

An Application for Reconsideration

- by -

Gregg Buckley

- 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: Carol L. Roberts

FILE No.: 2001/761

DATE OF DECISION: January 14, 2002

DECISION

This is a decision based on written submissions by Gregg Buckley, and Perry Shea on behalf of Newf's Furniture.

OVERVIEW

This is an application by Gregg Buckley, pursuant to Section 116(2) of the Employment Standards Act ("the Act"), for a reconsideration of Decision BC EST #D554/01 (the "Original Decision"), issued by the Tribunal on October 22, 2001.

The Original Decision confirmed a Determination made by a delegate of the Director on June 20, 2001, which concluded that Mr. Buckley had been paid in full for all commissions to which he was entitled.

ISSUE TO BE DECIDED

Whether the Adjudicator erred in failing to apply appropriate legal principles on appeal.

FACTS

Mr. Buckley was employed by 601087 B.C. Ltd. operating as Newf's furniture ("Newf's") as a commission furniture salesman from November 1, 2000 to the end of February 2001. Mr. Buckley and Newf's agreed that he was to be paid \$1500.00 per month, or 5% of the sales commissions, whichever was greater. At the end of his employment, Mr. Buckley contended that he was owed commissions.

The delegate investigated Mr. Buckley's complaint, and concluded that Mr. Buckley had been paid all commissions. The delegate found that commissions were paid in each pay period as the sales contracts were "written", not the date the product was delivered, as was common in the industry.

In his appeal of the delegate's decision, Mr. Buckley argued that commissions were not in fact paid until furniture was delivered, and that there were a number of deliveries that occurred after his employment was terminated.

The adjudicator concluded that:

although Mr. Buckley's evidence raises in my mind some serious concerns about the correctness of [the delegate's] finding I am not sure it is sufficient to establish on a balance of probabilities that the delegate's finding was wrong. However, I find that I do not have to make a finding on this point because I conclude that the manner in which the employer calculated the commissions included all sales whether written or delivered.

The adjudicator further found:

Because the calculations by the employer included all written contracts, whether or not the product was ever delivered, paid for, refused or returned, the salesman received the benefit of being credited for the commission. Thus in the final pay period in which Buckley worked he received credit for commissions on all sales "written" right up to his last day of work. Delivery essentially becomes irrelevant because the commission has already been credited to the account of the salesperson. Even if the product sold by Buckley was delivered after termination of the employment there could be no commission payable on those deliveries because the commission had already been credited to his account during his employment and taken into account on his final pay cheque.

The determination was confirmed.

ARGUMENT

Section 116 of the Act provides that

- (1) on application under subsection (2) or on its own motion, the tribunal may
 - (a) reconsider any order or decision of the tribunal, and
 - (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 an decision or order of the tribunal may make an application under this section
- ...

Mr. Buckley seeks a reconsideration of the Original Decision on the grounds that the Tribunal erred in finding that his commissions had been fully paid. Mr. Buckley argues that the decision is in error in that it allowed for his wages to be "offset". He contends that, where an employee paid on a commission basis earns commission in one pay period, and the commission is paid in a subsequent pay period, the employee must be paid at least minimum wage in each pay period. Mr. Buckley submits that the minimum wage is paid as a draw on commissions, and that it is a contravention of the Act to deduct it from commissions in a subsequent pay period.

Mr. Buckley states that it is not impossible for an employee to receive more income through wages than through commissions, and argues that the Act says that both wages as well as commissions are payable to an employee.

In his letter of appeal, Mr. Buckley conceded that the delegate's findings of the sums of sales written and generated commissions was correct. Those findings were that Mr. Buckley wrote sales that would have generated commissions of \$1179.44 for November 2000, \$772.34 in December 2000, \$1416.41 in January 2001, and \$619.06 in February, 2001. All of those amounts are less than the \$1500.00 minimum paid to Mr. Buckley. Mr. Buckley argued before the

adjudicator that he would "bank" these commissions until the product was delivered, while receiving the minimum wage in full. He argued that, at the end of his employment, he was entitled to be paid for the commissions for the delivered product. Mr. Buckley argues that the adjudicator's conclusion that it was irrelevant whether commissions were paid on delivery or on writing, is in error.

ANALYSIS

The Tribunal has established a two stage analysis for an exercise of the reconsideration power (*Milan Holdings Ltd.* (BC EST #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 that 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 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,
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.

The adjudicator found that Mr. Buckley was to be paid at least minimum wage, so that, in those pay periods when he earned commissions totalling less than minimum wage, he was paid at least minimum wage. The adjudicator also found that Mr. Buckley received wages, according to a contract, of at least \$1500.00 per month, which was greater than minimum wage.

Finally, the adjudicator concluded that Mr. Buckley was paid commissions for all sales that had been written, regardless of whether the sale was ever concluded.

Mr. Buckley has not presented any evidence that this is in error. Indeed, Mr. Buckley's arguments in support of his reconsideration application appear to be different from, and conflicting with, those made to the delegate and the adjudicator. In any event, a reconsideration application is not an opportunity to have the Tribunal "re-weigh" the evidence.(see Milan)

Absent any demonstrated error, or unreasonableness in the adjudicator's decision, I find no basis to exercise the reconsideration power.

ORDER

The application for reconsideration is dismissed.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal