Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Kuljit Rai and Paul Rai
("the Rais")

- 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.: 2003/40

DATE OF DECISION: September 26, 2003

DECISION

OVERVIEW

Kuljit Rai and Paul Rai ("the Rais") seek reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of three decisions made by an Adjudicator of the Tribunal, BC EST #D454/02, dated October 16, 2002, BC EST #D088/03, dated March 11, 2003, and BC EST #D193/03, dated June 16, 2003 (collectively, the "original decisions"). The original decisions considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on May 3, 2002. The Determination had found that the Rais' employer, Abco Building Maintenance Ltd. ("Abco"), had contravened the overtime, annual vacation and statutory holiday pay provisions *Act* and that the Rais were owed an amount of $27,165.15.

The first of the original decisions accepted there was wages owing, but found the Director had misinterpreted the terms of the employment contract between Abco and the Rais and as a result had miscalculated the amount owing. In result, the Determination was referred back to the Director.

The second of the original decisions provided clarification of the first decision for the Director. The third of the original decisions confirmed a recalculation of the wages done by the Director and varied the Determination to order Abco pay wages to Paul Rai in the amount of $3,816.83 and to Kuljit Rai in the amount $3,360.48 together with interest under Section 88 of the *Act* on both amounts.

In this application, the Rais say the Adjudicator "failed to examine all the evidence that was before him at the hearing", specifically Appendix B to the Determination, which was a schedule of hours worked per week, by site, and a calculation of hours paid, and "thus, failed to apply the law".

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 issue raised in this application is whether the Adjudicator of the original decisions failed to examine the relevant evidence, resulting in a failure to apply the law to the facts, and, if so, whether that error justifies the Tribunal reconsidering the original decisions.

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) confirm, vary or cancel 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. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the Adjudicator (as distinct from tendering new evidence or demonstrating an important finding of fact made without a basis in the evidence) and come to a different conclusion. An assessment is also be 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 are limited and 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 Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration.

After reviewing the original decisions, the material on file and the arguments of the parties to this application, I have decided this is a case that does not warrant reconsideration.

ANALYSIS

In this application, the Rais say the Adjudicator failed to examine all the evidence. They refer to the following statement made in the first of the original decisions:

> The evidence and submissions made before me indicated that the employment contract provided that Paul and Kuljiy Rai agreed to provide maintenance service to a number of buildings. The parties agreed in advance as to the appropriate number of hours required to do the work. If the work were completed in fewer hours the Rais would still receive the full contracted wage amount. It was stipulated that no amount of work should be done that exceeded the contracted hours.
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> It was specifically agreed that no extra payment would be made over and above the contracted amount. . . .

The Rais say that, in fact, if one looks at Appendix B, it shows that on some ocassions they were paid for hours worked in excess of the scheduled hours and on other ocassions, when they worked less than the scheduled hours, were not paid the full scheduled hours. They say the effect of the decision is to take away wages for hours worked in excess of the scheduled hours. The exact argument was made to the Adjudicator prior to the issuance of the third of the original decisions. In a submission dated May 20, 2003, the Rais said:

> We disagree with the findings of the Director's designate for the following reason:
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> While the arithmetic in the Director's recalculation may be correct, the premise upon which it is calculated is incorrect.
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> - The Determination issued by the Director, admitted as evidence at the hearing, included, at Appendix B, the schedule of hours to be worked per week, per site, as approved by Mr. Rai, and the calculation of hours paid. . . .
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> - These records show that in 42 of the 106 weeks itemized, or 39.6% of the time, Mr. or Mrs. Rai, or both, worked and were paid for hours worked, in excess of the hours scheduled by the employer for that work. The records also show that, when the Rais worked fewer than the scheduled hours, they were not paid the full scheduled hours.
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> - The real affect [sic] of Adjudicator Orr's decision will be to take away wages for overtime hours worked in excess of the schedule, hours already acknowledged and paid for by Abco, albeit at the incorrect overtime rate.

Apart from the fact that this exact argument was made to the Adjudicator of the original decisions and is being recycled in this application without any additional analysis or information, the result that is complained about flows directly from a conclusion about the effect of the employment contract on the claim by the Rais. In the first of the original decisions, the Adjudicator made the following findings based on his assessment of the evidence and his examination of the employment contract:

> . . . The parties agreed in advance as to the appropriate number of hours required to do the work. If the work were completed in fewer hours the Rais would still receive the full contracted wage amount. It was stipulated that no amount of work should be done that exceed the contracted hours.
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> It was specifically agreed that no extra payment would be made over and above the contracted amount. The Tribunal has previously decided that an employee may not incur overtime wages without the consent or acquiesence of the employer; *Re: Shutt (c.o.b. Abco Building Maintenance)* BC EST #D287/97.

It is apparent from the original decisions that the Adjudicator sought to give effect to the employment contract, finding that while the contract "inherently attracted the overtime provisions of the legislation" (because some of the scheduled work required the Rais to work overtime), the agreement also precluded the Rais from working more than the scheduled hours and thereby generating more hours of work, including overtime hours, than allowed by the employment contract. That conclusion was one of mixed fact and law for which there appears to be some basis.

It is also apparent that this application is, in substance, challenging the interpretation given to the employment contract by the Adjudicator of the original decisions and is seeking a different interpretation,

one which would compel a conclusion that Abco had "directly or indirectly" allowed the Rais to work overtime hours in excess of the scheduled hours agreed to. No additional evidence has been added to what was before the Adjudicator of the original decisions.

An application for reconsideration is not intended to be simply an opportunity for one panel of the Tribunal to second guess the appeal panel. It is not a question of whether the reconsideration panel might have come to a different conclusion in all the circumstances, but whether, putting it in the context of this case, the applicant can show the conclusion reached by the Adjudicator of the original decisions was one which, on a proper and correct view of the evidence and the employment agreement, could not be made.

That has not been shown and the application is denied.

ORDER

Pursuant to Section 116 of the *Act*, I order the original decisions be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal