Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Hui Wei
("Wei")

- 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, Chair

FILE No.: 2002/259

DATE OF DECISION: July 15, 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."

The employee, Hui Wei ("Wei") requests that the Decision confirming the Determination be reconsidered. The request is based on an allegation that there has been an error in the facts of this case as understood by the adjudicator in the original decision. There is no evidence of this error and the request therefore fails.

The delegate, who is not the delegate who conducted the investigation, raises a new issue on reconsideration: that the original complaint was not filed in time.

FACTS

Wei worked for the employer, Tamoda Apparel Inc. ("Tamoda") from September 4, 1999 to October 20, 2000. The Determination issued October 16, 2001 found that her claim for overtime wages and for reimbursement of MSP premium deductions had already been met by Tamoda and that she was not owed any additional monies. The Tribunal held an oral hearing on April 10, 2002 and the Decision issued on April 12 confirmed the Determination.

The delegate now raises the issue of whether the last date of work was October 20, 2000 as noted in the Determination and in the Decision or whether the last date of employment was October 13, 2000 in which case, the complaint would not have been filed within the 6 month time limit.

ISSUE

Does this request meet the threshold established by the Tribunal for reconsideration such that the Decision should be cancelled, varied or referred back to the original panel. Should the question of the last date of employment be considered by the Tribunal as sufficient reason to refer the Decision back to the original panel to reconsider the facts of this case.

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* (BC EST # 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.

I find that this request by Wei is merely an attempt to re-argue the case that failed at appeal. The delegate submits that the adjudicator agreed with the delegate that Tamoda's records were more credible and that this is not an error of fact. I agree. Wei submits that Tamoda and the delegate think the Decision is wrong; neither Tamoda nor the delegate concur with that interpretation. Wei argues that the time cards used by Tamoda were not the ones she used when she was employed. However, there is no substantiation to her claim. She submits that the delegate did an improper and inadequate investigation, but again, this is the argument that the adjudicator ruled on in the Decision. As a result of an oral hearing, the adjudicator made a finding of credibility. There is nothing in the submission of the employee to convince me to disturb that finding.

In the response submission to this reconsideration request, the delegate raises a "new issue":

> "As well, I would like to report that a new issue has arisen at this late date. This is the issue about whether or not the complaint was filed in time. It appears that this issue did not arise during the original investigation due to no fault of the parties involved."

I cannot agree with the delegate that "no fault can be assessed" if there was an error in the original investigation with respect to the timeliness of the complaint. The delegate bears the burden of ensuring that complaints are within its jurisdiction. This includes the timeliness issue. The original investigating delegate who wrote the Determination had this responsibility.

Tamoda claims it was not aware of the 6-month time limit for filing a complaint. Regardless of whether it was aware of the 6-month time limit, Tamoda was aware that the delegate found as fact that the last day of employment was October 20, 2002. It had an opportunity to dispute that finding, but did not. It did not dispute that finding in the investigation and it did not appeal the Determination. If Tamoda can now 'prove' that the employment relationship ended on October 13, it could have done so earlier in this process. If I were to accept this late attempt to use this argument, it would undermine the dispute resolution process in the legislation that calls for both evidence and argument to be raised at the first step, i.e. when a complaint is investigated. New evidence can be introduced at appeal only if it was not previously available.

In response to question of the timeliness of her complaint, Wei submits that her employment ended on October 20, 2000. The employee's last date of work in the factory may have been October 13, but this is not necessarily the date that the employment relationship ended. The employee submits that she was on sick leave until October 28 and there is no evidence to contradict that submission. e.g. The employer provides no ROE showing October 13 as the termination date; pay stubs submitted indicate that for the two-week period ending October 27, the employee is still shown as being in the Medical Services Plan; vacation pay is not paid to the employee until December 30, 2000.

In summary, the request for reconsideration is denied as Wei has failed to meet the threshold test established by the Tribunal. Her request is simply a re-argument of the appeal. The attempt to introduce a "new issue" at reconsideration fails as even Tamoda who could potentially benefit from this, asserts in their reconsideration submission that the Decision stating that end date of the employment relationship was October 20, 2000 is a correct decision.

ORDER

The request for reconsideration is denied and I confirm the original Tribunal Decision BC EST # D135/02.

Fern Jeffries, Chair
Adjudicator
Employment Standards Tribunal