

An Application for Reconsideration

- by -

Gerald Hartwig
("Hartwig")

- 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.: 2002/279

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 Employer, Gerald Hartwig (“Hartwig”) seeks reconsideration of a Decision BC EST # D183/02, issued May 8, 2002, that awarded unpaid wages in the amount of \$5200 plus interest pursuant to Section 88 of the Act. The request is made on the basis that new evidence was introduced on appeal and Hartwig was not given an opportunity to respond.

The original appeal was filed by the former employee, Daren Sevenko (“Sevenko”). Sevenko appealed the January 16, 2001 determination that found there was no basis to the complaint. The first Decision, was issued May 14, 2001, following the May 1, 2001 oral hearing. This Decision was to refer back the matter for further investigation. The delegate completed that investigation and reported back November 19, 2001. As a result of this further investigation, the adjudicator awarded Sevenko wages as claimed. It is this decision that is now the subject of this request for reconsideration.

FACTS

Sevenko was employed by Above and Beyond Technologies (“ABT”). The principals of ABT are Gray Knight, Gerald Hartwig and Randy Rochfort. Sevenko claims unpaid wages plus reimbursement for expenses incurred on behalf of the employer. Receipts for these expenses were provided, as were various NSF cheques issued to him by various of the principals and/or other companies with which they were associated. The total owing was found to be \$5200 for the period from May through to June 2000.

Hartwig did not respond to any of the requests for submissions made throughout the appeal process; nor did he attend the oral hearing.

ISSUE

Does this application meet the threshold established for reconsideration?

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 Hartwig quotes all of the above criteria in his request, he does not provide any substantiation. In his submission, Sevenko notes:

1. “We were both given the same time to respond to anything
2. He never appeared for any hearing no even attempted any correspondence.
3. There is no error in stating the facts: I am not a lia.
4. There is no mistake in applying the law and furthermore if any issue was misunderstood or overlooked, I find that point to be invalid and unsubstantiated, as he never provided any issues at all.
5. This so called new evidence of his is not new at all, it is simply the first time he has even attempted to produce any sort of defense that this actually happened, now that he cannot deny it.
6. Documents that were left in his offices related to this claim have either been destroyed or altered and should not even be considered as any sort of new evidence.
7. Nor does he have any right to produce this evidence at this point in time as he has been given ample time and notice to do so, he simply chose not to.”

In her submission, the delegate confirms that “all information that was available to me at the time that I made by (sic.) determination in this matter was provided to Mr. Hartwig in order that he might have an opportunity comment.” Tribunal records confirm that Hartwig was provided with copies of all information as a party to this matter.

I find that Hartwig’s claim that he was not provided with an opportunity to respond is totally without basis. The reconsideration power of the Tribunal is not an opportunity to re-weigh evidence or to re-argue matters previously decided at appeal. This request for reconsideration does not meet the threshold established by the Tribunal.

ORDER

The request is dismissed; I confirm the decision BC EST # D183/02 awarding Sevenko \$5200 in unpaid wages and expenses together with whatever interest has accrued.

Fern Jeffries
Adjudicator
Employment Standards Tribunal