Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Don Guthrie operating as Dianne & Don's Cleaning
("Guthrie" 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.: 2001/369

DATE OF DECISION: July 20, 2001

DECISION

OVERVIEW

This is an application for reconsideration, by Don Guthrie operating as Diane & Don's Cleaning ("Guthrie" or "Employer") under Section 116 of the *Employment Standards Act, R.S.B.C. 1996, c. 113*, (the "*Act*") of decision BCEST #D195/01 (the "Original Decision") issued by the Employment Standards Tribunal ("Tribunal") on May 1, 2001. This appeal was decided on the basis of written submissions received from the Employer, the Delegate and June Holden, a social worker for the employee, Jeffrey Bachert. The Employer employed a mentally challenged individual in its janitorial business and scheduled the employee to work seven days per week, and less than four hours on each occasion. The Employer sought to blame a number of persons including the Ministry for Children and Family Development (referred to as Ministry of Human Resources), and other agencies for permitting the Employee to be scheduled in violation of the provisions of s. 34 of the *Act*. The Employer did not obtain a variance from the four hour minimum hours under s. 34 of the *Act*. It is apparent that the Employer scheduled the Employee in violation of the *Act*. The Act places a duty on the Employer to be aware of the *Act* and *Regulation*, and non-compliance can result in a penalty. If the Employer's error was induced by a government agency or official, it may be characterized as an officially induced error of law. "Officially induced error of law", is a defence limited to the prosecution of a "regulatory offence". It is not available to assist in Employer in evading the minimum standards, which result in payments owing to an Employee, under the *Act*. Mr. Guthrie also alleged that Dianne was not involved in the name of the employer, however, the employer provided this business name to the Delegate, did not object to the Delegate using this name in correspondence prior to the issuance of the Determination, and did not raise this issue in submissions considered by the Original Adjudicator. Other than a bare allegation, no evidence was provided showing an error in the naming of the employer, and therefore I declined to consider this ground for reconsideration.

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 an appropriate case, did the Delegate and the Adjudicator err in finding that the Employee was entitled to minimum daily pay in the amount of four hours per day?

FACTS

This is an application for reconsideration by Don Guthrie of Dianne and Don Guthrie operating as Dianne & Don's Cleaning ("Guthrie" or "Employer") of an original decision, issued on May 1, 2001 which is determined on the written submissions of the Employer and the Delegate and June Holden, a Social worker employed by the Ministry for Children and

Family Development. The original decision was adjudicated on the basis of written submissions from Mr. Guthrie, the Delegate, Jeffrey Bachert.

Jeffrey Bachert (the "Employee") is a mentally challenged individual who worked for the Employer's janitorial service. He worked 7 days a week and less than four hours each day. He was not paid four hours minimum daily pay as required by s. 34 of the *Act*. This matter apparently came to the attention, of the Ministry for Children and Family Development, as a financial assistance worker ("FAW") noted that Mr. Bachert's cheques did not contain a stub or any remittance advice information, necessary for the FAW to determine the earnings, and therefore the amount of assistance to which Mr. Bachert was entitled. The Employer alleged a variance, and a variance confirmed by the actions of the Ministry of Human Resources and DRS Vocational Services. The Adjudicator found that no variance was ever issued by the Director. From a review of the original decision it is apparent that the Employer argued that it did not have to pay the Employee minimum daily pay because Mr. Bachert was disabled and was not capable of working four hours per day. The Employer further argued that the Employee had agreed to work less than four hours per day. After Mr. Bachert filed a complaint under the *Act,* the Employer approached Mr. Bachert with a paper which was an agreement to work less than the minimum daily of four hours under the *Act*. The Adjudicator found that Mr. Bachert signed the paper because he was "confused and frightened."

During the investigation the Employer admitted to the Delegate that Mr. Bachert usually worked 7 days per week. The Delegate concluded that the Employer scheduled Mr. Bachert to work less than four hours per day, seven days per week, thereby breaching s. 34 of the *Act*. The Employer did not provide records to the Delegate which supported the Employer's assertion that Mr. Bachert did not show up for work on some days, and took vacation on other days. The Delegate apparently attempted to explain to the Employer the need to comply with the minimum daily pay provisions of the *Act*, and how to apply for a variance, however, the Employer apparently hung up the telephone on the Delegate. The Delegate found that Mr. Bachert was entitled to the sum of $7,138.38, plus interest of $233.22 on that amount.

The Adjudicator indicated as follows:

> Mr. Guthrie also appears to argue that the agencies he was dealing with in employing Mr. Bachert, were negligent in failing to inform him about the law governing their employment relationship, and specifically, the minimum daily hours and the variance provisions.
>
> As an Employer, Mr. Guthrie is obliged to inform himself of the relevant laws and regulations governing his business affairs. Attempting to shift that burden onto third parties with who he has a relationship is not an answer for his failure to do so. The agencies he dealt with in employing Mr. Bachert, including DRS Vocational Services and MHR, are under no duty to inform Mr. Guthrie of his obligations as an Employer, and I am unable to agree that their failure to do so constitutes negligence. In any

> event, the evidence is that the Delegate attempted to advise Mr. Guthrie of the variance provisions of the Act, advice Mr. Guthrie was not inclined to take.

Argument:

Don Guthre argues that the Ministry of Human Resources, and other agencies set up a situation where their client, Mr. Bachert, was permitted to work in a scheduling manner which did not meet the requirements of the *Act*. The Employer argues that the agencies are responsible for his failure to comply with the provisions of the *Act*. The Employer further argues that there is no Dianne Guthrie in the name of the Employer.

The Delegate argues that the Employer has not raised any grounds for the Tribunal to reconsider the original decision. The Delegate submits that the reconsideration application simply reiterates the statements made in the appeal, which were canvassed and addressed by the Adjudicator in the original decision. The Delegate says that if there was an error in the name of the Employer, it was an error induced by information provided to the Delegate by the Employer, and in any event the Employer tendered no evidence of any error in the name of the Employer.

Mr. Bachert did not file a submission. A social worker, June Holden, filed a submission on his behalf. Ms. Holden submits that it is not the responsibility of the Ministry of Children and Families to accept or reject terms of employment for their client, nor was it for the Public Trustee to monitor the employment relationship. She submitted that the Employer must know the Act and regulations, and only the Employer can seek a variance of the provisions of the *Act* or *Regulation*.

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 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:
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> (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).

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, as set out in *Zoltan Kiss, BCEST #D 122/96*, 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 at length, the tests to be applied in a reconsideration. There are two arguments raised by the appellant which I deal with below:

Naming of Employer

The Employer argues that Adjudicator and Delegate erred in describing the Employer as Dianne Guthrie and Don Guthrie operating as Dianne & Don's Cleaning, and says that the correct name is Don Guthrie carrying on business as Dianne & Don's Cleaning. I am not satisfied that Mr. Guthrie has demonstrated any error in the naming of the Employer. Don Guthrie advised the Delegate of the name of the Employer. The Delegate corresponded with both the named Employers, and at no time did Mr. Guthrie object to the name identified in the correspondence. He did not raise this argument in any submission considered by the Adjudicator in the Original Decision. Generally, the failure to raise a point before the Adjudicator is fatal to a consideration of that ground on reconsideration. The Employer has not any provided any documents, or anything other than a bare submission, that the name was incorrect. I find that the allegation is not supported by any evidence, was not raised before the Delegate or the Adjudicator, and therefore I decline to consider the submission.

Other Agencies:

The Employer argues that social service agencies and persons other than himself are responsible, for the Employer's not meeting the minimum requirements set out in the *Act*. The Employer's strongest argument, is that the Employer was not aware that he was not complying with the *Act*, and that error was "induced" by government or other agencies. I note that generally, the *Act* places an onus on the Employer to be aware of the provisions of the *Act*, and penalties can be assessed for non-compliance.

The Employer's argument raises a type of defence known as officially induced error of law, and was developed in the context of the regulatory offence, where a summary conviction charge was laid against a defendant. This type of "defence" to non-compliance with the *Act*, has been considered by the Tribunal in *Canwest Countertops Ltd, BCEST #D016/99 and Gulbranson Logging Ltd. BCEST #D337/97*. In each case the "defence" was rejected as inapplicable to the Employer's failure to pay an Employee in accordance with the *Act*. "Officially induced error of law", cannot preclude the enforcement of the provisions of the *Act*, which provide for minimum payment standards to an Employee. The doctrine is limited to a "defence" to a quasi-criminal charge, or a regulatory offence. Mr. Guthrie has not been charged under any legislative enactment, and a complaint under the *Act*, cannot be considered to be a charge.

It is evident that the Employer has raised no ground which falls properly within the scope of a reconsideration application. A reconsideration application is not a fresh opportunity to have the reconsideration Adjudicator address the merits of the arguments, as if an Original Decision was not rendered by the Tribunal. I therefore dismiss this appeal on the first branch of the *Milan Holdings Ltd* test, that the Employer has not shown any grounds for the Tribunal to exercise its discretion under s. 116 of the *Act*.

ORDER

Pursuant to section 116 of the Act, I decline to cancel or vary the Original Decision dated May 1, 2001.

Paul E. Love
Adjudicator
Employment Standards Tribunal