Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Oakcreek Golf & Turf Inc.
("Oakcreek")

- 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

**FILE No.:** 2002/294

**DATE OF DECISION:** August 12, 2002

# DECISION

## OVERVIEW

This is a request from the employer, Oakcreek Gold & Turf Inc. ("Oakcreek") to reconsider a decision pursuant to Section 116 of the *Employment Standards Act*, R.S.B.C. 1996 (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 Determination found that the employee, Theodore Dechant ("Dechant") was a manager and therefore not entitled to overtime wages. At appeal, this Determination was overturned and the adjudicator awarded Dechant overtime wages and vacation pay and interest for a total amount owing of $6,373.45. Oakcreek seeks reconsideration of this decision.

## FACTS:

The facts are clearly articulated in both the Determination and the Appeal Decision. What is not in dispute is that Dechant was the service manager for Oakcreek from January 12, 1993 to April 3, 2001. Both Dechant and Oakcreek agreed that overtime hours were worked. However, in the Determination issued January 15, 2002, the delegate concluded that Dechant was a manager within the definition of the *Act* and was therefore not entitled to overtime wages. Dechant appealed that Determination and the Adjudicator, in a Decision issued April 26, 2002, found that Dechant was not a manager for at least the previous two years of employment and awarded overtime wages.

On May 30, 2002 Bill 48, the *Employment Standards Amendment Act,* 2002 was given Royal Assent. This provides that the maximum retroactive pay that may be collected is 6 months, not 2 years as was previously the case under the *Act.*

## ISSUE:

In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case is appropriate for reconsideration, the substantive issue raised is whether the original decision correctly concluded that Dechant was not a manager and was entitled to overtime wages.

## ANALYSIS:

Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is *"to provide fair and efficient procedures for resolving disputes over the interpretation and application"* of its provisions. Another stated purpose, found in subsection 2(b), is to *"promote the fair treatment of employees and employers"*. The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC

EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. An assessment is also be made of the merits of the Adjudicator's decision. Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two-stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration.

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 applying for reconsideration, Oakcreek alleges three errors by the Adjudicator:

1. "an error of law by finding that the only evidence which could be considered on a substantive question of fact was temporally limited by the statutory time limit set out in s. 80 of the Employment Standards Act, which relates to the period of time for which wages may be recovered:

2. an error of law and fact in finding that the Director's delegate (the "Delegate") improperly relied on evidence before her in making the Determination; and

3. an error of law and fact in re-weighing the evidence rather than considering whether the proper legal principles were applied in the original Determination".

**Statutory Time Limit**

With respect to the issue of the time limit, Oakcreek argues that the Adjudicator should concern herself with whether Dechant was a manager taking into consideration the entire period of time for which he worked for Oakcreek. In response, Dechant submits that: "The Adjudicator correctly considered the whole employment history of the Respondent with the employer Appellant but concluded that during the time for which the overtime was claimed, the Respondent was not working as a "manager" as defined in the *Act*. I cannot agree with Oakcreek that there was any error here. Oakcreek seeks to re-argue whether the lack of evidence that Dechant performed managerial functions during the last two years' of employment means that he was no longer a manager. Reconsideration is not an opportunity to re-argue the case that was lost at appeal.

Further, Oakcreek argues that this "has implications of significant importance both to the business of Oakcreek and to the Tribunal's jurisprudence particular in light of Bill 48 *Employment Standards Amendment Act, 2002,* s. 42 which proposes that the limit on recovery of wages be reduced from 24 to 6 months."

I cannot agree that this raises a significant issue for tribunal jurisprudence warranting reconsideration. First, with respect to any retroactive application of the *Amendment Act*, I note that the complaint, the Determination, and the Decision were all completed within the timeframe of the *Act* prior to Royal Assent to the *Amendment Act*. In deciding that the *Amendment Act* has no application in this matter, I am guided by Driedger on the Construction of Statutes (3rd ed., Butterworths, 1994):

> "When a court is called on to interpret legislation, it is not engaged in an academic exercise. Interpretation involves the application of legislation to facts in a way that affects the well-being of persons for better or worse. Not surprisingly, the courts are interested in knowing what the consequences will be and judging whether they are acceptable. Consequences judged to be good generally are presumed to be intended and are regarded as part of the legislative purpose. Consequences judged to be unjust or unreasonable are regarded as absurd and are presumed to have been unintended. Where it appears that the consequences of adopting an interpretation would be absurd, the courts are entitled to reject it in favour of a plausible alternative that avoids the absurdity." (p. 79).

In my view it would be absurd for the legislature to have intended to invite applications for reconsideration of all decisions made between proclamation of the *Act* establishing the 2-year time limit in 1995 and Royal Assent of the *Amendment Act* in 2002. This remains an act, a purpose of which, as articulated in Section 2 is "To provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act." I find that it would produce an absurd result were I to agree with Oakcreek that the time limit for collecting on wages owed in the new *Amendment Act* should be a factor in deciding whether to reconsider a claim made under the former time limit.

I find that the Adjudicator did not commit an error of law in considering evidence concerning the time period in which Dechant maintained he was not a manager. Further, I find that this is not an issue with any serious impact warranting reconsideration in light of legislation passed after this decision was made.

**Improper Reliance on Evidence**

Oakcreek submits that the Adjudicator relied improperly on evidence in arriving at the decision the Dechant was not a manager during the relevant time period. At appeal, the onus is on the appellant to prove the Determination is wrong. The Adjudicator heard evidence from the parties and made a reasoned decision. In particular, the Adjudicator heard Dechant rebut the evidence of the current manager. This appears not to have been considered by the Delegate. I find no impropriety here.

**Re-Weigh Evidence**

Oakcreek argues that "It is an error of law and fact to merely re-weigh the evidence relied upon by the Delegate". In support of this argument, Oakcreek quotes from *Re Premier Auto Transmission Ltd*. (BCEST #D149/99):

> "In this case it appeared that the adjudicator had simply substituted his view of the evidence for that of the delegate and had not applied the principles in terms of the onus being on the appellant to establish conclusively that the determination was wrong".

In response, Dechant argues that the Adjudicator "clearly considered new facts and submissions provided to her by both parties". I agree. The Adjudicator did not simply substitute her interpretation of the evidence, rather the Adjudicator heard new evidence and concluded that the appellant had met the burden of proof required to overturn the Determination.

**Summary**

I do not find any of the three issues or related arguments raised by Oakcreek sufficient to meet the threshold test established by the Tribunal to warrant the exercise of discretion to reconsider decisions.

**ORDER:**

I deny the request for reconsideration and confirm the Decision.

**Fern Jeffries**
**Chair**
**Employment Standards Tribunal**