Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

MBS Computers Ltd.
("MBS")

- 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: Fern Jeffries

FILE No.: 2002/228

DATE OF DECISION: June 26, 2002

DECISION

OVERVIEW

This is a request to reconsider a decision pursuant to Section 116 of the *Employment Standards Act* (the "*Act*") that provides:

> "(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."

A Determination issued October 29, 2001 awarded the employee ("Jones") compensation for length of service and overtime wages totaling $2990.49. The employer, Kulraj Gurm on behalf of MBS Computers Ltd. ("MBS") appealed the Determination, claiming that compensation for length of service was not owed as Jones was terminated for cause and that overtime payments were not due as no overtime was worked. Following an oral hearing, the appeal decision was issued April 9, 2002. The Decision confirmed the Determination in the amount of $2990.49 plus accrued interest.

This reconsideration is requested on the basis that there was a denial of natural justice and serious errors of fact made by the delegate. In order to meet the objectives of the *Act*, the Tribunal exercises its discretion to reconsider with considerable restraint. After careful consideration, I conclude that this application fails to meet the threshold established for reconsideration in that this application merely re-argues the case that was before the original adjudicator.

FACTS

Jones commenced employment on March 1, 1997 as a service technician at the rate of $2,500 per month. His was dismissed on May 22, 2001. His complaint involved a claim for unpaid overtime and for compensation for length of service. The Determination records the delegate's finding that:

- "the employer did not keep a record of daily hours worked as required by Section 28 of the Act.
- the employer did not keep a record of the warnings that he stated to have given Jones and Jones denies getting any warnings
- Jones last day worked was May 22 but he was paid until May 25,2001…"

On September 18, 2001, the delegate wrote MBS advising it of the preliminary findings of the investigation and inviting MBS to make any submissions with respect to additional evidence or information. The deadline for response was September 28, 2001. On October 3, 2001, MBS responded with a settlement offer. No additional evidence or information was provided and the Determination was issued October 29, 2001.

The delegate awarded overtime and compensation for length of service. The Decision issued on April 9, 2002, upheld the Determination. In addition to written submissions from MBS, Jones, and the delegate, the decision was made on the basis on an oral hearing held on April 3, 2002.

ISSUE

Has there been a denial of natural justice or serious error such that this request meets the threshold test established by the Tribunal?

ANALYSIS

The *Act* intends that the Adjudicator's Appeal Decision be "final and conclusive". Therefore, the Tribunal only agrees to reconsider a Decision in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This reflects the purposes of the *Act* detailed in Section 2.

As established in *Milan Holdings* (BCEST # D313/98) the Tribunal has developed a principled approach in determining when to exercise its discretion to reconsider. 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.

Reasons the Tribunal may agree to reconsider a Decision are detailed in previous Tribunal cases. For example, BC EST # D122/96 describes these as:

- The adjudicator fails to comply with the principles of natural justice;
- There is some mistake in stating the facts;
- The Decision is not consistent with other Decisions based on similar facts;
- Some significant and serious new evidence has become available that would have led the Adjudicator to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The Decision contains some serious clerical error.

While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The reconsideration process was not meant to allow parties another opportunity to re-argue their case. As outlined in the above-cited case:

> 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.

While MBS acknowledges this in its application for reconsideration, the application itself reflects little else but an attempt to reargue the case that was settled at appeal.

At appeal, MBS presented what it believed to be evidence that corroborated its justification for terminating Jones without compensation. In its submission, the delegate argued that any corroboration should have been presented during the investigation. In support of this position, the delegate supplied the Tribunal with copies of her September 18, 2001 correspondence requesting "any additional

documentation" and the October 3rd response from MBS that did not make any reference witnesses or evidence that would support either the 'just cause' dismissal' or the refusal to acknowledge the overtime liability.

The adjudicator is charged with responsibility for determining whether the witnesses proposed by MBS would be of assistance to his decision-making responsibility. While the Tribunal Administrator advised MBS that it was possible for witnesses to 'appear' via teleconference, it is up to the adjudicator to determine whether the appearance is necessary. Given the written submissions of MBS's witnesses, the adjudicator determined that their appearance was not appropriate and not required. In its reconsideration application, MBS submits that this was a denial of natural justice, both by the adjudicator and by the delegate. I cannot agree. Tribunal jurisprudence maintains that an appellant cannot wait to participate until the appeal stage. If there is significant evidence available while the complaint is being investigated, this must be brought forward to the delegate. New evidence that was not available may be brought to the appeal and may be considered by the adjudicator if he/she considers it relevant. However, the corroborating submissions that MBS sought to bring forward to appeal as evidence were available to him during the course of the investigation and could have been submitted to the delegate.

In its request for reconsideration, MBS re-argues allegations of denial of natural justice by the delegate in the course of the investigation. This does not warrant reconsideration.

In the Determination, the delegate states her opinion that "there is an onus on the employer to establish…that progressive discipline had been given to the employee for failure to meet … standards". While this opinion may be an established practice in the unionized sector, the Employment Standards Act provides no support for this practice. The Decision issued by the adjudicator applies the correct test as to whether the employer can avoid the liability for compensation for length of service by a claiming that there was just cause for dismissal in cases of misconduct. At reconsideration, MBS claims that Jones's behaviour was not minor, but was of such a fundamental breach so as to warrant immediate dismissal. This argument is based on the wording of the adjudicator's decision. I do not consider it appropriate to allow this type of new argument to justify reconsideration of the decision.

At appeal, the adjudicator considered the conflicting perspectives. For example, MBS maintained that Jones wasted a considerable amount of time looking at pornographic web sites. Jones maintained that any internet activity related to these web sites was in relation to MBS's direction in support of its interest in registering and selling domain names. MBS maintained that Jones remained at its adjoining internet café in order to play video games. Jones maintained that the time spent was required and expected by his employer.

In the face of these conflicting perspectives, the adjudicator correctly applies the test as outlined in *Faryna v. Chorny (1952)* 2 D.L.R. 354, B.C.C.A and determined that the balance of probabilities was the Jones's version was more believable. I see no reason to re-think or overturn that assessment.

MBS argues that because the adjudicator did not reference al of his evidence and argument in the decision that it was not considered. Again, I cannot agree. It is likely that no decision of this tribunal will contain a comprehensive recital of all the evidence and argument. This does not mean that it was not considered in the decision-making process.

In this case, the reasons for the decision are fully provided in writing, and the decision itself is adequately supported both in the documents used at appeal and in the reference to the adjudicator's assessment of the oral hearing.

In summary, while MBS is clearly very unhappy with the decision, I see no error of law or abuse of the principles of natural justice to warrant reconsideration.

ORDER

The request for reconsideration is denied; Tribunal Decision BC EST # D125/01 is confirmed.

Fern Jeffries, Chair
Adjudicator
Employment Standards Tribunal