Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Rachel Guvi and Archie Guvi operating as Global Internet Systems Co.
(“Global” or the “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: Ib S. Petersen

FILE No.: 2002/380

DATE OF DECISION: September 9, 2002

British Columbia

DECISION

OVERVIEW

This is an application by the Employer, pursuant to Section 116 of the *Employment Standards Act* (the "*Act*"), of a Decision of the Employment Standards Tribunal (the "Tribunal") issued on May 2, 2002 ((BCEST #D004/01 (the "Decision"). In the Decision the Adjudicator upheld a Determination dated December 6, 2001 which concluded that Mr. Shaban-Zanjani was owed $6,015.15 for regular wages, vacation entitlement and interest.

The background may be extracted from the Decision:

> The Employer operates a computer store that also designs and maintains web sites. A complaint was filed with the Employment Standards Branch on August 1, 2001 by Saeid Shaban-Zanjani alleging that the Employer owed Mr. Shaban-Zanjani for regular wages not paid.
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> The Complainant was first hired by the Employer in December of 2000. Prior to this the Complainant had been volunteering with the Employer as part of his practicum for the BCIT course he was taking in programming and database systems. The Complainant was approached by the Employer and offered a position as webmaster.
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> Prior to Mr. Shaban-Zanjani started to work for the Employer an agreement was made between the Employer and Sante Services Ltd. ("Sante") to provide a wage subsidy for the first six months of Mr. Shaban-Zanjani's employment. Sante is a contractor that provides training services and administers a government funded training program. The contract stated that Sante would provide a wage subsidy of 50% for the first two months of employment, 20% in the second two months, and 10% in the final two months of the agreement. The contract between Sante and the Employer provided that Sante would reimburse the Employer provided that the Employer submitted a claims form, an activities report and proof of employee payment.
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> From the material before me it appears that Sante reimbursed the Employer $3,528.00. The Employer sent Claim Forms to Sante at the end of June, 2001 claiming reimbursement for hours worked by the Complainant between April 15, 2001 through to June 15 ,2001. Sante refused to reimburse for these hours based on the fact that no proof of payment to Mr. Shaban-Zanjani was sent in with the Claim Forms.
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> On August 1, 2001, Mr. Shaban-Zanjani filed a complaint with the Employment Standards Branch alleging that the Employer had not paid him for the hours he had worked between April 15, 2001 through to June 15, 2001. The file was assigned to a Delegate of the Director of Employment Standards who requested that the Employer provide the Complainant's work record. The Employer did not respond to this request nor to the follow up requests including a Demand for Employer Records pursuant to section 85 of the Act. The Employer did not respond to this Demand and the Delegate made a Determination based on the evidence provided by the Complainant and Sante. Included in the evidence is a Record of Employment (R.O.E) which states that Mr. Shaban-Zanjani's last day of work was April 15, 2001. The R.O.E. was issued May 15, 2001. Mr. Shaban-Zanjani states that he did not receive the R.O.E. until July 6, 2001. There is also a number of wage statements that were forwarded to Sante by the Employer and copies of four cheques issued by the Employer to the Complainant. The cheques are dated; January 15, 2001, January 31, 2001, February 15, 2001, and June 18, 2001.

ANALYSIS

The Tribunal has a long-standing policy of refusing to hear evidence that was not adduced to the Delegate during the initial hearing. (See *Tri-West Tractor Ltd.*, BC EST # D268/96). The Employer is not entitled to "lie in the weeds" during the investigation and then raise evidence on appeal that should have properly been before the Delegate during the investigation. While the Tribunal does have the discretion to admit evidence that was not placed before the Delegate, the party wishing to adduce the evidence must be able to show compelling reasons for the failure to provide the evidence. In the present case, the only reason offered by the Employer is that they were under a great deal of stress and that Mr. Guvi had been experiencing some heart problems. While I have no reason to disbelieve this statement the fact remains that it does not excuse the failure of the Employer to respond to the Delegate's request for information. I find that the Employer has not demonstrated reasons why any new evidence should be accepted in this Appeal.

The sole issue to be decided is whether the Complainant worked for the Employer between April 15 through to July 15, 2001. The Employer takes the position that Mr. Shaban-Zanjani stopped working for the Employer in mid April 2001 but continued on a casual basis until mid June, 2001. In the appeal submission the Employer states that Mr. Shaban-Zanjani informed the Employer that he would be happy just to be paid the wage subsidy provided by Sante and that the Employer need not pay him any more.

The Delegate, in determining that the Complainant had worked for the Employer during this time, relied on the information provided by the Complainant as well as the Claim Forms that were sent to Sante by the Employer. As stated earlier, these forms show that the Complainant was working for the Employer up to June 15, 2001. The only evidence that the Delegate had to dispute this finding was the R.O.E. stating that the Complainant had ceased to work for the Employer on April 15, 2001. The R.O.E. was not filled out until May 15, 2001. Nowhere in the Employer's submission is it contested that the R.O.E. was issued to the Complainant prior to June, 2001. I find that the Delegate was entitled to rely on the documentation supplied by the Employer which was forwarded to Sante declaring the hours worked by the Complainant as these records provided the best evidence of the Complainant's work history. As such, I can find no error in the Determination.

ARGUMENTS

The Employer applies for reconsideration. In the initial document initiating the reconsideration, filed by Mr. Guvi, the Employer takes issue with the Decision. From the form it is suggested that the reason for the appeal is "a serious mistake in the Decision concerning the facts." Mr. Guvi suggests in a rather general way that the process was flawed and unfair, and that Mr. Shaban-Zanjani lied about working for the Employer during the period in question, April 15 to June 15, 2001. The Employer indicates that witnesses will support this position.

Mr. Shaban-Zanjani argues that the Employer has not identified any "serious mistake" in the Decision and is simply dragging its feet.

Counsel for the Director, after briefly setting out the history of this matter, argues that the application does not disclose any "explicit grounds of error of law, fact or principle" in the original Decision and relies on the Tribunal's decision in (*The Director of Employment Standards ("Milan Holdings")*, BCEST D#313/98, reconsideration of BCEST #D559/97). The Director takes the position that the "new" evidence sought to be introduced was refused to be admitted by the Tribunal in its original Decision because the Employer had failed to present compelling reasons for its failure to participate in the

Director's investigation and refers to the Tribunal's repeatedly expressed caution against allowing appellants to bring up new evidence on appeal. The Director also notes that the burden on appeal rests with the Appellant to show that there are errors in the Determination or in the Decision under reconsideration. The reconsideration application is simply a disagreement with the Decision.

In a reply filed by counsel, which also seeks to rely on *Milan Holdings*, *above*, the Employer argues that the factual issues have never been considered on their merits because the Employer (admittedly) "failed to participate in the investigation" and because the Adjudicator refused to exercise his discretion admit this evidence. This new evidence would have resulted in a different decision. The Employer wishes to address the accuracy of the documentary evidence (the claim forms to Sante Services) and statements from other employees to the effect that Mr. Shaban-Zanjani could not have worked during the period in question. The Adjudicator erred in failing to allow this evidence even though he acknowledged that the Employer "had explained its failure to respond within the seven weeks allotted by reference to the medical condition of its principal."

Counsel for the Director requested additional time to respond to the new and extensive submissions of the Employer. In the circumstances, I am of the view that this is not necessary. In my view, for the reasons set out below, there is no merit to the application for reconsideration.

I would like to add that I have serious misgivings about the Employer's reply. In my view, the appropriate course of action in an application for reconsideration, is to set out substantively all the grounds for appeal, with particulars, and to file the documents in support of the appeal, with the application, and not in the reply. This process allows other parties an opportunity to respond such that the application can be dealt with in a timely and fair manner. In any event, in view of my decision, I say no further about this.

ANALYSIS

Section 116 of the *Act* provides for reconsideration of Tribunal decisions and orders. 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. 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 (*Zoltan Kiss* (BCEST #D122/96).

Consistent with those principles, the Tribunal has adopted an approach which resolves into a two stage analysis (*Milan Holdings*). At the first stage, the reconsideration panel decides "whether the matters raised in the application in fact warrant reconsideration" considering such factors as the timeliness of the application together with any valid reason for a delay; whether the primary focus is to have the reconsideration panel "re-weigh" the evidence; whether the application arises out of a preliminary ruling made in the course of an appeal; whether the application raises 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; and whether the application raises an arguable case of sufficient merit to warrant reconsideration.

The panel in *Milan Holdings* noted:

> "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 the correctness of the decision being reconsidered."

I agree with the Respondent and the Director that the application should be dismissed. I am of the view that the application for reconsideration has not met the threshold test set out in *Milan Holdings*. In my view, this is simply an attempt to re-argue the merits of the matter before the Delegate and the Adjudicator.

The fact are relatively straight forward. The Determination was issued on December 6, 2001. Prior to the Determination being issued, as noted by counsel for the Director, the Employer was allowed an opportunity to respond. The particulars are provided, and, in any event, are not in dispute:

- On August 28, 2001, the Delegate sent a letter, by regular mail, to the Employer.
- On October 3, 2001, a Demand for Employer Records was issued and sent via registered mail.
- On October 4, 2001, a second Demand was issued and sent via regular mail.
- The Employer did not respond to the inquiries.
- The Determination was issued on December 6, 2001.

The reason the merits of the Employer's factual allegations have never been considered is that the Employer failed to participate in the director's investigation. The Tribunal has time after time affirmed its view that an appellant cannot (generally) refuse to participate in the Director's investigation and then, when subsequently faced with an adverse decision, question that decision. This is not an absolute rule, and the Adjudicator retains discretion to admit new evidence. However, the nub of this application is the Employer's explanation for the failure to participate. The Adjudicator found this explanation to be wanting. I agree. The burden is on the Appellant to satisfy the Adjudicator that there is a compelling reason for the failure to participate in the investigation. The only reasons provided, in the original appeal to the Tribunal was that:

> "My wife (Rachel Guvi) and I have been under a great deal of stress with the new business and I also have been experiencing some heart problems."

It may well be that, in the appropriate circumstances, a person's health would be a reasonable or compelling explanation. That case has not been made out here. I note that there are no particulars of this, even on the application for reconsideration. In light of the burden on appeal, I think it would have been appropriate for the Appellant to provide particulars as to his health situation, if, as suggested, that is the reason and explain why, given the time between the original demand for information and the Determination, the Employer was unable to participate in the Delegate's investigation. All the Adjudicator was left with was some unspecified health condition.

This matter does not warrant reconsideration.

ORDER

Pursuant to Section 116 of the *Act*, I order that the application for reconsideration of #D167/02 be dismissed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal