An Application for Reconsideration

- by -

Westec Venture Group, Inc.
("Westec" 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.: 2002/455

DATE OF DECISION: November 21, 2002

DECISION

OVERVIEW

This is an application, by Westec Venture Group Inc. ("Westec"), for reconsideration of a Decision of a Tribunal Adjudicator dated June 6, 2002 ("original decision"), pursuant to section 116 of the *Employment Standards Act, R.S.B.C. 1996 c. 113* ("*Act*") dismissing an appeal from a Determination issued on January 7, 2002 ("Determination') by a Delegate of the Director of Employment Standards ("Delegate"). It is apparent that neither Westec, nor its principal, chose to participate in the investigation conducted by the Delegate. Westec then sought to establish errors in the findings of the Delegate related to the employment status, hours worked, and rate of pay for two employees. Counsel for Westec argued that the Adjudicator erred in finding a wilful failure to participate, and submits that the Adjudicator erred in failing to determine error in the Determination based on the evidence adduced at the hearing. This is not an appropriate case for reconsideration: *Milan Holdings Ltd., BCEST #D 313/98.* The Adjudicator in the original decision found that Westec failed or neglected to participate in the investigation. The Tribunal applied the usual approach in dealing with parties who fail to participate in an investigation and then seek to introduce evidence on an appeal in attempt to show that the Delegate erred. The time to participate in an investigation is at the time the Delegate investigates the matter, and not at the appeal or on reconsideration. This application for reconsideration was dismissed.

ISSUES TO BE DECIDED

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

FACTS

In the Determination dated January 2, 2002, the Delegate found that Jim D. Robertson and Rob Wood, were employees of Westec, employed respectively as creative director, and graphics designer and were entitled to wages. The Delegate found that the wage entitlement of Mr. Robertson, together with interest was $14,194.59. The Delegate found that the wage entitlement of Mr. Wood, together with interest was $8,395.46. The Delegate also found in a Determination dated January 7, 2002, that Mr. Cully was a director or officer based on the records available from the Register of Companies.

In a Decision dated June 6, 2002 ("original decision"), issued after an oral hearing, the Adjudicator dismissed the appeal of Westec and Mr. Cully. This is a reconsideration application by Westec of the original decision.

The Adjudicator was of the view that he would not deal with the merits of Westec's appeal, although the evidence lead at the hearing raised some doubt with regard to the Delegate's conclusions particularly with regard to Mr. Wood's hours of work, and hourly rate.

The Adjudicator placed some reliance on the conclusions drawn by the Delegate in the Determination:

> The investigating officer left telephone messages for the employer requesting that the employer contact the investigating officer regarding the complaints. There was no response from the employer. The investigating officer sent letters dated September 7, 2001 and October 5, 2001

> (attached as Exhibit #1 and #2) outlining the complaints and requesting that the employer respond to the allegations. There was no response from the employer. The investigating officer then sent his preliminary findings to the employer by regular and registered mail on November 20, 2001 (attached as exhibit #3). There was no response from the employer. The registered mail was returned by Canada Post on December 21, 2001 indicating that it was unclaimed (attached as Exhibit #4). The Canada Post "track a package" web site indicates that on December 15, 2001, the employer refused the registered mail (attached as exhibit #5).

The Adjudicator also summarized the evidence at the hearing related to the decision of Westec not to participate in the investigation:

> Mr. Kristof, the president of Westec, who testified at the hearing, explained that after mid-May – when Mr. Wood, Mr. Robertson and Mr. Kristof, in the words of the latter, "agreed to call it a day" – there was essentially no-one in the office and he only went there on a few occasions. Undoubtedly this was a stressful time for Mr. Kristof with creditors knocking on the door, problems with the landlord over rent, etc. The owner of one of the offices (the Appellant Mr. Cully) commenced foreclosure proceedings in the fall of 2001. Mr. Kristof also sought and engaged in employment. Mr. Kristof also expressed some doubts as to whether the telephone was, in fact, working from May or June. He was not specific as to when the telephone were shut off. Asked about voice-mail could have been left, he answered "could have, I would have thought the phones would be off." In my view, his evidence in that regard was less than unequivocal.
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> Mr. Kristof testified that he "saw no need to open the mail" because Westec was incorporated and, it appears from advice he stated he received with respect to bankruptcy, he was of the view that as such there was no personal liability. He explained that he was unaware of any complaint to the Employment Standards Branch. In his view, Mr. Wood and Mr. Robertson had not been employees and he had no reason to suspect a claim from them. He testified that he did not become aware of the complaints until in the course of Mr. Cully's foreclosure proceedings in early January 2002. At that time, he responded expeditiously. Among others he also went to the office and checked the mail which "was in a box upstairs." As I understand the evidence, this mail included correspondence from the Delegate. With a minimum of diligence, Mr. Kristof could have either checked the mail periodically or had it forwarded. I do not find this to be a reasonable explanation in the circumstances.
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> The Delegate sought information and documentation with respect to the issues raised in the complaints. In my view, Westec had ample opportunity to provide information and documentation to support its case. The issues raised by the Westec–employment status versus independent contractor/business venture, and wages and hours of work–could have been addressed during the investigation. In my view, the Employer refused to participate in the investigation and I will not allow the Employer to raise these issues at this stage. As such, and on that ground alone, the appeal brought by Westec must fail.

The Adjudicator made the following finding of fact (page 3 of the Decision):

> Considering all of the circumstances of the instant case, I am of the view that Westec failed to cooperate with the delegate's investigation. Requests for a response to the complaints was sent to Westec. The Tribunal will generally not allow an appellant who refuses to participate in the Director's investigation, to file an appeal on the merits of the Determination. There is in my view, no reasonable explanation for the failure to cooperate with the investigation.

Employer's Argument:

Counsel for the Employer argues that the Original Decision does not include any adverse finding of credibility with respect to Mr. Kristof's evidence. Further, it is submitted that "however negligent it might have been for Westec or its president, Mr. Kristof, not to have checked the mail or the answering machine, it is inappropriate to treat mere negligence as willful conduct. It is submitted that adherence to such a standard of strict liability is unfair and inconsistent with the principles of the *Act*. Counsel further submits that a similar standard was not applied against the Claimants and that the Claimants withheld information from the Delegate. Counsel further argues that the Delegate obtained the registered office address of Westec in May, but did not send any notification to that address until after the Determinations were issued. Counsel submits that Westec took steps to appeal the Determination as soon as it had "actual notice of the claims", and provided information.

The balance of the Employer's submission is an attack on the facts found by the Delegate, in particular submitting that neither Mr. Wood nor Mr. Robertson were employees, and that the hours worked and hourly rate was incorrect.

ANALYSIS

In a reconsideration application the burden rests with the appellant to show that the application meets the test for reconsideration. In essence the appellant submits that the facts found by the Delegate might have been different had the Westec participated in the investigation.

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 #D 313/98*). 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.

In my view this is a matter which falls to be determined on the first branch of the Milan Holdings test.

The Adjudicator's Decision contained a rather unfortunate phrase, which in my view does not accurately describe the process in which the Adjudicator engaged prior to rendering his decision:

> The Tribunal will generally not allow an appellant who refuses to participate in the Director's investigation, to file an appeal on the merits of the Determination.

It is apparent that Westec did file an appeal. The appeal was assigned to an adjudicator for an oral hearing. The adjudicator conducted an oral hearing. One of the written submissions before the Adjudicator, from the Delegate, was that the appeal should be dismissed on the basis that Westec failed to participate in the investigation. It is apparent that the Adjudicator heard evidence concerning the issue of "non-participation" by Westec, as the evidence and findings are recited in the facts above. It is also apparent that the Adjudicator did hear the arguments and information presented by the appellant "on the merits" during the appeal, as the Adjudicator commented:

> While I am of the view that the evidence presented at the hearing, especially with regard to Mr. Wood's hours or work and hourly rate, at the very raises some doubt as to the Delegate's conclusions, I am of the view that I do not deal with the issues on the merits of the Determinations.

The Adjudicator did not dismiss the appeal on a preliminary objection, prior to the case presentation of the appellant. The Adjudicator did not "use the information presented by Westec", which was essentially new information not presented to the Delegate, in order to determine if the Delegate erred in the findings of fact set out in the Determination. What in essence has happened, is that the Adjudicator determined the appeal against Westec, on the basis that Westec did not participate in the investigation before the Delegate, after having heard all the evidence on the appeal.

An Adjudicator has considerable latitude in the conduct of a hearing, and I do not wish these comments to be taken as a "prescription" for how to conduct the hearing. An Adjudicator may choose to deal with the issue of failing to participate as a preliminary issue, and dispose of an appeal on that basis. Often the issue of participation/non participation and opportunity to participate, is a live issue during the appeal, may require evidence, and it may not be convenient to deal with the "participation" issue as a preliminary matter, which disposes of the entire appeal. When the appeal may not be conveniently decided on the basis of a preliminary objection prior to hearing evidence on the merits, the Adjudicator may hear all the evidence, and decide the appeal without the need to address the "merits" of the argument advanced by the party based on new information not presented to the Delegate during the investigation. Here the Adjudicator apparently chose to decide the case on the basis of the failing to participate point afer hearing all the evidence on the appeal.

