

An Application for Reconsideration

- by -

Derek Meshard Hines
("Hines")

- 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.: 2002/258

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 request is made by Derek Meshard Hines (“Hines”) a former employee of Brinks Home Security Canada Ltd. (“Brinks”). Hines complained that he was owed wages for overtime in excess of eight hours per day and 40 hours per week. He also alleged that he was owed additional wages for operating his vehicle. His complaint was dismissed and he appealed to the Tribunal. The appeal Decision, dated May 4, 2001 referred the matter back for further investigation. The Decision, dated March 28, 2002, dismissed the appeal.

This request is based on allegations of serious errors and violation of the principles of natural justice.

FACTS

Hines worked out of his home as a sales representative from September 15, 1996 to November 5, 1999. He was paid on a commission basis, with a minimum wage guarantee based on a 40-hour workweek. In addition, he was reimbursed for automobile expenses on a per kilometer basis for travel related to shows and sales meetings, and on a flat rate for completed sales. While he was a senior sales representative, he was reimbursed \$400 for vehicle expenses. Brinks did not keep records of the hours worked.

The Determination issued October 17, 2000 found that additional wages were not owed and that additional vehicle expenses were not owed. While Hines submitted extensive day timer records, the extent of the discrepancies found resulted in a finding that no overtime wages were owed. The issue of home office expenses was not dealt with in the Determination.

At appeal, the Adjudicator found that overtime may be owed, but likely not in the amount of \$40,734.36 as claimed by Hines. In the decision dated May 4, 2001, he referred this matter back for further investigation. Similarly, he referred back for investigation the question of whether there was adequate compensation for vehicle expenses. The adjudicator noted that the Determination did not make mention of the home office expenses claimed by Hines. He referred back for investigation the issue of whether this was part of the original complaint to be investigated or whether it was a matter that was brought up for the first time at the appeal stage.

The report on this was received at the Tribunal on November 20, 2001. This report outlined the various steps taken to provide Hines with an opportunity to use his records to prove that overtime was owed. The delegate concluded that Hines could not offer sufficient proof to support his claim for overtime. Brinks did compensate Hines for vehicle expenses and the report found that the Director does not have “jurisdiction to determine what is fair and reasonable compensation”. With respect to the issue of the home office, the report did not answer the question posed by the adjudicator, i.e. was this issue raised at the time the complaint was lodged. Rather the report indicated that in general, “the Director does not

view employees working from their homes as necessarily having a cost of doing business passed on to them.” The report notes the tax benefit that Hines derived from this working arrangement.

Based on this report, the Tribunal issued a second decision March 28, 2002. With respect to the claim for overtime wages, the adjudicator found that Hines had been reasonably compensated for the operating costs associated with the business use of his vehicle. He concurred with the Director’s position on the issue of home office, noting the consistency with the Tribunal’s decision on this matter, *Bennett* (BC EST # RD234/01). With respect to overtime, the adjudicator found that the claim for overtime also fails as Hines was unable to substantiate his claim. The adjudicator found that Hines had not met the burden of proof required and his appeal was dismissed.

ISSUE

There are two issues on reconsideration: Does this request meet the threshold established by the Tribunal for reconsidering a decision. If so, should the decision be cancelled or varied or sent back to the original panel?

ANALYSIS

The Tribunal reconsiders a Decision only 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 supports the purposes of the *Act* detailed in Section 2 “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act.”

In *Milan Holdings* (BC EST # D313/98) the Tribunal set out 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.

The Tribunal may agree to reconsider a Decision for a number of reasons, including:

- 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.

BC EST # D122/96

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.

The application for reconsideration indicates awareness of this analytical framework, as does the response submission of the employer. Brinks's submits that the applicant fails to meet the threshold test and I agree.

Hines lists various "failures and mistakes" that justify reconsideration:

1. *Evidence collected by the delegate leading to the Determination*

Any fault or issue with the original investigation was remedied at appeal: there were written submissions, direct testimony and cross examination at the three-day hearing. The reconsideration process is not another opportunity to re-weigh evidence.

2. *Proof of Overtime*

Hines maintains that if any overtime is proven it must be paid. This matter was referred back for further investigation by the first adjudicator. During this second investigation, Hines was unable to prove overtime to the delegate. The second adjudicator accepted the report. I am unable to find any error or abuse of natural justice. The reconsideration process is not another opportunity to re-weigh evidence.

Hines references BC EST #D244/98, however, in my opinion, this does not support Hines's case. This is a decision in which the adjudicator clearly upheld both the employee's burden of proof in a case where there were insufficient records and the delegate exercised discretion in not accepting the employees records.

3. *Schedule of Hours*

It is acknowledged that Brinks did not post a schedule of hours. The delegate may impose a penalty in this respect, but it does not speak to Hines's overtime claims. Hines notes that the Minister of Labour has not responded to correspondence, however it is well beyond the jurisdiction of the Tribunal to comment on that. It is certainly not a reviewable error.

Hines maintains that detailed pager records would prove that he did have a 'schedule of hours' that included overtime. Brinks submits that it "did not have such records and duly made inquiries of its service provider whether records of calls were kept in respect of its alphanumeric pagers. Brinks' current service provider, Rogers AT&T, has been providing the alphanumeric pager service to Brinks since November 5, 1997. Inquires (sic.) were made and Rogers AT&T has advised that no such records exist". I accept Brinks' submissions in this respect. Further, I am unable to see how the pager records would comprise a 'schedule of hours' within the meaning of the Employment Standards Act.

4. *Complaints before the determination*

Hines details complaints to the Director of Employment Standards, copied to the Minister, his MLA, and to the Premier. Comment on this is beyond the mandate of this Tribunal and not a reason to reconsider its Decision.

5. *Vehicle Expenses*

This matter was referred for further investigation by the original adjudicator. The delegate dismissed Hines's claim, finding that there was compensation for business use of Hines's vehicle. This finding that Brinks did not pass on the cost of doing business by failing to compensate vehicle costs was accepted by the adjudicator in the second Decision. As noted in Brinks's submission: "Mr. Hines was unable to produce any receipts. As a result the next best evidence of the quantum of his claim is based on his actual vehicle operating costs for the purpose of claiming a tax deduction on his income taxes. His income tax returns show a cost to Mr. Hines of operating his vehicle, including an amount for capital cost allowance, of only \$4,175.02 based on 81.58% business use in 1998 and \$2,513.41 based on 85% use in 1999, less than what he was paid by Brinks over the same period." I find that the adjudicator did not commit an error in accepting the delegate's findings.

6. *Home office expenses*

The first decision of the adjudicator referred this back to the delegate to determine whether the Tribunal had jurisdiction, i.e. whether this matter was part of the original complaint as the Tribunal's mandate is to hear appeals of decisions made by the Director, not to award a claim in the first instance. At reconsideration, Brinks's contends that the first it heard of this matter was at the appeal's oral hearing. Notwithstanding this, the delegate considered the issue of whether a home office set-up implies that the employer has passed on the cost of doing business. The adjudicator confirmed that this is not necessarily the case. In this he is consistent with Tribunal jurisprudence. I cannot see a reviewable error here.

In summary, I find that the applicant has failed to meet the threshold established by the Tribunal for reconsideration. While the applicant may not agree with the decisions of the Tribunal, he has not been able to prove an error in law or abuse of the principles of natural justice such that reconsideration is warranted. Hines asks that I re-weigh evidence considered by two previous adjudicators. That is not the purpose of the reconsideration function.

ORDER

The application for reconsideration is denied and the original Determination that found that Hines is not owed wages is confirmed.

**Fern Jeffries, Chair
Adjudicator
Employment Standards Tribunal**