Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Ziad Ardat aka Ziad Elardat aka Ziad El Ardat aka Ziad Abouelardat aka Ziada Bou El Ardat aka Ardat El Abou and Maha Ardat

("Ardats")

- 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.: 2002/257

DATE OF DECISION: July 15, 2002

DECISION

OVERVIEW

This is a request from the employer, Ziad Ardat aka Ziad Elardat aka Ziad El Ardat aka Ziad Abouelardat aka Ziada Bou El Ardat aka Ardat El Abou and Maha Ardat ("Ardats") 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."

Ardat requests the reconsideration on the basis that the adjudicator failed to comply with the principles of natural justice, that there were factual mistakes, and that the delegate and the adjudicator erred when they found the employee ("Pineda") more credible.

FACTS

The Ardats employed Pineda as a nanny from April 25, 2000 to August 25, 2000. Both the hours of work and the wage rate were in dispute. In the Determination issued August 17, 2001, the delegate concluded that the minimum wage rate applied. The delegate preferred Pineda's records with respect to hours worked. An oral hearing was held on November 29, 2001. In the decision issued January 14, 2002, the adjudicator found that the employer did not meet the burden of proof at appeal to convince him that his records were preferable to Pineda's.

The delegate found that Pineda was terminated without just cause. However, this was overturned at appeal. The adjudicator varied the decision, confirming the order for wages but canceling the aspect of the determination requiring compensation in lieu of notice.

ISSUE

Was there significant error in fact or law or a denial of natural justice such that this decision warrants reconsideration?

ANALYSIS

The *Act* intends that the adjudicator's Appeal Decision be final and binding. 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.

In assessing the merits of this request by the Ardats against the standards for reconsideration established by the Tribunal, I find that the threshold test has not been met.

First, with respect to the allegation that the adjudicator refused to accept the "new evidence" respecting the hours of attendance at hairdressing school. This information was available during the course of the investigation. It cannot be classified as "new". The Tribunal has long held that evidence that is available during the course of the investigation cannot be introduced for the first time at appeal. In this case, this information was not only available while the complaint was being investigated, it could have been made available in submissions during the course of appeal. Ardat missed both those opportunities to introduce the letter from the hairdressing school. In reality the letter is of little value to Ardats' case. The letter states that Mrs. Ardat's course ran from 8:30 a.m. through to 3:30 p.m. While a nanny may have been necessary to care for the children because Mrs. Ardat was attending the course, there is no evidence to support an assumption that the hours of employment for the nanny and the school attendance hours were precisely co-terminus.

In his final submission, Mr. Ardat asserts that "I have been working in BC for over fifteen years and never write the starting time or quitting time nor any single person". The Act clearly requires the employer to maintain records. The fact that the employer has never complied with the Act is hardly a reasonable rationale for reconsideration of this decision.

The request for reconsideration contains a number of other allegations of wrongdoing on the part of the adjudicator. For example, that the adjudicator asked that Mr. Ardat slow down in order for him to take accurate note of the testimony; that Pineda's assistant at the hearing was her husband. These allegations do not constitute a denial of natural justice. Ardat also alleges that the hearing was out of control. I find that there is no basis to these allegations. This was no doubt a difficult hearing in that two interpreters

were required: a Spanish translator and an Arabic translator. Nonetheless, there is nothing in the request for reconsideration that substantiates any denial of natural justice to the appellant or the respondent.

The request for reconsideration alleges that the adjudicator erred in assessing the credibility of Pineda with respect to whether Pineda had reasonable cause to fear for her safety. In reality, the adjudicator preferred the evidence of the Ardats in this respect and cancelled that portion of the determination ordering compensation in lieu of notice.

The request for reconsideration attempts to re-argue the case attempted at appeal. No violation of the principles of natural justice is substantiated. Nor is any significant error proved.

ORDER

The request for reconsideration is denied; the Decision BC EST # D020/02 is confirmed.

Fern Jeffries
Adjudicator
Employment Standards Tribunal