It cannot be said that this process raises any issue of natural justice or other grounds for reconsideration. This approach is consistent with the Tribunal's jurisprudence in factual circumstances where a party does not participate in an investigation, but seeks to appeal a Determination. This Tribunal has held consistently that an appellant who fails to participate in an investigation, will not be "heard" on an appeal in the sense that generally any evidence which was not before the Delegate will not be considered in the appeal process: *Kaiser Stables Ltd*., BCEST #D085/97, *Tri-West Tractor Ltd*., BCEST #D268/96, *D.J.M. Holdings Ltd.*, BCEST #D46/97, *Big Olive Taverna*, BCEST #D440/00, *EMB Transport*, BCEST #D419/00, *Syncon Investments Ltd.*, BCEST #D094/97. It is clear, that the Tribunal has discretion to consider new evidence.

The Tribunal is a forum for correcting errors that a Delegate made during the investigative process. The time to make one's case is before the Delegate during an investigation. A Delegate has a duty under section 77 of the *Act* to afford a reasonable opportunity to a party to participate in an investigation. Section 77 reads as follows:

> If an investigation is conducted, the director must make reasonable efforts to give a person under investigation an opportunity to respond.

Obviously, the conclusions drawn after an investigation will depend on the information before a Delegate. A party may choose to participate, and the information provided may be helpful in coming to a Determination. If a party chooses not to participate, the result of an investigation may well have been different, as the Delegate will only be able to determine the issues on the basis of information presented. It is not an error for the Delegate to issue a Determination in circumstances where a party neglects or fails to participate. A party who "wakes up" after receiving a copy of the Determination, and files an appeal after failing to participate in an investigation, is in an "awkward position". That party often must simply live with the consequence of a Determination based on the information and evidence presented to the Delegate. The appellant who fails to participate, has more limited tactical options in an appeal hearing, than does an appellant who participates in the investigation, but who fails to persuade the Delegate. In certain situations, an appellant who fails to participate in an investigation may be able to demonstrate during an appeal that the Delegate erred in reaching the findings of fact, application of the law to the facts, or the applicable law. It may, for example, be apparent from a reading of a Determination that a Delegate has erred in interpreting the relevant legislation, or has erred in conclusions drawn on the basis of the information provided solely by the participating party, or the Determination may contain mathematical errors. I do not mean this to be an exhaustive list, but illustrative of errors that appear in Determinations.

In many appeals, however, error may not be apparent unless the appealing party in some detail canvasses "the facts from its point of view"by introducing its own documents, or oral evidence from witnesses. What is not open as an option for the defaulting party is to introduce new evidence not presented to the Delegate, which tends to show that the Delegate erred. While an Adjudicator may choose not to interfere with this type of case presentation, the Adjudicator need not use the information to consider "error", and this is not unfair to the appellant, as the appellant has had available to it, its chance to participate at the proper time during the investigation. Often, however, in a hearing, the Adjudicator hears all the evidence that parties seek to tender on an appeal, and then determines the case on the basis of applicable legal principles. This may be a more efficient way to conduct a hearing.

An example of the impermissible process was used by the appellant in this reconsideration application was the filing of an affidavit of Peter Kepkay. This affidavit was proffered for the purpose of proving that the Delegate erred in its findings that Robertson and Wood were employees. This was a major issue before the Delegate, and at the oral hearing before the Adjudicator. The Tribunal accepted this document for filing. The fact that this document was filed, does not mean that an Adjudicator must rely or consider the document in making a decision. This document is apparently new evidence which was not provided either to the Delegate prior to the issuance of the Determination, or to the Adjudicator at the hearing which resulted in the Original Decision. No reason is advanced for failing to provide this information to the Adjudicator, other than the "inability of the witness to attend". The Tribunal has a subpoena power, and there is no evidence that the Tribunal was asked to use its subpoena power to compel the attendance of Mr. Kepkay. I decline to consider this information to assist me in determining whether this is a matter requiring reconsideration.

In summary, the *Act* provides a scheme for the just and speedy resolution of employment complaints. The statutory scheme provides for investigation and determination of rights by the Delegate, with a substantial error correction power to the Tribunal. There is a further error correction power available through reconsideration. The purpose of the *Act* is undermined if an appellant "wakes up" after a Determination is issued, and then seeks to set the Determination aside on the basis of its own failure to participate in the investigative process. In my view, there was ample support for a finding by the Adjudicator that Westec chose not to participate in the investigation. There was apparently no error that could be demonstrated

without the use of new evidence, and the Adjudicator did not use the new evidence to "investigate" error. The reconsideration application does not raise any grounds for reconsideration, within the *Milan Holdings* standard.

For all the above reasons, I dismiss this application for reconsideration.

ORDER

Pursuant to section 116 of the *Act*, I order that the Decision in this matter, dated June 6, 2002 be confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal