Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

M.J.M. Conference Communications of Canada Corporation
("MJM" or "employer")

- 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: Paul E. Love

FILE No.: 2001/267

DATE OF DECISION: June 14, 2001

DECISION

OVERVIEW

This is an application for reconsideration, made by M.J.M. Conference Communications of Canada Corporation ("MJM" or "employer") pursuant to s. 116 of the *Employment Standards Act, R.S.B.C. 1996, c. 113*, (the "*Act*") of a decision of the Employment Standards Tribunal ("Tribunal") dated March 2, 2001 (the "original decision"). At the time of the investigation by a Delegate of the Director of Employment Standards ("Delegate"), the amount due and owing did not appear to be at issue, and the only issue before the Delegate was whether Chris Yorke, was an employee and entitled to use the *Act* to enforce his claim against MJM. The issues before the Adjudicator related to the bonus, and whether the Delegate should have calculated and deducted the amount of deductions for employment insurance and Canada Pension Plan. The only issue before me was whether the Adjudicator erred in finding that Chris Yorke (the "employee") was entitled to a bonus in the amount of $1,000. I dismissed the application for reconsideration on the basis that this was not a proper case for reconsideration. There was a rational basis for the Adjudicator to find an entitlement to incentive pay, and the employer was seeking me to "readjudicate" or "reweigh" the evidence concerning the bonus and substitute my decision for that of the Adjudicator.

ISSUES TO BE DECIDED

As a threshold issue, is this a proper case for the exercise of the Tribunal's discretion to reconsider under s. 116 of the *Act*?

If this is a proper case for reconsideration, did the Adjudicator err in determining that the employee was entitled to a bonus in the amount of $1,000.

FACTS

This was a matter determined on the basis of written submissions. The Adjudicator determined that the Delegate had not erred in finding that Chris Yorke was an employee of M.J.M. Conference Communications of Canada Corporation ("MJM" or " employer"). Mr. Yorke was employed as a graphic designer on the production of the "Canadian Miner", which was a publication of MJM. Mr. Yorke was employed between June 21, 1999 to February 1, 2000.

The Delegate found that Mr. Yorke was an employee and that he was entitled to the sum of $1,454.63 as regular wages, compensation for length of service in the amount of $416.00 plus interest of $87.98 calculated in accordance with s. 88 of the *Act*. The Delegate found that there was no dispute that Mr. Yorke was entitled to the money. The employer did not accept that Mr. Yorke was an employee, and that he was entitled to use the mechanism of the

Act, to collect monies owing to him. The Delegate considered the control test, the integration test, the economic reality test, the specific result test and concluded that Mr. Yorke was an employee.

The employer appealed the Determination, claiming that the amount found to be owing by the Delegate was in error. The employer deducted the sum of $1,000 claiming it was a bonus to a contract worker not an employee for lack of benefits such as EI and CPP deductions. The employer also submitted that the Delegate erred in failing to deduct amount for Employment Insurance and Canada Pension Plan payments in the amount of $229.50 and 253.74, respectively.

The Adjudicator found that Mr. Yorke was entitled to a bonus in the amount of $1,000. There was a typed contract between the parties, which contained clauses relating to remuneration, and also, contained a handwritten note "plus $1,000 bonus on each release". The Adjudicator found that the bonus was "incentive pay" and therefore was wages under the *Act*. The Adjudicator further found that the Delegate had no jurisdiction to make the statutory deductions when making the Determination, but that the employer could remit the amount less the statutory deductions to the employee, as set out in the Determination, with remission of the statutory deductions to the appropriate federal body.

The employer seeks reconsideration and asks that the decision be "readjudicated". The employer submits that the Adjudicator erred in finding that Mr. Yorke was entitled to a $1,000 bonus. The Delegate submits that the Adjudicator did not err and considered all relevant evidence. The employer says that the note relating to the bonus was handwritten, added at a later time, and was in lieu of benefits such as EI, CPP and holiday pay. Mr. Yorke supports the decision of the Adjudicator, and submits that the Adjudicator did not err in finding that the $1,000 bonus was part of the wage structure, and an incentive for production of the magazine.

The employer appears to have accepted the Decision or abandoned the issue raised, on appeal, concerning the statutory deductions. The only issue in this reconsideration relates to the bonus. I note that the issue of the bonus appears to be raised for the first time in the appeal of the Determination, and in the discussion of the wage entitlement of Mr. Yorke there was not a discussion of what amount of the wage entitlement was a bonus.

ANALYSIS

In an application for reconsideration, the burden rests with the appellant, in this case the employer, to show that this is a proper case for reconsideration, and that the Adjudicator erred such that I should vary, cancel or affirm the Decision. An application for reconsideration of a Tribunal' s decision involves a two stage analysis, as set out in *Milan Holdings Ltd., BCEST #D186/97*:

At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration: Re British Columbia (Director of Employment Standards), BCEST #D122/98. In deciding this question, the Tribunal will consider and weigh a number of factors. For example, the following factors have been held to weigh against a reconsideration:

(a) Where the application has not been filed in a timely fashion and there is no valid cause for the delay: Re British Columbia (Director of Employment Standards), BCEST #D122/98. In this context, the Tribunal will consider the prejudice to either party in proceeding with or refusing the reconsideration: Re Rescan Environmental Services Ltd. BC EST #D522/97 (Reconsideration of BCEST #D007/97).

(b) Where the application's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): Re Image House Inc., BCEST #D075/98 (Reconsideration of BCEST #D418/97); Alexander (c.o.b. Pereguine Consulting) BCEST #D095/98 (Reconsideration of BCEST #D574/97); 323573 BC Ltd. (c.o.b. Saltair Neighbourhood Pub), BC EST #D478/97 (Reconsideration of);

(c) Where the application arises out of a preliminary ruling made in the course of an appeal. "The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid multiplicity of proceedings, confusion or delay": World Project Management Inc., BCEST #D134/97 (Reconsideration of BCEST #D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.

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. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": Zoltan Kiss, supra. As noted in previous decisions,

> "The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons": Khalsa Diwan Society (BCEST #D199/96, reconsideration of BCEST #D114/96).
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> After weighing these and other factors relevant to the matter before it, the Panel may determine that the application is not appropriate for reconsideration. If so, it will typically give reasons for its decision not to reconsider the adjudicator's decision. Should the Panel determine that one or more of the issues raised in the application is appropriate for reconsideration, the Panel will then review the matter and make a decision. The focus of the reconsideration panel "on the merits" will in general be with the correctness of the decision being reconsidered.
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> The very point of reconsideration being to provide a forum for sober reflection regarding questions which are considered sufficiently important to warrant such review, we consider it sensible to conclude that questions deem worthy of reconsideration - particularly questions of law -should be reviewed for correctness.

The reconsideration power is one to be exercised with caution. A non-exhaustive list of grounds for reconsideration include:

a) a failure by the adjudicator to comply with the principles of natural justice;

b) a mistake of fact;

c) inconsistency with other decisions which cannot be distinguished;

d) significant and serious new evidence that has become available and that would have lead the adjudicator to a different decision;

e) misunderstanding or failing to deal with an issue;

f) clerical error.

I have set out a detailed explanation of the test to be applied, because the employer suggests that I ought to “readjudicate” this matter, and it is clear that a “reconsideration” is a different process, than is an “appeal of a Determination”.

There was an ample basis for the Adjudicator to conclude that the contract stipulated that Yorke was entitled to a production bonus or incentive. MJM seeks to have me “readjudicate”

or "reweigh" the evidence before the Adjudicator, and come to a different conclusion on whether the contract included a bonus. The adjudicator considered all the relevant evidence. The Adjudicator considered and rejected the employer's explanation of bonus as "not compelling". The Adjudicator indicated that there was nothing on the face of the contract to suggest that the payment was in lieu of benefits, and that the payment was tied to the words "on each release". The Adjudicator considered this to be an incentive for production and incentive pay. In my view, this is not an appropriate case for reconsideration. There was a rational basis for the adjudicator's conclusion. I dismiss this application for reconsideration on the first branch of the *Milan Holdings Ltd.* test.

ORDER

Pursuant to section 116 of the *Act*, I order that the Decision in this matter, dated March 2, 2001 be confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal