

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.: 2001/725

DATE OF DECISION: December 20, 2001

DECISION

OVERVIEW

This is an application filed by Kenneth Waters (“Waters”), presumably pursuant to section 116 of the *Employment Standards Act* (the “Act”)—as will be seen, that is not entirely clear—for reconsideration of an adjudicator’s decision issued on November 13th, 1997 (B.C.E.S.T. Decision No. D510/97).

PREVIOUS PROCEEDINGS

The Determination

On April 7th, 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 a total sum of \$20,816.80 to 30 former employees.

The delegate determined that Watt failed to pay his employees in accordance with provisions of the now-repealed *Skills Development and Fair Wage Act* and accompanying regulation. The employees were paid for their work at hourly rates ranging from \$8 to \$12.50 rather than the mandated \$23.90 hourly rate (including benefits) for labourers. Thus, the Determination was issued representing the shortfall due to the various employees (the employees’ individual awards range from about \$550 to \$750). The names of the employees, and the amount awarded to each, are set out in a Calculation Schedule appended to the Determination.

Further, 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 “one person for the purposes of the Act” and, “jointly and separately [severally] liable” for the employees’ unpaid wages.

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 on January 13th, 1998 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 the employees’ 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

A joint notice of appeal was filed by legal counsel for Watt and Pacific Waters, however, Watt did not appear at the appeal hearing (held on November 8th, 1997) and, at that hearing, counsel advised the adjudicator that he appeared only on behalf of Pacific Waters. A number of the

employees also appeared at the appeal hearing as did counsel for the Director and the Director's delegate.

Following the October 8th appeal hearing, the adjudicator issued written reasons for decision (B.C.E.S.T. Decision No. D510/97 issued November 13th, 1997) in which he confirmed some of the unpaid wage awards and referred certain other employees' claims back to the Director for purposes of calculating their proper entitlement. This latter decision is the subject of the present reconsideration application.

There were three main issues in the appeal: first, whether the *Skills Development and Fair Wage Act* 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 the employees' various wage claims were correctly calculated.

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 the employees were all employed at the subject site during the period in question. With respect to the employees' wage claims, the adjudicator observed (at page 6 of his reasons):

In the Determination the Director's delegate estimated the hours worked by the employees and where the number of hours is unknown I would confirm the findings of the Director's delegate. However, a number of employees have submitted actual hours to the Director and I will be referring the matter back to the Director to recalculate the amounts owing to the employees based on the actual hours submitted. These hours were not disputed by [Pacific Waters] at the hearing.

The Director's delegate recalculated seven employees' unpaid wage claims, as directed by the adjudicator, and prepared a summary report dated December 11th, 1997 in the form of a letter (with appended Calculation Schedule) to Watt and Pacific Waters. As a result of the recalculations, the total amount of unpaid wages jointly and severally payable by Watt and Pacific Waters increased to \$48,606.78. This increased unpaid wage liability was attributable solely to an upward adjustment in the amounts payable to the seven employees (plus section 88 interest) who had submitted time records to the delegate; the other 23 employees' claims remained unchanged. The seven employees' unpaid wage awards ranged from \$1,845.60 to \$6,817.25 plus interest; six of the seven claims exceeded \$4,000.

The delegate's December 11th, 1997 recalculation report specifically stated that the original April 7th, 1997 Determination was being varied to reflect the recalculations set out in the report. I might note that in varying the Determination (pursuant to section 86 of the *Act*) the delegate was simply doing the very thing that the adjudicator had ordered him to do.

So far as I am able to determine, based on the material before me, neither Watt nor Pacific Waters took any steps to challenge the delegate's recalculations before the Tribunal prior to the filing of this section 116 application on October 16th, 2001 (*i.e.*, nearly 4 years after the issuance of the delegate's recalculation report).

However, on July 25th, 2001, Kenneth Waters filed an application for judicial review of the Determination, as varied, and the adjudicator's decision. I now turn to that application.

The Application for Judicial Review

On July 25th, 2001, 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*. The petitioner also apparently seeks an order quashing both the Determination, as varied, and the Tribunal's appeal decision with respect to the initial Determination. It is my understanding that the petition has not yet been heard.

THE APPLICATION FOR RECONSIDERATION

In a one-sentence letter to the Tribunal dated October 16th, and filed October 17th, 2001 (*i.e.*, nearly 4 years after the adjudicator's decision was issued), counsel for Kenneth Waters (the same counsel who filed the original appeal and appeared at the appeal hearing on behalf of Pacific Waters) purported to "appeal" the adjudicator's decision. Counsel's letter simply states:

This will confirm it is our intention to appeal both decisions numbered D-511/97 and D-510/97 on the same grounds contained in our Petition of July 25, 2001.

I should note, at this juncture, that these reasons for decision concern only the application to reconsider B.C.E.S.T. Decision No. D510/97. The same adjudicator issued the reasons for decision recorded as B.C.E.S.T. Decision No. 511/97 (the two appeals, which included several of the same parties, were heard on the same day). The adjudicator, in B.C.E.S.T. Decision No. 511/97, confirmed a separate \$521.25 determination issued against Watt and Pacific Waters in favour of another employee who also worked at the subject job-site. I am issuing, concurrent with these reasons, my decision with respect to the reconsideration request relating to B.C.E.S.T. Decision No. D511/97.

ANALYSIS

Although the instant application is framed as an “appeal” of the adjudicator’s decision (the Act does not allow for such appeals), I am prepared to deal with the application as an application for reconsideration under section 116.

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 nonetheless 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 nearly 4 years from the date of the adjudicator’s decision as inordinate. The delegate’s recalculation report was issued within a month of the adjudicator’s decision and yet no action was taken to challenge those recalculations until, at the very earliest, the misconceived judicial review application was filed on July 25th of this year.

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. As noted by the adjudicator, the additional hours claimed by the seven employees was not contested and their wage rate was fixed by regulation. Thus, the employees’ unpaid wage entitlements would not appear to be open to any credible challenge, especially at this late date.

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 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. 510/97 is refused.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal