Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Kamloops Golf and Country Club Limited
(the "Appellant")

- 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: E. Casey McCabe

FILE No.: 2001/520

DATE OF DECISION: October 17, 2001

DECISION

OVERVIEW

This is an application by Kamloops Golf & Country Club Ltd. ("KGCC", or the "employer") under Section 116(2) of the *Employment Standards Act* (the "*Act*") for a reconsideration of BC EST Decision # D278/01 dated May 29,2001. The Employment Standards Tribunal received the application on July 16, 2001. The reconsideration is being dealt with through written submissions.

ISSUE(S) TO BE DECIDED

1. Does the Director of Employment Standards have the jurisdiction under the Act to enforce a contract of employment that provides for wages over and above the minimum prescribed by the Act?

2. Should the Tribunal have considered the evidence related to alleged discrepancies in the time records created by Mr. Kupchanko?

FACTS

The facts have been set out in sufficient detail in the original appeal decision and I do not intend to repeat them in this decision. KGCC has applied under section 116 of the *Act* seeking reconsideration of part of the appeal decision. That decision upheld part of the decision of the Delegate dealing with this matter. Specifically, Adjudicator Stephenson held that the Delegate did not err in determining that the Director of Employment Standards has the jurisdiction to enforce contracts of employment in which the terms exceed that of the minimum standards set out in the *Act.* As well, the Adjudicator determined that there was evidence to support the finding of the Delegate that the contract of employment between the complainant and KGCC called for a salary based on a forty-hour workweek. On the basis of this finding the Delegate had determined that the hours worked by the complainant over and above the forty-hour week had not been compensated by the employer. As the complainant was a manager these hours were to be paid at "straight time" rather than overtime, given that the complainant was exempted from the overtime provisions of the *Act.*

ANALYSIS

Section 116 of the *Act* reads:

> Reconsideration of orders and decisions
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> 116.(1) On application under subsection (2) or on its own motion, the tribunal may:
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> (a) reconsider any order or decision of the tribunal, and
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> (b) cancel or vary the order or decision or refer the matter back to the original panel.
>
> (2) The director or a person named in a decision or order of the tribunal may make an application under this section.
>
> (3) An application may be made only once with respect to the same order or decision.

The power to reconsider orders and decisions under Section 116 is a discretionary power that is exercised sparingly. The Tribunal has accepted certain limited grounds for reconsideration of decisions. Those grounds include a failure by an adjudicator to comply with principles of natural justice; where a mistake of fact has been made; where a decision is inconsistent with other decisions not distinguishable on the facts; where significant and serious new evidence has become available that had such evidence been presented to the adjudicator it would have lead the adjudicator to a different conclusion; serious mistake in applying the law; misunderstandings or failure to deal with a significant issue; and a clerical error in the decision.

The discretionary power to reconsider is exercised with caution. One reason for exercising such caution is that the purpose of the *Act* is to resolve disputes fairly and efficiently (see section (2)(d)). Allowing more than one hearing in a matter turns the appeal hearing of a determination into a type of discovery to set the basis for a reconsideration application. Furthermore, the Tribunal's authority is limited to confirming, varying or canceling a determination, or referring a matter back to the Director of Employment Standards under Section 115. The above reasons imply that a degree of finality is desirable. (See Re: *Kiss* BC EST # D122/96; Re: *Pacific Ice Company* BC EST # D241/96; Re: *Restaurontics Services Ltd.* BC EST # D274/96; and Re: *Khalsa Diwon Society* BC EST # D199/96).

The purpose of the policy is to facilitate the quick, efficient and inexpensive adjudication of complaints. It has been stated that the reconsideration power should be used sparingly and only in exceptional cases. (See *World Project Management Inc.* BC EST # D134/97; Re: *Allard* BC EST # D265/97).

In this case, KGCC in its request for reconsideration relies on submissions filed with the Tribunal for the original appeal. Based on the above reasoning, I do not intend to review each and every argument made by KGCC on the original appeal. The issues raised in this reconsideration deal only with the alleged deficiencies of the original appeal. Specifically, I do not intend to address the question of whether the contract of employment between KGCC and the complaint was properly interpreted by the Delegate. The only question on this matter is whether the Delegate had the jurisdiction to interpret the contract of employment.

The first ground of the appeal raises an issue of jurisdiction. There can be no doubt that a finding of jurisdiction where none exists would be a serious mistake in applying the law. In this case the Adjudicator relied on *Re Dusty Investments c.o.b. Honda North*, BCEST # D043/99 (Reconsideration of BCEST #D101/98) to find that the Delegate had the jurisdiction to enforce the contract of employment. Counsel for KGCC has not attempted to distinguish this case in any way. I have read the *Honda North* decision and agree that the argument advanced by the appellant in this case is identical to the argument rejected in *Honda North*. While it may be true that the Tribunal is not bound by previous decisions, it is generally preferable for Adjudicators to follow earlier decisions that are on point. The appellant has not shown that the Adjudicator has made any error of law in concluding that the Delegate had the jurisdiction to enforce the contract of employment. For these reasons the first ground of the reconsideration application must be dismissed.

The second ground of appeal deals with an allegation by counsel for KGCC that the Adjudicator refused to consider evidence that the records of the complainant that were accepted by the Delegate in determining hours worked had serious discrepancies such that the interpretation put on these records by the Delegate was wrong. A failure to consider relevant evidence can be considered a denial of a fair hearing. What is not clear from all the material before me is what exactly is the evidence that the Adjudicator refused to hear.

The evidence before the Delegate dealing with the employer's interpretation of the complainant's record of hours worked was limited to submissions sent in by the employer prior to KGCC taking the position that the Delegate did not have jurisdiction. After taking this position, KGCC did not participate in any further discussions with the Delegate. The contents of the submissions sent in by KGCC to the Delegate would appear to have been considered, but were not found to be sufficient to dissuade the Delegate from accepting the complainant's records in the absence of any other records.

It is uncontested that the employer stopped participating in the Delegate's investigation after the employer concluded that the Delegate did not have jurisdiction in this matter. There is a long-standing policy of the Tribunal not to allow parties to adduce evidence on appeal that should have properly been before the Delegate. The Adjudicator in the original appeal set out the reasoning behind this policy. (see *Re Tri-West Tractors Ltd.*, BCEST #D268/96). While I have no doubt that the employer honestly believed that the Delegate did not have the jurisdiction to make the determination, the fact is the Delegate did have this jurisdiction.

Where a party has notice of a proceeding and refuses to participate on the mistaken belief that there is no jurisdiction to proceed, it is not a denial of a fair hearing for the proceeding to continue and for a determination to be made solely on the evidence adduced in the proceeding.

The Tribunal does have the authority to allow the introduction of evidence on appeal, even where the evidence should have been before the Delegate. At a bare minimum in order to be successful on a reconsideration application, the party wishing to introduce such evidence must say what it is and how such evidence may change the original decision. (*Re Dusty Investments c.o.b. Honda North*, BCEST #D171/99 (Reconsideration of BCEST #D101/98)). There does not appear to be any evidence on file apart from the submissions received by the Delegate. The employer has not brought forward any new evidence to support its position that the determination by the Delegate concerning hours worked by the complainant was in error. Given this there is obviously no evidence concerning how such evidence would change the original reasons. For these reasons, this part of the reconsideration application must also fail.

For the above reasons the reconsideration application is dismissed.

ORDER

The Determination dated May 29, 2001 is confirmed.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal