

An Application for Reconsideration

- by -

Tsunami Technologies Inc.
("Tsunami")

- 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.: 2002/327

DATE OF DECISION: August 20, 2002

DECISION

OVERVIEW

This is a request from the employer, Tsunami Technologies Inc. (“Tsunami”) 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.

Tsunami makes this request based on its submission that there has been a mathematical error and that \$8200.83 is payable and not \$14,681.44 plus interest as ordered in the Decision.

FACTS:

Raelle Johnson (“Johnson”) worked for Tsunami Technologies as a Xerox representative/Account Manager from January 1, 2000 to October 13, 2000. In a Determination dated February 5, 2001, the delegate ordered that Johnson be paid \$16,051.71 for outstanding wages, commissions, expenses, and compensation for length of service and interest. This amount is arrived at based on interviews with witnesses, records provided by the employer, and records provided by the employee.

Tsunami appealed this Determination on February 26, 2001. With this appeal, Tsunami filed information and argument and concluded that it was willing to settle for a payment of \$338.00. A hearing was held on June 26, 2001 and in the Decision rendered on July 16, 2001, the Adjudicator confirmed all aspects of the Determination, with the exception of the commissions. The Adjudicator referred back to the Director the issue of calculating the commissions owed to Johnson.

The delegate completed this work and advised Tsunami and Johnson in a letter dated December 21, 2001. He requested that Tsunami advise him by January 25, 2002 if there are any errors in the recalculation. The delegate submitted this report to the Tribunal in a letter dated February 8, 2002. He notes that “Mr. Diana was to respond in writing setting out his reasons for disagreeing with the calculations but two (2) weeks have past (sic.) since January 25/02 and I have not heard from him.” The Tribunal asked for submissions on this report and re-assigned it to the Adjudicator for a final decision. The request for submissions invites parties to “specify your reasons for agreeing or disagreeing with the calculations made by the Director”.

In a Decision dated May 7, 2002, the Adjudicator reviewed the entire matter and confirmed the report from the delegate to the effect that \$14,681.44 plus interest is owed to Johnson.

Tsunami filed a request to reconsider this decision on June 6, 2002, on the basis that the Adjudicator erred by not giving adequate weight to the records submitted by Tsunami resulting in a “serious mistake of fact in connection with the Recalculation” and that “the Employer did not understand when originally presented with the Recalculation that it was in a position to disagree with those figures”.

ISSUE:

Does this application meet the threshold for reconsideration established by the Tribunal? Was a serious error committed? Was Tsunami denied an opportunity to present its figures in contradiction to the delegate's recalculations?

ANALYSIS:

The Tribunal reconsiders a Decision only 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 supports the purposes of the *Act* detailed in Section 2 “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act.”

In *Milan Holdings (BCEST # D313/98)* the Tribunal set out 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.

The Tribunal may agree to reconsider a Decision for a number of reasons, including:

- 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.

(BC EST#D122/96)

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.

In response to the request for reconsideration, Johnson submits that “To begin with, Mr. Diana submitted very few business records to myself, as an employee, or to the Director, even once the claim was started. As due process was followed, both prior to the hearing and during the hearing, Mr. Diana was given many opportunities to provide more information. He was also given opportunities to explain the limited information he provided and to respond to the calculations (and then recalculations) made by (sic.) the Director. Mr. Diana however, has refused to participate and has just simply stated that he “will not pay”.

I concur with Johnson's submission that there has been ample opportunity provided to Tsunami. I find that the argument that he didn't know he could disagree with the figures quite disingenuous.

Further, Johnson submits that "Mr. Diana is not providing any new significant or serious evidence to support his request for reconsideration. Instead, he has just made some recalculations based on the existing material, has used a combination of gross and net figures, and has neglected to include some figures in an attempt to reduce the figure owed". I concur that there is no significant evidence provided. I find that Tsunami is just rearguing the case that was essentially made at appeal.

Reconsideration is not an opportunity to re-argue an appeal. I find that Tsunami has not met the threshold for reconsideration.

ORDER:

The request for reconsideration is denied and I confirm the order that Johnson is owed \$14,681.44 plus interest.

Fern Jeffries
Chair
Employment Standards Tribunal