An Application for Reconsideration

- by -

Eye2Buy Technology Canada Ltd.
(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: Kenneth Wm. Thornicroft

FILE No.: 2002/500

DATE OF DECISION: December 10, 2002

DECISION

INTRODUCTION

This is an application filed by Eye2Buy Technology Canada Ltd. (the "Employer") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of an adjudicator's decision issued on September 16th, 2002 (B.C.E.S.T. Decision No. D418/02).

The application for reconsideration is contained in a 1 1/2 page letter submitted to the Tribunal by the Employer dated September 26th, 2002. In its September 26th letter, the Employer asserts that the adjudicator "fail[ed] to comply with the basic principles of natural justice" and made "numerous mistakes...in stating the facts". The Employer also says that "the adjudicator's decision is not consistent with other decisions based on similar facts" and that he made "serious mistakes...in applying the law". Finally, the Employer states that the complainant "is a bald faced liar" whose statements "are a complete abomination of fact and are wildly exaggerative".

I have also reviewed the Employer's November 8th, 2002 letter although this latter document does not materially add to the Employer's original submission.

PREVIOUS PROCEEDINGS

Daryl H. Hepting ("Hepting") filed a complaint with the Employment Standards Branch in which he claimed unpaid wages and unreimbursed expenses. According to the information set out in a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on March 26th, 2002, Hepting was employed by the Employer from August 1st, 2000 to April 19th, 2001 as its "Chief Technology Officer" and was paid a monthly salary of $5,500.

As recounted at page 2 of the Determination, the delegate went to quite extraordinary lengths--several telephone calls and letters--to obtain the Employer's position with respect to Hepting's complaint but the Employer appears to have taken a position of resolute indifference to the entire matter. Ultimately, when the Employer failed to provide proper employment records pursuant to a lawful demand, a penalty determination was issued (on March 7th, 2002), however, even in the face of that sanction no proper records were ever produced.

In the absence of any submissions from the Employer (other than an uncorroborated telephone voice mail message in which the Employer's principal stated that Hepting was not owed any wages because he was working as a "volunteer" at the material time), the delegate proceeded to issue the Determination with the available information. Hepting provided evidence that he was not paid any wages after the end of March 2001. He claimed $3,750 on account of unpaid wages earned during April 2001 and a further $350 on account of unreimbursed business expenses.

Since there was no evidence to show that Hepting was a "volunteer" for the month of April (he was clearly a salaried employee prior to April), the delegate awarded Hepting the sum of $4,100 on account of unpaid wages and expenses plus concomitant vacation pay and section 88 interest. In the end result, a Determination was issued ordering the Employer to pay Hepting the sum of $4,532.89.

The Employer, as was its statutory right, appealed the Determination to the Tribunal. The Employer asserted that Hepting's services during April 2001 were rendered as a "volunteer" and that, by reason of some alleged (but unparticularized) previous salary "overpayment", Hepting was not entitled to any further compensation. The Employer asked the Tribunal to cancel the Determination.

The adjudicator, after considering the parties' respective written submissions, confirmed the Determination. The adjudicator noted that the Employer had not met its evidentiary burden of proving that there was a "volunteer" relationship in place for April 2001--once again, the Employer failed to produce any relevant payroll records. As for the Employer's argument that the risk of nonpayment of wages was an inherent risk of the industry, the adjudicator correctly pointed out that section 4 does not permit an employee to waive their statutory and contractual entitlement to be paid for all hours worked. Further, I might add, there is no evidence before the adjudicator of such a waiver by Hepting in any event.

With that background in place I now turn to the Employer's reconsideration application.

ANALYSIS

Applications for reconsideration do not proceed as a matter of statutory right. The Tribunal *may* reconsider a previous decision (see section 116 of the *Act*). A reconsideration application must first raise a sufficiently significant issue to warrant further inquiry. The Tribunal will only examine the merits of the application if this latter threshold has been satisfied.

In terms of the initial threshold, the applicant must show, for example, that there was a demonstrable breach of the rules of natural justice, or there is compelling new evidence that was not available at the time of the appeal hearing, or that the adjudicator made a fundamental error of law. The reconsideration provision of the *Act* is not to be used as a second opportunity to challenge findings of fact made by the adjudicator, unless such findings can be characterized as lacking any evidentiary foundation whatsoever.

The present application, on its face, does not in my view raise a significantly serious issue such as it meets the initial threshold. The Employer's application amounts to not much more than a number of (wholly uncorroborated) assertions about the credibility of Hepting. The Employer's assertion that it was somehow (this is never articulated) denied natural justice is, based on the record before me, totally untenable.

This Employer was given every fair and reasonable opportunity to advance its position (both during the delegate's investigation and again before the Tribunal) and to provide corroborating evidence but, inexplicably, chose not to avail itself of the several opportunities provided.

There is nothing in the material before me that would suggest that either the delegate or the adjudicator proceeded on an incorrect legal principle or otherwise misinterpreted the *Act*. The material before me shows that both the delegate and the adjudicator properly placed the burden on the Employer to prove a "volunteer" relationship and both correctly concluded that this burden has not been discharged.

ORDER

The application to reconsider the decision of the adjudicator in this matter is refused. Tribunal Decision BC EST # D418/02 dated September 16, 2002 is confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal