EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the *Employment Standards Act* R.S.B.C. 1996, C.113

- by -

Wilma Croisdale operating as St. Francis House
(" appellant ")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Paul E. Love

FILE No: 2000/669

DATE OF DECISION: January 02, 2001

DECISION

OVERVIEW

This is an application, by the employer, for reconsideration of a Decision dated September 15th , 2000. The employer alleges that the Adjudicator erred in failing to consider that Anita Korinth was a live in support worker, and not a domestic worker, as found by the Delegate. The employer also alleged that the Adjudicator erred in failing to consider fresh information submitted on the appeal concerning the hours worked by the employee. In refusing to consider the fresh evidence and argument, the adjudicator noted that the Delegate had afforded a reasonable opportunity to the employer to participate in the investigation and the employer had not provided any wage information to the Delegate. The employer did not raise the issue of "misclassification" of the employee as a domestic worker at any time prior to the filing of the appeal.

ISSUES TO BE DECIDED

Does this application for reconsideration met the threshold for consideration of the merits of the arguments advanced?

FACTS

At all material times, the appellant operated a foster home, funded by the Ministry of Children and Families, and provided home support services for two mentally challenged adults, and three "highly functioning children". The appellant responded to a newspaper ad placed by the complainant, Anita Korinth, for employment as a live in cook/housekeeper. At the time of placing the advertisement, Ms. Korinth lived in Manitoba. As a result of the appellant answering the advertisement, Ms. Korinth moved to British Columbia and supplied housekeeping, cooking, and care for the residents for the period April 1, 1999 to August 27th, 1999.

The Delegate issued a determination for wages, vacation pay, and interest in the amount of $10,296.65.

Before the Delegate issued the Determination, the Delegate attempted to contact the employer on December 29th (unsuccessfully), contacted the appellant on January 4, 2000, left a message on January 12, 2000 contacted the employer on January 30th, 2000, issued a Demand for Employer records on February 2, 2000, reviewed the employer's response to the demand, wrote to the employer on March 27th, 2000 indicating her preliminary view of the matter, wrote to the appellant on May 1st to discuss settlement, and issued the Determination on May 17th, 2000, when no response was received from the appellant.

The appellant's response to the demand was to submit a letter to the Delegate dated February 18, 2000 indicating that she was unable to comply with the request as a contract of employment was

not entered into with Ms. Korinth. The March 27th letter from the Delegate outlined the preliminary view of the Delegate that Ms. Korinth was employed as a domestic worker, and the amount of wages alleged to be owing, and invited the employer to respond in writing with reasons why the employer felt money was not owing, with payroll records.

The appellant claims to have contacted a lawyer as a result on the March 27th letter, however, she did not retain the lawyer, nor did she provide the lawyer with any instructions. She left the country on a holiday from April 28th, 2000 to May 21, 2000. She did not communicate to the Delegate that she was seeking legal counsel, and she did not respond to the Delegate's letter of March 27th, 2000.

In the appeal of the determination, the appellant argued:

The Delegate failed to afford and opportunity to the employer to respond during the investigation.

The employee was classified incorrectly as a domestic worker by the Delegate.

The Delegate erred in accepting the complainant's time and payment records as the basis for determining the employer's liability.

Counsel for the appellant filed a lengthy and detailed brief consisting of 66 pages of evidence and argument.

The Adjudicator reviewed the investigation conducted by the Delegate and concluded that the Delegate afforded a reasonable opportunity to the employer to participate in the investigation. The Adjudicator found that the Delegate did not err in relying on the only records produced during the investigation which were those produced by the employee. The Adjudicator failed to admit and consider new information relating to the argument made on appeal that Ms. Korinth was a live in caregiver, as this was not an argument advanced to the Delegate. The Adjudicator also refused to consider information relating to the wages owing to Ms. Korinth, as this information was not advanced to the Delegate during the investigation.

On this appeal the appellant alleges a breach of natural justice in that the Adjudicator improperly relied upon a "technical/procedural argument" to exclude consideration of new evidence and argument tendered by the employer that Ms. Korinth was a "live in care giver" not a "domestic", and that her claim for hours worked was inflated.

The principle point raised on the appeal is that the Adjudicator's reasons to exclude the evidence was unfair and attributed a higher legal sophistication to the employer than was intended by the *Act*. Counsel for the employer argues that his client was "unaware of the subtle, yet important distinction in the *Act* between the definitions of a "domestic" and a "live in support worker". Counsel argues that the employer was not aware that the delegate's demand for employment records could include other, circumstantial evidence and not solely a written contract. The argument further is made that it is unfair to penalize the employer for failing to submit information that she did not know existed during the investigative stage, until she had retained

council. The employer submits that it would be unfair to the appellant, an unsophisticated employer, to exclude the evidence which she seeks to tender on the appeal.

I note that the position taken initially by the appellant during the investigation was that Ms. Korinth was not an employee, and that Ms. Korinth cooked and house cleaned in exchange for free room and board, and that the employer gave the complainant money out of the "kindness of her heart". The appellant did not tender any evidence to the Delegate related to the hours worked by Ms. Korinth. The appellant did not respond to the Delegate's letter of March 27th , which outlined the preliminary view of the Delegate concerning Ms. Korinth's entitlement under the *Act*. I note that no evidentiary foundation has been submitted by the appellant that allows me to find that Ms. Croisdale was an unsophisticated employer or that she did not understand the correspondence sent to her by the Delegate.

From the circumstances apparent in this case, while the Delegate afforded to the appellant a reasonable opportunity to participate in the investigation, the appellant refused or neglected to participate in the investigation conducted by the delegate.

ANALYSIS

In a reconsideration application the burden rests with the appellant to show that the application meets the test for reconsideration.

The reconsideration power of the Tribunal is one to be exercised cautiously. This is because the purpose of the *Act* is to ensure that disputes are resolved fairly and efficiently, that a degree of finality is required, and that the appeal hearing is meant to be the primary forum where the Tribunal corrects errors made by the Delegate. The appeal hearing is not a discovery forum, and the appellant cannot re-litigate the entire appeal on reconsideration. The reconsideration process is meant to review errors that the Adjudicator made at a hearing, which make a difference to the parties, and to the public at large.

The Tribunal has, therefore developed a two stage process in considering applications for reconsideration (see *Milan Holdings Ltd., BCEST #D313/98*). I must first determine whether the matters raised in the application warrant consideration. In particular, while the list is not exhaustive, I must consider whether there has been a failure by the Adjudicator to comply with the principles of natural justice, whether there has been a mistake of fact, whether there is inconsistency with other decisions indistinguishable on their facts, serious and significant new evidence not available at the time of the hearing, mistake in applying the law, failure to adjudicate on all grounds of appeal advanced, or a clerical error in the decision.

The second stage involves a consideration of the merits of the appeal, having first decided that there is a basis for reconsideration. The merits argument essentially is that Ms. Korinth was not a domestic but a live in care giver, and that she is not entitled to overtime under the *Act*. The employer also argues that the hours and records supplied by Ms. Corinth are inflated.

This reconsideration application fails in my view, on the ground that the application does not warrant reconsideration. While the argument in this case is cast in the guise of an error in natural justice, the refusal of the Adjudicator to consider evidence and arguments not advanced by the employer at the investigative stage, cannot be said to be an error in natural justice. The Adjudicator's decision was simply a reflection of the proper investigative role of the Delegate and the proper appellate role of the Tribunal. The Tribunal exists to correct errors made by the Delegate. It is the function of the Delegate to investigate the complaint and make findings of fact : *Re Deveraux, BCEST #D272/97*. The Delegate in this case made reasonable efforts to give the appellant an opportunity to respond to the complaint, and therefore fulfilled her duty under s. 77 of the *Act*. I note that the employer did not challenge the conclusions of the Delegate that the employee was a domestic worker, entitled to a specific amount of wages, when presented with the opportunity to do so during the investigation. She simply did not participate in any way which assisted the Delegate in making the Determination. Where a party neglects to provide relevant information to the Delegate, without a reasonable excuse, it cannot be said that a Delegate has erred when the Delegate relies on the only information provided to him or her.

In my view, the proper argument to be made in this case, is whether an employer, who now alleges to the Tribunal that, she "misunderstood the investigation process," should be permitted to advance her case to the Adjudicator, rather than the Delegate. There is, however, no evidentiary basis for me to conclude that the employer was unsophisticated or misunderstood the investigation. The correspondence between the Delegate and the employer consists of very clear and precise documents and any reasonable person who read the documents would conclude that as an alleged employer she was required to supply information, and that the case would be decided on the basis of information which was provided to the Delegate.

The employer has suggested that the Adjudicator applied a technical argument to exclude the arguments and evidence presented on the appeal. The employer says that the failure to consider the evidence brings the integrity of tribunal decision making into question. In this case the Adjudicator applied the principle that the purpose of an appeal under the *Act* is to correct errors made by the Delegate, and the appeal process is not a place where decisions are made in the first instance. This policy manifests itself in the principle that "new evidence" not presented to the Delegate will not be admitted and considered on an appeal, and that "new arguments" that were not presented to the Delegate will not normally be considered on an appeal. The adjudicator relied on *Tri-West Tractor Ltd, BCEST #D 268/96 and Re Kaiser Stables Ltd, BCEST #D058/97, Horizon Fibreglass Products Ltd, BCEST #D444/97* as cases which illustrate this approach to new evidence and arguments. The Adjudicator's approach was not "technical" but a reasoned approach which does not permit an appellant who neglects the investigation process, to have a right to a fresh investigation of the merits of the dispute by the Tribunal. The appellant appears to be suggesting the Adjudicator ought to have set aside the Determination and held an oral hearing to, in effect, investigate the issues because, the employer "woke up" after receiving the Determination and now appreciated the serious consequences of not addressing her mind to the demands and information requests made by the Delegate during the investigative phase.

In my view, any reasonable person, should have been alive to the seriousness of the investigation, when that person received the demand for employer records. There is no cogent evidence before

me to support any argument that Ms. Croisdale misunderstood the investigation that was being conducted. If the employer does not understand documents that are presented to her, then she should have retained counsel at the appropriate time, which was while the investigation was underway. She simply did not take the investigation seriously, and did not provide the information requested by the Delegate. The Delegate was not made aware by the appellant that she had consulted counsel, the Delegate simply was dealing with a non-responsive and non-cooperative party in the investigation process.

In order to provide fair and efficient procedures for resolving disputes concerning the application and interpretation of the *Act*, it is fundamental and often fatal to an appeal if the appellant does not participate in the investigation of the complaint by the Delegate. The approach proposed by the appellant would create a very real mischief to the scheme of the *Act* if the parties to the dispute seek to establish the merits of their dispute on appeal, without first providing the information to the Delegate who is charged with the investigation of the complaint.

ORDER

Pursuant to section 116 of the *Act*, I order that the Decision in this matter, dated September 15th , 2000 be confirmed.

PAUL E. LOVE

Paul E. Love
Adjudicator
Employment Standards Tribunal