudicator accepted Mr. Sidhu’s evidence that he worked May 18, 25, June 8, 22, July 13, 30 at a rate of \$13.00 per hour for 8 hours per day, with the

exception of July 30, where the Adjudicator found Mr. Sidhu was to be compensated for 5 hours. The total amount was \$585, plus interest. This is the decision for which the employer seeks reconsideration.

At the hearing the employer's own evidence cast doubt on the accuracy of the payroll records. While the employer's witnesses (Mr. Sohal and Mr. Singh) indicated that the employer did not generally work on Sundays, the witnesses testified that the employees were required to "Redo substandard work on their own time", and while the employer provided transportation to the work site, the employer did not pay the employees, and explained that this was a practice in the industry. The Adjudicator found that "work redone" was work within the meaning of the *Act*.

Employer's Argument:

The employer alleged the disagreed completely with the adjudicator's decision and found that it was a biased decision. The employer alleges that the Adjudicator did not question the employer's witnesses, granted the employee a brief adjournment to review notes, and preferred the evidence of the employee. The employer alleged that the adjudicator erred in accepting the evidence of the employee over the evidence of the employer's two witnesses. The employer alleges that the Adjudicator allowed the employee ½ hour to go through his notes and calendar. The employer maintains that the employee did not work on the dates in question, and particular notes that the employee did not work on Sundays (May 18, June 8, July 13) but "corrected work".

Employee's Argument:

At the hearing before Adjudicator Petersen, the employee was seeking compensation for 9 days. The employee, in effect, says that there was evidence before the Adjudicator to support the findings made by the Adjudicator.

ANALYSIS

In an application for reconsideration, the burden rests with the appellant, in this case the employer 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), BC EST #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 BC EST #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., BC EST #D075/98 (Reconsideration of BC EST #D418/97); Alexander (c.o.b. Pereguine Consulting) BC EST #D095/98 (Reconsideration of BC EST #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., BC EST #D134/97 (Reconsideration of BC EST #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 led the adjudicator to a different decision;
- e) misunderstanding or failing to deal with an issue;
- f) clerical error.

I turn now to the application of the test to the grounds for reconsideration presented by Cariboo Tree Service Ltd.. The employer alleges that the adjudicator was biased and erred in the fact finding process. The employer says that the Adjudicator should not have found any entitlement to wages.

This case involves no issue of law, and is simply a case where the employer asks me to re-weigh the evidence before the Adjudicator. The Adjudicator correctly applied the law that "correction of errors" is work, within the meaning of the *Act*: *Gustavson, BCEST #D101/96 (Eden)*, *Re Marcil, BCEST #D415/98 (Suhr)*, *Re New Style Exteriors Inc, BCEST #D416/98 (Suhr)*, *Warren Consulting Ltd., BCEST #D506/00 (Love)*. It is clear that credibility played an issue in the adjudicator's findings. This case also involved an appeal where the Adjudicator found that the employer had not kept adequate payroll records concerning the employee. (*Sidhu, BCEST D002/00*). In the absence of any allegation of bias, I would dismiss this case on the basis that the appellant has raised no issue within the scope of a reconsideration application.

A central theme in the employer's submission is that the Adjudicator was biased. Bias is a breach of natural justice, and therefore is a matter that falls within the proper scope for a reconsideration application. I find, however, that while the appellant has alleged bias, the appellant has not proven any bias on the part of the adjudicator. There is no evidence in this case that the Adjudicator had formed views about this case, other than on the basis of the evidence before him, after hearing the evidence. The issue of credibility of witnesses, the questioning of witnesses by the panel, and adjournments granted during the course of a hearing are all matters for the Adjudicator, and not for the reconsideration decision maker. An adjudicator is not required to question a witness tendered by any party, and the failure to ask a question does not demonstrate bias. The granting of a brief adjournment to a party to review notes, during the course of a hearing, does not raise any issue of unfairness in the hearing or partiality on the part of the Adjudicator. Provided that the process is not unfair, the Adjudicator has a wide latitude with regard to the conduct of a hearing. I cannot infer any bias or reasonable apprehension of bias, or any unfairness to the appellant from the circumstances alleged by the employer.

I note that consistent with the Tribunal's approach to reconsideration as identified in *Milan Holdings Ltd.*, reconsideration is a power to be exercised conservatively. Unless an appellant identifies a clear error, falling within the scope of reconsideration, the application will fail. A reconsideration application is not a fresh opportunity to re-litigate the issues on appeal. The appellant has not made out an arguable case of sufficient merit for me to proceed further with the reconsideration.

For all the above reasons, I dismiss the application of the employer for reconsideration.

ORDER

Pursuant to section 116 of the *Act*, I order that the Decision in this matter, dated December 6, 2000 be confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal