

**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 -

Jinfu Yang  
(" Yang ")

- of a Decision issued by -

The Employment Standards Tribunal  
(the "Tribunal")

**ADJUDICATOR:** C. L. Roberts

**FILE No:** 2000/647

**DATE OF DECISION:** December 22, 2000

## **DECISION**

This is a decision based on written submissions by Jinfu Yang, and by Dong Liang, President and CEO of Aurora Instruments ("Aurora").

### **OVERVIEW**

This is an application by Jinfu Yang ("Yang"), under Section 116(2) of the Employment Standards Act ("the Act"), for a reconsideration of Decision BC EST #D220/00 (the "Original Decision") which was issued by the Tribunal on June 9, 2000. Aurora also filed an application for a review of the decision (see BC EST #D541/00).

The Original Decision varied a Determination made by a delegate of the Director on February 8, 2000. The delegate concluded that Yang was not a "manager" as that was defined in section 1 of the Employment Standards Regulations, and that Yang was not entitled to compensation for length of service from Aurora. Neither of these conclusions were appealed.

The delegate determined that Yang was entitled to be paid overtime pay and vacation pay, plus interest, in the total amount of \$15,394.06. The Tribunal varied this aspect of the Determination on appeal.

Although the adjudicator found that the delegate had not erred in concluding that Yang was entitled to overtime pay, he determined that the delegate had not applied the appropriate "regular wage" rate in calculating Yang's overtime entitlement, thus overstating the amount owed. The Determination was remitted back to the delegate for recalculation.

### **ISSUE TO BE DECIDED**

Whether the Tribunal erred in law in neglecting to consider evidence Yang submitted at the hearing on May 23, 2000. Yang contends that the decision is wrong and not based on the facts supported by objective evidence, and that the Tribunal failed to comply with the principles of natural justice.

### **FACTS**

The pertinent facts are set out in some length in the Tribunal's decision (BCEST D#220/00), and will be summarized only briefly for the purposes of this decision.

Yang worked for Aurora from December 15, 1996 to July 30, 1998, following which he filed a complaint with the Employment Standards Branch, contending that he was owed compensation for overtime hours. Following an investigation, the Director's delegate issued a Determination on February 8, 2000. The delegate concluded that Yang was not a manager, as noted above.

**BC EST #D540/00**  
**Reconsideration of BC EST #D220/00**

The delegate then considered Yang's claim for overtime wages. Aurora contended that Yang was paid all overtime due to him. Mr. Liang gave the delegate calculations he provided to his payroll department with instructions on how overtime was to be calculated. The delegate found these calculations wanting, concluding that the calculations were incorrect, and that Yang had no knowledge that Aurora intended to include the overtime in his salary. Yang's pay stubs did not indicate that any overtime wages were paid.

One of Yang's pay stubs was submitted to the delegate, who concluded that it did not reflect the calculations Mr. Liang indicated were given to his payroll department.

The delegate found that Aurora failed to comply with section 27(1) of the Act, which requires an employer to give each employee a written wage statement for each pay period setting out, among other things, the hours worked, the wage rate, the overtime hours worked, and the amount of the deductions.

After reviewing the records submitted by the parties, the delegate concluded that Yang was owed overtime wages. This was not disputed by Aurora. The amount of the overtime wages was disputed, as Aurora contended it had been included in Yang's salary. The delegate determined that the evidence did not support Aurora's position. The delegate preferred Aurora's evidence to that of Yang's on the issue of overtime, and calculated overtime wages owed in the amount noted above.

Aurora appealed the Determination, claiming that the delegate erred in awarding Yang overtime pay in the absence of reliable evidence of Yang having worked any overtime, wrongly rejected Aurora's position that Yang's monthly salary included an allowance for 10.5 overtime hours each week, and conducted a procedurally flawed investigation.

As the appellant, Aurora had the burden of establishing to the Tribunal's satisfaction that the Determination was in error. The appeal hearing was held on May 23, 2000, during which documentary evidence was presented to the Tribunal. The adjudicator also heard the oral evidence of both parties and witnesses, which was subject to cross-examination.

After reviewing the evidence and considering the arguments of the parties, the adjudicator concluded, on the issue of hours of work and regular wages, as follows:

The most credible explanation, in my view, is that nothing was specifically agreed as between the parties with respect to Yang's compensable working hours; the parties only agreed on a \$2,000 monthly salary.

The adjudicator concluded, as did the delegate, that Yang was entitled to overtime pay in addition to his monthly salary. However, the adjudicator found that the delegate had erred in applying the appropriate "regular wage" rate in calculating Yang's overtime entitlement.

I note here that Yang did not appeal the Determination. He had standing at the appeal hearing only because he was the complainant. He had no burden or obligation to defend the Determination. That burden rests with the Director, who was not present at the appeal hearing.

## **ARGUMENT**

Yang argues that the adjudicator failed to consider the evidence he submitted at the hearing. In his reasons for requesting a reconsideration, Yang states that "the key dispute between Aurora... is how many hours did the salary Aurora Instruments paid to me cover?" In support of his submission, Yang enclosed several documents relating to the number of hours he worked. He contends that his position was that the salary he was paid covered 40 hours per week, and that there was no agreement about overtime hours. He contends that he submitted two pieces of evidence at the hearing to support his position, the pay stubs and his Record of Employment ("ROE"), and that he gave evidence in respect of these documents at the hearing.

Yang argues that the Tribunal's conclusion that there was no clear agreement between him and Aurora on hours of work, and that the regular wage must be calculated based on the normal or average weekly hours of work is in error. Yang contends that "the Adjudicator neglected to consider the evidence I submitted and also presented at the hearing, which is very important and significant to support my position". Yang then refers to evidence he submitted during the investigation and on appeal, including pay stubs, the ROE and a publication of Human Resources Department Canada. He alleges that the adjudicator neglected this evidence, and failed to mention it in his decision.

Yang also argues that he did understand that his salary was based on a 40 hour week, 8 hour day schedule, despite a finding by the adjudicator that there was no agreement regarding the compensable working hours, and that, the decision was not based on the evidence.

## **ANALYSIS**

The Tribunal has established a two stage analysis for an exercise of the reconsideration power (*see Milan Holdings Ltd. (BCEST #D313/98)*). At the first stage, the panel decides whether the matters raised in the application in fact warrant reconsideration.

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.

*(Milan Holdings, p. 7)*

The Tribunal has held that a reconsideration will only be granted in circumstances demonstrate that there has been a breach of the rules of natural justice, where there is compelling new evidence that was not available at the new hearing, or where the adjudicator made a fundamental error of law. (*Bicchieri Enterprises Ltd. (BCEST #D335/96)*)

The scope of review on reconsideration is a narrow one (*see Kiss BCEST#D122/96*):

1. failure by the adjudicator to comply with the principles of natural justice,

**BC EST #D540/00**  
**Reconsideration of BC EST #D220/00**

2. mistake in stating the facts,
3. failure to be consistent with other decisions which are not distinguishable on the facts,
4. significant and serious new evidence that would have led the adjudicator to a different decision,
5. misunderstanding or a failure to deal with a significant issue in appeal, and
6. a clerical error in the decision.

In my view, this is not an appropriate case for exercising the reconsideration power.

Yang alleges a breach of the rules of natural justice, contending, as I understand it, that the adjudicator failed to consider, or give sufficient weight, to evidence he put before him. On the face of the record, I cannot find this argument tenable. Natural justice requires that parties have the opportunity to:

1. know the case against them
2. have the opportunity to dispute, correct, or contradict anything that is prejudicial to their positions, and
3. present arguments and evidence supporting their own case.

The fact is that the decision was in respect of Aurora's appeal of the Determination. Thus, the burden of establishing that the Determination was incorrect rested was Aurora. As Yang did not appeal the Determination, the adjudicator was entitled to accept the findings of the delegate that were not appealed as conclusive, as it appears that he did.

There is no evidence the Tribunal failed to gave the parties a full and fair hearing. The adjudicator allowed the parties to present their evidence as if the Determination had not existed. The parties knew the case against them, had full opportunity to dispute or challenge evidence that was prejudicial to their positions, and to present full argument. That evidence was subject to cross-examination. There is no evidence that the adjudicator failed to comply with rules of natural justice.

The basis for Yang's appeal is that the adjudicator failed to give appropriate weight to certain evidence, and his arguments.

A reconsideration application is not an opportunity to have the Tribunal "re-weigh" the evidence.(see Milan) The record shows that the adjudicator weighed the evidence before him, some of which was conflicting. The fact that the adjudicator did not make specific reference to all evidence put to him does not mean that he did not consider it. It may be that the evidence was not relevant to the issue on appeal, or that the adjudicator placed no weight on that evidence, as he is entitled to do. The adjudicator preferred the evidence of one party over another and arrived at conclusions that were based on that evidence. Absent any unreasonableness in that conclusion, it is not appropriate to exercise the reconsideration power.

**ORDER**

The determination is confirmed.

***C.L. Roberts***  

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**C. L. Roberts**  
**Adjudicator**  
**Employment Standards Tribunal**