

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 116 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

D. Rand Automotive Ltd..
("D. Rand")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

RECONSIDERATION: Geoffrey Crampton

DATE OF RECONSIDERATION: May 3, 2001

FILE NUMBER: 95/001

DECISION

OVERVIEW

This is a reconsideration under Section 116 of the *Employment Standards Act* of Decision #D001/96 which was issued by the Employment Standards Tribunal on January 5, 1996. That Decision confirmed Determination #CDET000032 which was issued by the Director of Employment Standards on November 9, 1995. The adjudicator concluded that D. Rand did not have just cause to terminate Rick Smith's employment and ordered Rand to pay compensation as calculated by the Director under Section 63 of the *Employment Standards Act*.

Rand has applied for a reconsideration of the Tribunal's decision on the ground that the Tribunal did not hold an oral hearing prior to making its decision of January 5, 1996.

ISSUE TO BE DECIDED

The issue to be decided in this reconsideration is: Did the Tribunal err by making a decision without an oral hearing?

FACTS

Decision #D001/96 sets out the facts underlying Determination #CDET000032 and Rand's appeal of that Determination. In summary, those facts are as follows:

- Smith commenced employment with Rand as a mechanic on June 17, 1994
- Smith stopped working for medical reasons on March 8, 1994
- Rand terminated Smith's employment without notice on August 8, 1994
- Rand issued a Record of Employment to Smith on September 9, 1994 indicating that the reason for issuing it was "A shortage of work"

In his appeal, Rand argued that Smith was not entitled to compensation under Section 63 of the *Act* because he had dismissed Smith for "just cause". Rand argued that Smith had stolen goods prior to commencing medical leave. The Director argued that Rand did not provide any proof to support his allegation that Smith stole his employer's property.

The adjudicator made a finding that Rand did not take disciplinary action within a reasonable time and condoned Smith's alleged misconduct. She also found that "...the

failure of Rand to indicate a dismissal for theft on the Record of Employment brings into question the credibility and validity of this reason.”

Decision #D001/96 concluded that Rand did not have just cause to terminate Smith’s employment and ordered Rand to pay compensation to Smith in the amount calculated by the Director.

ANALYSIS

Rand’s application for reconsideration was based on his request for an oral hearing and was stated in the following terms:

Dear Sir:

Since we started this process well over a year ago, I have been adamant about not paying anything to Rick Smith until we get a face to face meeting about our situation. Since the decision of earlier this year, I have had the feeling that nobody cares what I say or what my version of this incident is. I feel that if Rick Smith had to actually do something about this affair, instead of hiding behind the massive government system that protects him, he would get a peek into the real world. I have the feeling that I am being judged guilty and have to prove myself innocent instead what our constitution guarantees me, e.g. innocent until proven guilty. It is very frustrating to me that I have to fight big government and my accuser can sit at home and contribute nothing, especially since I have tried to settle this matter since the decision and have run into a brick wall. I no longer have my business, but have been trying to do the right thing morally. You owe me a face to face meeting with a man who stole from me and who I went to bat for, paying his bills for six months while he recuperated from a mental breakdown. Nobody has taken this into consideration, because it is easier to make the small businessman pay than the real culprits take the blame. I await your reply on the time this meeting and reconsideration could take place.

Section 116 of the *Act* describes the Tribunal’s reconsideration powers as follows:

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 a decision or order of the Tribunal may make an application under this section.
3. An application may be made only once with respect to the same order or decision.

This is the first application for reconsideration which the Tribunal has received. It is, therefore, an appropriate opportunity to set out and comment on the Tribunal's practices and procedures concerning oral hearings.

The Tribunal makes decisions about the rights and obligations of parties under the *Employment Standards Act*. In carrying out responsibilities, the Tribunal has a duty to act fairly. At the common law, the duty is described in terms of *natural justice* and *procedural fairness*. The Charter of Rights, which overrides other statutes, provides a third duty of *fundamental justice*. The Supreme Court of Canada has established that a tribunal such as this has two obligations:

- a) to act fairly, in good faith and without bias and in a judicial temper; and
- b) to provide the parties with an adequate opportunity to state their case

[*Singh v. Minister of Employment and Immigration*[1985] 1 S.C.R. 177, 17 D.L.R. (4th) 422]

The Tribunal does not have the luxury of replicating formal court processes in every case. Our obligation to provide a fair hearing has to be balanced against the other objectives of the Tribunal which were identified by Professor Mark Thompson at page 134 of his report "Rights and Responsibilities in a Changing Workplace: A Review of Employment standards in British Columbia."

The advice the Commission received from members of the community familiar with the appeals system, the staff of the Ministry and Attorney General was almost unanimous. An appeals system should be relatively informal, with the minimum possible reliance on lawyers. Cases should be decided quickly at the lowest possible cost to the parties and the Ministry. The process should not only be consistent with the principles of natural justice, but be seen to meet those standards.

The *Act* provides the Tribunal with considerable flexibility but does not dictate the process which the Tribunal must follow. Section 107 of the *Act* provides that:

"Subject to any rules made under section 109(1)(c), the tribunal may conduct an appeal or other proceeding in the manner it considers necessary and is not required to hold an oral hearing."

Section 107 is a clear statement of legislative intent that the Tribunal has the flexibility to determine its own processes, but does not relieve the Tribunal of its obligation of procedural fairness. One of the procedural questions for the Tribunal in a given case is whether to hold an oral hearing. Section 107 speaks directly to that issue when it says that the Tribunal "is not required to hold an oral hearing." Thus, the Tribunal is not

required to hold an oral hearing merely because an appellant requests one. The question, then, is when must the Tribunal hold an oral hearing to ensure a fair hearing?

The short answer to that question is that the Tribunal is likely required to hold an oral hearing in either of two circumstances:

1. The case involves a serious questions of credibility on one or more key issues;
or
2. An oral hearing is the only adequate way of ensuring that each party can state its case fairly.

In this case, the adjudicator provided the following analysis to support her decision that Rand owed compensation to Smith:

The burden of proof for establishing that Smith was dismissed for just cause rests with D. Rand. Rand has not provided sufficient evidence to substantiate its contention that Smith stole from the company. There is no indication that D. Rand charged Smith with theft. The statements of Kevin Keihil (referred to in the investigating officer's September 5, 1995 notes) were denied by Smith and not challenged by D. Rand. Furthermore, D. Rand took no action at the time of the alleged theft and chose instead, several months later, to dismiss Smith due to "shortage of work". If an employer does not dismiss an employee at the time of an act of misconduct, or within a reasonable time, then the employees' conduct will be held to be condoned and the employer will be precluded from dismissing the employee for that act at some later date. I find that D. Rand did not take disciplinary action within a reasonable time, and condoned Smith's alleged misconduct. D. Rand cannot rely on the alleged theft by Smith in March, 1994 to justify a dismissal in August/September, 1994. Finally, the failure of D. Rand to indicate a dismissal for theft on the Record of Employment brings into question the credibility and validity of this reason. I conclude that D. Rand did not have just cause to terminate Smith's employment.

This reasoning and analysis shows that the adjudicator did not decide the question of whether or not Smith stole from his employer. It was not necessary for the adjudicator to decide whether or not Smith stole from his employer because the reason given by Rand for terminating Smith's employment was "shortage of work". Furthermore, neither the officer's investigation nor Rand's written submission contained any evidence to support the allegation of theft. Thus, the adjudicator did not have to decide a serious question of credibility in order to make her findings of fact. Rand offered no evidence in support of his allegation against Smith.

Rand's request for a reconsideration does not contain any facts or reasons which lead me to conclude that an oral hearing would have been the only adequate way of providing him

with a fair opportunity to state his case. Rand was provided with a copy of all documents which were provided by the Director to the Tribunal. His written submission (dated December 20, 1995) in support of his appeal and written request for reconsideration (dated March 14, 1996) indicate his ability to express himself in writing. In addition, my review of Rand's request reveals the following:

- there is no new evidence which would require an oral hearing;
- there is no apparent error or confusion in the adjudicator's findings of fact;
- there is no apparent error or confusion in the adjudicator's analysis and reasons; and
- the request does not contain any argument or reasons concerning how the decision is incorrect.

For all of these reasons I conclude that the Tribunal did not err by making a decision without an oral hearing and , therefore, I decline to cancel or vary the original decision and order.

ORDER

Pursuant to Section 116 of the Act, I order that Decision #D001/96 be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal
GC:sf