Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Joe Hirak
("Hirak")

- 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: Ib S. Petersen

FILE No.: 2001/346

DATE OF DECISION: July 11, 2001

DECISION

OVERVIEW

This is an application by Hirak pursuant to Section 116 of the *Employment Standards Act* (the "*Act*"), against a Decision of the Employment Standards Tribunal (the "Tribunal") issued on April 6, 2000 (#D085/00) (the "Decision"). In the Decision the Adjudicator upheld a Determination, dated November 10, 1999, which concluded that Floyd Joseph, was an employee of Hirak and entitled to $10,036.03, including interest, on account of wages and compensation for length of service.

The Adjudicator identified the issues before him as (1) whether Joseph was an independent contractor/partner or an employee; and (2) if he was an employee, were wages owed to him. In a lengthy decision, detailing the evidence presented at the hearing by Hirak, Nancy Hirak, Walter Hirak and Brad Everett (who testified for the Employer) and Joseph (who testified on his own behalf), the Adjudicator concluded that Joseph was, indeed, an employee. . With respect to the basic facts, the Adjudicator noted (at page 9):

> "There is no dispute with respect to some of the basic facts in this matter. Joseph responded to advertisements from Hirak Holdings Ltd. for a heavy duty mechanic and, around October 1997 began to perform work at a placer gold mine lease owned by Hirak. Joseph worked from October 1997 until the end of November or early December 1997 (the end of the season) and again from March 1998 until early August 1998. Joseph was paid on a percentage basis (8%) of the gold recovered. Joseph performed work involving repair of equipment and other related duties. Joseph received a total of $3,571.41 for work performed during the period March 29, 1998 to August 4, 1998."

The evidence from Hirak was to the effect that Joseph was never an employee. Joseph's evidence contradicted that. The Adjudicator resolved the dispute in the evidence based on the oft quoted test in *Faryna v. Chorny*, [1952] 2 DLR 354 (BCCA) in favour of Joseph. Among others, he noted that the evidence presented by the Hiraks and Everett was at times "confused, unclear, evasive and contradictory." This evidence included Hirak changing "his story" with respect to Joseph's termination from being based on smoking "dope", to stealing gold and, then, at the hearing, to incompetence.

The Adjudicator then considered the evidence in light of the statutory definition of "employee" in the *Act*, and concluded that the work performed by Joseph, mechanical repairs and related duties, is work normally performed by an employee. As well, and in any event, he was satisfied, based on "various common law tests," that Joseph was an employee, not an independent contractor/partner in a "joint venture." The reasons included that the advertisement that resulted in Joseph's hire sought an employee, "not a partner;" Hirak

directed the work; the mining lease and most of the equipment was owned by Hirak; and Joseph did not invest anything in the operation.

The Adjudicator then considered Joseph's entitlement to wages, based on the minimum wage rate, and compensation for length of service, in light of the termination without just cause. The Adjudicator accepted the amounts awarded by the delegate in his Determination.

FACTS AND ANALYSIS

In this application for reconsideration, which was filed on May 1, 2001, or more than 12 months after the date of the Decision, Hirak argues that the Adjudicator erred and that the Decision must be reconsidered.

In the circumstances, the only issue to be decided here is whether the application is timely. For the reasons set out below, and in the case referred to, I am of the view that the application is not timely.

The principles applicable to an application for reconsideration are well established (see for example, *Milan Holdings Inc.*, BCEST D#313/98, reconsideration of BCEST #D559/97). An application for reconsideration should succeed only where there has been a demonstrable breach of the principles of natural justice, where there is compelling new evidence not available at the original appeal, or where the adjudicator has made fundamental error of law. In *Zoltan Kiss* (BCEST #D122/96), the Tribunal has emphasized that it will use the power to reconsider with caution in order to ensure finality of the Tribunal's decisions and efficiency and fairness of the system.

In my view, the panel in *The Director of Employment Standards*, BCEST #D122/98 reconsideration of BCEST #D172/97 (the "*Unisource Decision*") correctly stated the law with respect to the timeliness issue, namely that an application for reconsideration under the *Act* must be filed within a reasonable time. "Reasonable time" depends on the circumstances of each particular case. While "substantial prejudice or hardship" is one of the factors considered by the Tribunal, in making its decision with respect to timeliness, I am of the view that a party making an application for reconsideration after a long delay must show "good cause", *i.e.*, a reasonable explanation for the delay.

In his original application for reconsideration, Hirak argues, with respect to the issue of timeliness, that he

> "went to the director and asked him what I can do as this was wrong. I asked if I can appeal or if I can even go to court, I even asked if Joseph and I could take a polygraph test to show the truth. The Director said NO! There is absolutely nothing I can do."

I do not accept Hirak's submissions. In my view, this is not a reasonable explanation for the substantial delay in filing this application. In the *Unisource Decision*, the reconsideration panel rejected the Director's explanation, for a delay of six months in filing an application for reconsideration, that she required an "opportunity to re-canvas the law in the area to prepare a detailed legal opinion concerning the relationship between confidential information and dismissal." While I appreciate that Hirak is not a lawyer, and his statement that he suffered mentally and financially from his family break-up, even if I accept Hirak's submission that he received poor advice from the delegate (and that is in dispute), the onus is on Hirak to obtain the necessary legal advice as to his options. As well, it appears from one of Hirak's submissions that the timing of this application was more likely the result of the Director seeking to enforce the award against Hirak.

I would like to add that even if I am wrong with respect to the above, and adopt a broader approach to the issue of timeliness (see *The Director of Employment Standards*, BCEST #D046/00, reconsideration of #D466/99, I am nevertheless still of the view that the application must fail. The delay in this case is lengthy and there is, as noted above, no reasonable explanation for the delay. In the circumstances, the lengthy delay is likely to prejudice other parties, in particular, Joseph. There is, as well, in my view, no compelling case on the merits of the application. The application in the instant case essentially challenges the factual findings of the Adjudicator and seeks to re-argue those facts. It is clear from the Adjudicator's decision that he found that Hirak's evidence was not credible.

In the circumstances, I am of the view that the Original Decision does not warrant reconsideration. In brief, therefore, the application for reconsideration must fail.

ORDER

Pursuant to Section 116 of the *Act*, the application for reconsideration is dismissed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal