

An Application for Reconsideration

- by -

Kenneth Waters
("Waters")

- 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.: 2001/667

DATE OF DECISION: December 20, 2001

DECISION

OVERVIEW

This is an application filed by Kenneth Waters (“Waters”) pursuant to section 116 of the *Employment Standards Act* (the “*Act*”) for reconsideration of an adjudicator’s decision issued on November 13th, 1997 (B.C.E.S.T. Decision No. D511/97).

As will be seen, this is an unusual application.

PREVIOUS PROCEEDINGS

The Determination

On July 16th, 1997 a delegate of the Director of Employment Standards (the “delegate”) issued a Determination (the “Determination”) against Bruce Watt (“Watt”) and Pacific Waters Ventures Ltd. (“Pacific Waters”) ordering those two persons to pay the sum of \$521.25 to Tim Walsh (“Walsh”) on account of unpaid wages.

By way of the Determination, Watt and Pacific Waters were declared to be “associated” under section 95 of the Act and, accordingly, both persons were held “jointly and separately liable” for Walsh’s unpaid wages. The delegate determined that Walsh had not been properly paid in accordance with provisions of the now-repealed *Skills Development and Fair Wage Act* and accompanying regulation. Walsh was paid for 37.5 hours of work at an hourly rate of \$10 per hour rather than the mandated \$23.90 hourly rate (including benefits) for labourers. Thus, the Determination was issued for the shortfall due to Walsh.

It should be noted that although Waters is the president of Pacific Waters, he is not personally liable under the Determination. I understand that a separate determination was issued quite some time ago against Waters personally pursuant to section 96 of the *Act* (director/officer liability for employees’ unpaid wages), however, the matter of Waters’ personal liability for Walsh’s unpaid wages does not arise in these proceedings. I also understand that the section 96 determination issued against Waters in his personal capacity was never appealed.

The Appeal

Pacific Waters appealed the Determination and following an oral hearing held on October 8th, 1997, the adjudicator issued written reasons for decision dismissing the appeal and confirming the Determination (B.C.E.S.T. Decision No. D511/97 issued November 13th, 1997). This latter decision is the subject of the present reconsideration application.

Pacific Waters’ appeal raised three questions: first, whether the *Skills Development and Fair Wage Act* wage rates applied if the employer was unaware that the job site in question was subject to that legislation; second, whether Watt and Pacific Waters ought to have been declared

to be “associated” pursuant to section 95 of the *Act*; and third, whether Walsh was an “employee” for purposes of the *Skills Development and Fair Wage Act*. The adjudicator held that Pacific Waters’ ought to have known the project in question was governed by the *Skills Development and Fair Wage Act*, that the section 95 declaration was appropriate and that Walsh was employed at the subject site during the period in question.

As previously noted, Kenneth Waters is the president of Pacific Waters. He appeared and testified before the adjudicator on behalf of Pacific Waters and, in addition, Pacific Waters was also represented by legal counsel. The adjudicator’s decision was mailed to, *inter alia*, Pacific Waters and to its legal counsel on November 13th, 1997. The adjudicator’s original decision contained a few minor typographical errors and thus a corrected version of his reasons were also forwarded to Pacific Waters and to its legal counsel, again by mail, on December 4th, 1997.

The Application for Judicial Review

On July 25th, 2001 (i.e., about 3 years and 8 months after the adjudicator’s decision was issued), a petition was filed in the Supreme Court of British Columbia (Victoria Registry No. 01-3326) by legal counsel on behalf of Kenneth Waters (the same counsel who represented Pacific Waters before the Tribunal). As noted, the petitioner is Kenneth Waters; the sole respondent is the Director of Employment Standards. The Tribunal is not specifically named as a respondent.

The petitioner seeks an order declaring various provisions of the *Skills Development and Fair Wage Act* and section 95 of the *Act* unconstitutional by reason of section 7 of the Canadian Charter of Rights and Freedoms. Although the petitioner refers to another determination also issued against Watt and Pacific Waters as well as a Tribunal decision with respect to that determination (B.C.E.S.T. Decision No. 510/97), the particular Determination at issue in these proceedings is not mentioned at all.

I should note that a separate application has been filed with respect to B.C.E.S.T. Decision No. 510/97; my reasons for decision regarding that application are being issued concurrently with these reasons.

It is my understanding that Waters’ petition for judicial review has not yet been heard.

THE APPLICATION FOR RECONSIDERATION

In a letter to the Tribunal dated August 27th, and filed August 28th, 2001 (i.e., about 3 years and 9 months after the adjudicator’s decision was issued), counsel for Kenneth Waters asked for a “review” of the adjudicator’s decision. Counsel’s letter reads as follows:

Re: Kenneth Waters -and- Director of Employment Standards
Employment Standards Tribunal Decision of John M. Orr of Nov. 13,
1997

This will constitute my request for a Review of the Decision of John Orr of November 13, 1997 pursuant to Section 116 of the *Act*.

I would appreciate information as to what process you consider appropriate to amply [sic] for review of this decision that I might provide further details in compliance with your directions in that regard.

By letter dated September 4th, and filed September 11th, 2001, counsel for Waters once again wrote the Tribunal stating that “We wish to appeal the Decision of John M. Orr of November 13, 1997”. Counsel’s letter continues: “Our grounds for requesting this review are set out in the Petition, a copy of which is attached for your information”.

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*). I see no principled basis for allowing this application to go forward, particularly when, in my view, this application is wholly without merit.

First, it is not clear to me on what basis Mr. Kenneth Waters has any status to seek reconsideration. He is not subject to any “order to pay” under the Determination; he is not an “associated” party under section 95. He was not an appellant before the Tribunal. Second, on the assumption that Kenneth Waters is not the “true” applicant, but rather, is applying on behalf of Pacific Waters, the application must nevertheless be dismissed.

This application is not timely (see *Unisource Canada Inc.*, B.C.E.S.T. Decision No. D122/98 and *MacMillan Bloedel*, B.C.E.S.T. Decision No. D279/00). I think one can fairly describe a delay of some 3 3/4 years as inordinate. Further, there is no legitimate explanation for the delay in bringing this application forward. The applicant has been represented by legal counsel throughout these proceedings; the issues before the adjudicator were not particularly factually or legally complicated. The amount of money involved is comparatively small.

Mr. Waters avers in an affidavit filed with his petition--and this is wholly unsubstantiated--that he has “been suffering depression since this incident” (I presume he is referring to the matters addressed in the other determination) but that does not strike me as an adequate explanation when all that Mr. Waters needed to do was to instruct his counsel (as he now apparently has) to file an application for reconsideration.

With respect to the merits of the application, I note that the grounds supporting the application for judicial review (which have been adopted for purposes of this application), namely, a section 7 Charter attack, were never advanced before the delegate or before this Tribunal. I might add, at least on a cursory examination, that these grounds strike me as having extremely limited prospects for success.

ORDER

The application to reconsider B.C.E.S.T. Decision No. 511/97 is refused.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal