Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

James Hubert D'Hondt operating as D'Hondt Farms

- 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

TRIBUNAL MEMBERS: Frank A.V. Falzon, Panel Chair
Norma Edelman
David B. Stevenson

FILE No.: 2004A/164

DATE OF DECISION: February 1, 2005

DECISION

OVERVIEW

James Hubert D'Hondt applies to have this Tribunal reconsider the August 17, 2004 appeal decision of Member Roberts in this matter.

Section 116 of the *Employment Standards Act* (the *Act*) authorizes the Tribunal to reconsider any order or decision of the Tribunal. We adopt the principles governing the exercise of the reconsideration power as set out in *Milan Holdings Ltd.*, BC EST #313/98. For the reasons given in this decision, the application for reconsideration is dismissed.

BACKGROUND

James D'Hondt runs a chicken farm and hatchery. To operate the farm, he requires workers. Christopher Mervyn worked on the farm for 15 months, from April 5, 2002 to July 5, 2003. He earned $12 per hour.

The employment relationship ended on July 5, 2003. On that day, there was a falling out between Mr. D'Hondt and Mr. Mervyn.

Mr. Mervyn claimed he was fired, and is therefore entitled to severance pay under the *Act*. Mr. D'Hondt claimed Mr. Mervyn quit, and thus has no such entitlement under the *Act*. Mr. D'Hondt also claimed the right to withhold Mr. Mervyn's last paycheck and vacation pay because Mr. Mervyn had not repaid Mr. D'Hondt the sum of $2500, which Mr. D'Hondt asserted was an advance on wages.

Did Mr. Mervyn quit or was he fired? That was the key issue facing the Director's delegate, who conducted an oral hearing on this question on November 13, 2003, arising from Mr. Mervyn's claim of entitlement to statutory benefits under the *Act*.

Faced with two competing versions of what happened on July 5, 2003, the Delegate preferred Mr. Mervyn's version of events. The Delegate's March 19, 2004 reasons for Determination explain why:

> In this case Mervyn testified under oath of the argument between him and D'Hondt. I established as a fact Mervyn and D'Hondt were the only two individuals involved in the argument and during the drive back to the farm.
>
> D'Hondt had the opportunity to provide direct evidence and chose not to. He was directly involved and presumably had first-hand knowledge of the events that transpired. D'Hondt chose to be represented by St. Remy [his wife]. St. Remy's evidence was heard but consisted mostly of Hearsay, as the evidence did not proceed from her personal knowledge of the events that led to Mervyn's termination. St. Remy's testimony and cross-examination carries little weight due to the fact that she was not present during the argument that caused the end of Mervyn's employment. I cannot test the truthfulness, reliability and accuracy of the information stated given D'Hondt's absence from the hearing. [emphasis added]

On April 28, 2004, Mr. D'Hondt exercised his right of appeal to this Tribunal. Pursuant to s. 112(1) of the *Act*, the Appellant, to succeed on appeal, has the onus of proving an error of law, a breach of natural

justice, or that evidence is available that was not available at the time the determination was made: Act, s. 112(1).

Mr. D'Hondt's April 28, 2004 notice of appeal included the allegation that the Delegate should not have made the critical finding of fact against Mr. D'Hondt based on his non-appearance at the hearing. Mr. D'Hondt's June 8, 2004 submission to Member Roberts, elaborated as follows:

> In response to the officer, Rob Bianchini's decision stating that D'Hondt had a chance to present his evidence and by not showing up Rob Bianchini ruled against D'Hondt farms. My wife Allana … also representing our farm and who initially interviewed, hired and wrote all cheques, T'4's etc. for Chris Mervyn specifically asked at the first meeting prior to the hearing if she could attend as I was very busy with harvesting Cauliflower in October and was told "yes" that would be fine. She attended on my behalf and was subjected to threats, both verbal, facial gestures and physical, in the form of clenched fists and fingered "in the presence of the officer". The officer dismissed Chris Mervyn and had Allana wait behind for Chris to leave before walking safely to her vehicle.

While Mr. D'Hondt wrote that "my wife … specifically asked at the first meeting prior to the hearing if she could attend as I was very busy with harvesting Cauliflower in October and was told 'yes' that would be fine", Mr. D'Hondt provided no specifics regarding the date or purpose of that meeting, who was in attendance, whether Mr. D'Hondt was at the meeting himself, who the source of the alleged statement was (such that reliance on the person would be reasonable), and exactly what was asked and answered, including whether any caveat was given regarding the risks involved in non-attendance.[1]

On August 17, 2004, Member Roberts dismissed the appeal. The Member's reasons do not specifically address the allegation that a breach of natural justice arose from the allegation that the Branch said that "it would be fine" for Mr. D'Hondt's wife to attend. The reasons do however uphold the legal correctness of the Delegate's treatment of the weight to be attached to her hearsay evidence in the circumstances:

> Hearsay evidence is, in a simplified form, the repetition by a witness of something someone else said in order to establish the matter asserted in the statement was true. Hearsay is, generally speaking, not admissible in a judicial proceeding because of its unreliability and the inability to question the maker of the statement. While hearsay evidence is generally admissible in administrative proceedings, it will be given less weight than if it had been made by the original speaker if it goes to the very issue in the hearing. In this case, that evidence was central to the issue of whether Mr. Mervyn was fired or not. I am unable to find that the delegate erred in placing less weight on the evidence of Ms. St. Remy in this respect. I find no error of law in this respect.

[1] One might speculate the "first meeting" was a "mediation session" conducted by an officer of the Branch, pursuant to Step 4 of the Branch's *Complaint Resolution and the B.C. Employment Standards Act Fact Sheet* (see also *Employment Standards Act Hearings Fact Sheet*). However, the only document in the Tribunal's possession regarding the process that preceded the Delegate's hearing was the Notice of Hearing sent to the parties in October 2004. The Director's submissions before this Tribunal do not refer to any prior meeting, and it is not clear what if any knowledge the Delegate would have had of the previous meeting, particularly if its purpose were mediation.

REQUEST FOR RECONSIDERATION

On October 26, 2004, the Tribunal received the employer's reconsideration request, tendered through legal counsel. Natural justice is the sole foundation of counsel's application.

Unlike other natural justice cases this Tribunal has decided[2], counsel has not provided direct evidence regarding the matters addressed in the application. Rather, counsel has merely written a letter, which states:

> *We have been advised that*, prior to the Hearing, Ms. St. Remy, the wife of Mr. D'Hondt ("Ms. St. Remy") attended at a conference with the former employee, Mr. Mervyn ("Mr. Mervyn"), and a representative from the Employment Standards Office (the "Representative"). At that conference, Ms. St. Remy had a fairly lengthy discussion with the Representative, advising the Representative of D'Hondt's position with respect to the alleged termination of employment of Mr. Mervyn and his claim for past wage loss. During this discussion, Ms. St. Remy made it clear that much of the information she was relying on and was presenting to the Representative came from Mr. D'Hondt and was not based on her personal knowledge. [emphasis added]
>
> When the matter was not resolved and it was apparent that it would be proceeding to the Hearing, Ms. St. Remy advised the Representative that the Hearing was scheduled at a time when Mr. D'Hondt would be harvesting cauliflower. As such, he would be very busy at the farm and would have difficulty getting away to attend the Hearing. Ms. St. Remy asked if she could give evidence in place of Mr. D'Hondt. She was advised by the Representative that she could. Ms. St. Remy was not advised that her evidence at the hearing may not be given much weight if it was based on hearsay information provided to her by Mr. D'Hondt, or that an adverse inference could be raised if Mr. D'Hondt did not attend. Ms. St. Remy was further not advised that Mr. D'Hondt could apply to have the Hearing adjourned to a date when he could attend.
>
> It is significant that both Ms. Remy and Mr. D'Hondt are unsophisticated litigants who, until now, were not represented by counsel. As such, they were not aware of the rules of evidence, and reasonably relied on the assurances of the Representative that Mr. D'Hondt was not needed to testify at the hearing. In fact, that was not the case.
>
> At the Hearing itself, Ms. St. Remy told the Delegate that Mr. D'Hondt was unable to attend the Hearing as he was very busy at the farm. The Delegate did not question her regarding adjourning the matter. As such Ms. St. Remy gave evidence, much of which was hearsay evidence based on information as told to her by Mr. D'Hondt. She was not told that this evidence would not be given much weight. Had she been advised of this, she could have sought to have the matter adjourned or to have it stood down while she contacted Mr. D'Hondt to see if he could attend the hearing.

It is not apparent from counsel's letter how this information was obtained, and whether its source was Mr. D'Hondt (in which case, coming from counsel, it would be double hearsay) or Ms. St. Remy (in which case one wonders why we do not have a direct statement from Ms. St. Remy), or some other source(s) of which we have not been made aware.

[2] See for example *J.C. Creations Ltd.*, BCEST #RD317/03

On September 15, 2004, Mr. D'Hondt made a final submission:

> Labour relations was asked if Allana St. Remy my wife could represent me and the answer was yes. The evidence given by Ms. St. Remy was based on what I told her, but the delegate at the time of the determination should have told Ms. Remy that her evidence is hearsay and that it is not admissible in this determination.

Here we have another statement from Mr. D'Hondt about what an unnamed person told his wife, apparently out of his presence. Significantly, "labour relations" is here merely alleged to have answered "yes" to whether Ms. St. Remy could *represent* him, which is a very different question from giving him an assurance that she could convey his evidence in a credibility case with no adverse impact on him.

DECISION

The application for reconsideration is dismissed.

We are satisfied that, if supported by proper evidence, the allegation that a party was misled by Branch officials prior to a hearing would be capable of constituting a breach of natural justice. We are satisfied that the allegation raised on this application raises a serious issue, appropriately considered on reconsideration according to the principles in *Milan Holdings*, BCEST #D313/98, and particularly since this ground was not expressly addressed in the reasons of Member Roberts.

It would be highly artificial to limit the Director's duty of natural justice to the four corners of the hearing room. The Director is responsible for the fairness of the entire complaint process, including what takes place before any oral hearing. A breach of natural justice can clearly arise where the conduct, assurances or representations of one of the Director's officers before the hearing gives rise to conduct that causes unfairness in the hearing itself. The Director is thus well-advised to ensure that all Branch officials involved in the complaint process understand the basics of administrative law, that Branch officials do not, at the pre-hearing stage, make statements or representations that could mislead parties and thus undermine the hearing, and that the Delegate conducting the oral hearing is provided with a record of any procedural matters addressed before the hearing (separate from any mediation discussions) so that the Delegate can correct any problems or misunderstandings that may have possibly arisen before the hearing.

The question before us is whether a case been made out for a breach of natural justice in the pre-hearing stage of the complaint process on the facts here. We find that it has not. A finding that the Branch has breached natural justice through representations or assurances that were reasonably relied upon and misled a party is a serious matter. While sworn evidence is not necessarily required, clear and reliable first party evidence is required.

The onus of proof to demonstrate a breach of natural justice is on the Appellant. In *J.C. Creations Ltd.*, BCEST #RD317/03 the Tribunal was provided with a statutory declaration from the employer outlining the specifics of the breach of natural justice alleged. In contrast, the information before us here consists of second-hand information from Mr. D'Hondt and latterly from legal counsel in a letter.

As for counsel's letter, the source of each statement in counsel's letter is not stated; nor is the manner in which it was elicited. At no time in the appeal or reconsideration process has this Tribunal been given a statement from Ms. St. Remy who participated in the pre-hearing discussions as to exactly what the

Branch representative told her, the timing and circumstances in which that statements were made and what if any caveats might have been placed on such statements. Who the Branch person is who gave the assurances alleged is never mentioned; nor is there any basis on which we can judge whether any such statements amounted to "assurances", let alone whether reliance on any such statements was reasonable in the circumstances.

This difficulty is especially significant because Mr. D'Hondt's own letters (June 8, 2004 submission to Tribunal and September 15, 2004 submission on reconsideration) merely state that when the Branch was asked if his wife could "*attend*" or "*represent*" him, they said yes. Such a response is not the same thing as saying that Mr. D'Hondt was taking no risk or suffering no possible prejudice by not appearing personally or giving direct evidence in a case where the issue was quit/fire. In this respect, we must have regard to the common sense reality that one does not need to be a lawyer, a sophisticated litigant or a person schooled in the law governing hearsay to appreciate that if a case comes down to a third party having to choose your word against another's, you are taking a calculated risk by not showing up. If the evidence showed that a Branch official misled them about *that*, the matter would be serious indeed. But it is precisely because this is a serious charge, and because subtle changes in the facts can make a significant difference in the outcome of natural justice cases, that sufficient evidence and precision supporting an alleged breach of natural justice are important. This Tribunal has been given neither despite the several opportunities the Appellant has been given at first instance and now on reconsideration.

The Panel has considered whether, in the circumstances before us, we should exercise our power to issue an order requiring the parties to attend before us for a more thorough airing of this issue. We have concluded that we should not. Ours is not an inquisitorial process. The statutory appeal process places the obligation on the parties to advance their case before the Tribunal. This is so *a fortiori* on reconsideration, which is an exceptional remedy. If a party wishes to access the reconsideration process - and particularly if as here that party, through counsel, seeks to and has been given the opportunity to further elaborate upon a natural justice ground - it is that party's responsibility to provide direct and cogent evidence in support. This has not been done.

There having been no demonstrable breach of natural justice at the pre-hearing stage, we turn to whether there was a breach of natural justice at the hearing before the Delegate. On this point, counsel's reconsideration letter states as follows:

> At the Hearing itself, Ms. St. Remy told the Delegate that Mr. D'Hondt was unable to attend the Hearing as he was very busy at the farm. The Delegate did not question her regarding adjourning the matter. As such Ms. St. Remy gave evidence, much of which was hearsay evidence based on information as told to her by Mr. D'Hondt. She was not told that this evidence would not be given much weight. Had she been advised of this, she could have sought to have the matter adjourned or to have it stood down while she contacted Mr. D'Hondt to see if he could attend the hearing.

Even if we accept this statement, we find it insufficient to demonstrate a breach of natural justice. It shows that at some point in the proceeding the reason for Mr. D'Hondt's absence was addressed before the Delegate. There is no suggestion that Ms. St. Remy told the Delegate that her husband was absent because the Branch told them he did not need to be there, or even that they honestly believed his direct evidence was not necessary. Rather, this paragraph says she told the Delegate that he was "*unable* to attend the Hearing as he was *very busy* at the farm". [emphasis added] From this the Delegate might very reasonably and properly assumed that, for reasons of their own, Mr. D'Hondt and Ms. St. Remy made a conscious decision based on their priorities and circumstances.

We find ourselves unable to find that the Delegate committed any breach of natural justice during the hearing by failing to go further and proactively invite Ms. St. Remy to adjourn the hearing. We are unaware of any decision in the law governing natural justice that would impose on a hearing Chair in circumstances such as these – where Mr. D'Hondt's absence had already been addressed - a further legal duty to warn or invite a party to apply for an adjournment because a party/witness's absence was becoming problematic for her position.[3] Indeed, to do so could in some sets of circumstances itself give rise to charges that the Delegate was acting as an advocate for the party, and thereby reflect adversely on his or her impartiality.[4]

The reconsideration application is dismissed.

Frank A.V. Falzon **Member, Panel Chair** **Employment Standards Tribunal**	**Norma Edelman** **Tribunal Vice-Chair** **Employment Standards Tribunal**	**David B. Stevenson** **Member** **Employment Standards Tribunal**

[3] This is not a case such as this Tribunal recently decided in *Freney*, BCEST D#130/04, where neither party appeared for the hearing, and the Tribunal found that a Delegate had a natural justice duty to make a minimal inquiry before summarily dismissing a claim in circumstances where the employee had theretofore been diligent in pursuing his claim.

[4] In making this point, we do not wish to be taken as saying that Delegates are required to sit passively during hearings. To spend one day watching judges in Small Claims Court is to see that it is entirely permissible for hearing chairs to ask questions, obtain clarification and ensure that parties understand the process. However, the question as to how active to be is often a matter of judgment, inclination and style based on an assessment of the dynamics and subtleties of the hearing, and recognizing that decision-makers must be conscious of the distinction between inquiry, information and advocacy. As noted above, we are not satisfied that the limited circumstances as have been given to us point to an injustice that demanded intervention by the Delegate.