

An Application for Reconsideration

- by -

Dencan Restaurants Inc. dba Denny's
("Denny's")

- 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.: 2001/691

DATE OF DECISION: January 15, 2002

DECISION

This is a decision based on written submissions by Graham Rennie, Vice President, Human Resources, on behalf of Dencan Restaurants dba Denny's ("Denny's") and Carol F. Anderson.

OVERVIEW

This is an application by Denny's, under Section 116(2) of the Employment Standards Act ("the Act"), for a reconsideration of Decision BC EST # D508/01 (the "Original Decision") which was issued by the Tribunal on September 24, 2001.

On November 30, 2000, a delegate of the Director of Employment Standards issued a Determination concluding that, although Ms. Anderson had been terminated for just cause and was not entitled to compensation for length of service, she was owed some wages and vacation pay. Ms. Anderson appealed that Determination. The adjudicator allowed the appeal, finding that Ms. Anderson had not been terminated for just cause, and cancelled the Determination. The matter was sent back to the delegate for a calculation of the proper amounts owed to Ms. Anderson for compensation for length of service, and for early starts, missed meal breaks and post-shift cash-outs. (Decision BC EST D#172/01, or "the first decision").

On June 19, 2001, the delegate issued a determination concluding that Ms. Anderson was owed length of service compensation in the amount of \$437.02. The delegate also determined that an additional sum of \$1,357.93 was owed to Ms. Anderson for early starts, late cash outs and missed meal breaks. The delegate noted in his decision that Denny's did not accept the first decision with respect to Ms. Anderson's dismissal.

Although Ms. Anderson accepted the delegate's calculation for early starts, missed meal breaks, late cash outs and vacation pay, she disputed the calculation for length of service. She also sought payment of interest on the total amount owed. In its response to Ms. Anderson's appeal of the calculations, Denny's sought to have the adjudicator review his decision in respect of Ms. Anderson's termination. In its letter of July 11, 2001, Denny's wrote:

Prior to awarding severance we would ask that the Adjudicator carefully review the facts surrounding Ms. Anderson's dismissal and if necessary obtain further information re the events surrounding Ms. Anderson's dismissal from the parties prior to issuing a final decision.

Denny's did not file an appeal of the first decision, nor did it seek a reconsideration of that decision. Rather, it appears that it attempted to appeal it by way of a response to Ms. Anderson's appeal. In his second decision (Tribunal decision BC EST #D509/01, or "the second decision"), the adjudicator appeared to regard Denny's letter as a discrete appeal, as he set out the issue to be decided as whether the Tribunal should "make any adjustment in respect to the compensation for length of service awarded to Anderson in the Decision dated April 11, 2001."

After a review of the facts and arguments, the adjudicator concluded that he had already reviewed the material in the first decision, and found no reason to change that decision. He confirmed the delegate's calculations for compensation for length of service.

In light of Ms. Anderson's agreement that the delegate's calculations on the other matters was accurate, and, in light of the fact that there was no indication that interest had been calculated on those amounts, the adjudicator referred the matter back to the delegate for the calculation of additional interest.

Denny's now seeks a reconsideration of the second decision on the issue of whether Ms. Anderson was dismissed for cause.

GROUNDINGS FOR REVIEW

Denny's contends that the adjudicator erred in interpreting the facts with respect to Ms. Anderson's dismissal.

In essence, Denny's argues that Ms. Anderson's violation of a strict policy with respect to beverage sales warranted disciplinary action, and that her failure to give Denny's payment received went directly to the root of the employee-employer relationship, justifying termination without notice.

Ms. Anderson contends that there was no evidence she committed a criminal act, and that the adjudicator's determination was correct in finding that there was no progressive discipline applied.

ANALYSIS

The Tribunal has established a two stage analysis for an exercise of the reconsideration power (*Milan Holdings Ltd. (BCEST #D313/98)*). At the first stage, the Tribunal decides whether the matters raised in the application in fact warrant reconsideration. In deciding this question, the Tribunal should consider and weigh a number of factors such as whether the application is timely, whether it is an interlocutory matter, and whether its primary focus is to have the reconsideration panel effectively "re-weigh" evidence tendered before the adjudicator at first instance. However, the primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which 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 Tribunal has held that a reconsideration will only be granted in circumstances demonstrate that there has been a breach of the rules of natural justice, where there is compelling new evidence that was not available at the new hearing, or where the adjudicator made a fundamental error of law. (*Bicchieri Enterprises Ltd. (BCEST #D335/96)*)

The scope of review on reconsideration is a narrow one (see Kiss BC EST #D122/96), and include * failure by the adjudicator to comply with the principles of natural justice,

- mistake in stating the facts,
- failure to be consistent with other decisions which are not distinguishable on the facts,
- significant and serious new evidence that would have led the adjudicator to a different decision,
- misunderstanding or a failure to deal with a significant issue in appeal, and
- a clerical error in the decision.

Denny's seeks, in essence, to have a reconsideration of the first decision (172/01), in which the adjudicator concluded, after a review of the evidence, that Ms. Anderson was terminated without cause. Although Denny's did not file an appeal, the adjudicator nevertheless took its reply submissions as an appeal, and effectively reconsidered his own decision in the context of the second decision. Although that procedure is unusual, I find that Denny's has already had the opportunity to have the adjudicator reconsider his own decision on the issue of whether Ms. Anderson's employment was terminated for cause. In the first decision, the adjudicator found, on a balance of probabilities, that Ms. Anderson did not commit a deliberate act to deceive and defraud Denny's of funds. Given his conclusion that there was no evidence to support a serious, wilful and deliberate act on Ms. Anderson's part to justify immediate termination, the adjudicator then turned to the issue of whether Denny's applied progressive discipline. The adjudicator concluded that Denny's had not.

The adjudicator reviewed the evidence and submissions in the context of the second decision, and concluded that he had not erred in this aspect of his determination.

The reconsideration power is not, as noted above, an opportunity for a party to have an adjudicator "re-weigh" the evidence. The adjudicator carefully reviewed the evidence, and concluded that Denny's had not established just cause. I have reviewed that evidence, the decision of the adjudicator, and am unable to find that Denny's has established a basis for which the reconsideration power will be exercised, in this case, effectively for the second time. Denny's has not persuaded me that the adjudicator made a mistake in stating the facts, or that he misunderstood the issues on appeal.

ORDER

I Order, under Section 116(1) of the Act, that the application for reconsideration is denied.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal