Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

BWI Business World Inc.
("BWI")

- 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: Fern Jeffries

FILE No.: 2001/838

DATE OF DECISION: January 22, 2002

DECISION

This is a request to reconsider a decision pursuant to Section 116 of the *Employment Standards Act* (the *"Act"*) that provides:

(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.

OVERVIEW:

BWI appealed a Determination issued by the Director on August 7, 2001 that awarded the employee $2,401 on account of outstanding commissions. The employer contended that commissions were not due because the employment contract clearly stated that "no commissions will be paid on any sales closed [i.e. paid for] after [the employee's] termination of employment". The Determination found that this clause relates solely to situations in which BWI terminates the employment, not to situations in which the employee voluntarily resigns.

The adjudicator in a Decision issued on November 14, 2001, confirmed the Determination. BWI now seeks reconsideration of this decision. In the reconsideration application, the employer alleges that the adjudicator failed to consider testimony that would have confirmed that the employee understood the terms of the contract to mean what the employer contended that they meant; and further, that the adjudicator failed to consider testimony from two other employees who would have testified that they too agreed with the employer's interpretation. However, the adjudicator makes it clear in the Decision that his decision was made on the basis of contract interpretation.

The *Act* provides the Tribunal with the discretion to reconsider its decisions. This power is discretionary and is exercised with caution. In the opinion of this adjudicator, this is not a case that warrants reconsideration.

ISSUE:

Has the applicant raised issues of such serious a nature so as to warrant a reconsideration of the decision?

FACTS:

BWI Business World Inc. sells supplies at the wholesale level. The employee was hired on January 28, 1997 as a commissioned salesperson. She was paid a base salary as a draw against commission. She resigned her employment effective September 18, 2000. The employment contract specifies that commission of one third of gross profit is to be paid on closed sales i.e. "a

sale for which BWI has been paid by the customer. Further, the contract in Clause 9 entitled "Termination of Employment states that:

> "BWI may terminate my employment immediately without notice for just cause. I understand that if I breach any of the terms of this Agreement, BWI will have cause to dismiss me.
>
> BWI will terminate my employment for any other reason by giving me the following notice:
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> a. one (1 week's notice after three (3) consecutive months of employment;
> b. two (2) weeks' notice after twelve (12) consecutive months of employment;
> c. three (3) weeks' notice after three (3) consecutive years of employment, plus one additional week for each additional year of employment, to a maximum of eight (8) weeks' notice;
>
> or by giving me a combination of notice and pay in lieu of notice equivalent to the above. Where pay in lieu of notice is given, it will be calculated based upon my regular weekly earnings during the last eight weeks that I worked normal or average hours at BWI. I also understand that no commissions will be paid on any sales closed after my termination of employment with BWI."

This agreement was given to the employee for signature approximately six months into her employment. The employer maintains that this clause in the employment agreement covers the situation we have here in which the employee voluntarily resigns. The employee maintains that that the contract clause only applies to situations in which BWI terminates the employment. The delegateconfirmed the employee's interpretation, basing her analysis in part on the legal principle that an ambiguous provision is to be construed against the person who draft it.

The adjudicator notes that:

> "At the hearing, the Employer argued that the language of the agreement was clear and that Cooke was not entitled to the commissions. Burton testified that the agreement had been explained to all the employees, including Cooke, and that they had been given time to review it and receive legal advice. Those facts were not seriously in dispute. Burton also sought to adduce the –largely opinion— evidence of two other employees who agreed with her interpretation. In my opinion, that evidence is largely irrelevant in the circumstances."

The adjudicator proceeds to decide this matter "based on the language of the agreement and the parties intent as it is manifested in the agreement"

ARGUMENT AND ANALYSIS:

The *Act* intends that the adjudicator's Appeal Decision be "final and binding". Therefore, the Tribunal only agrees to reconsider a Decision in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This reflects the purposes of the *Act* detailed in Section 2.

As established in Milan Holdings (BCEST # D313/98) the Tribunal has developed a principled approach in determining when to exercise its discretion to reconsider. The primary factor weighing in favor 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.

Reasons the Tribunal may agree to reconsider a Decision are detailed in previous Tribunal cases. For example, BC EST#D122/96 describes these as:

- The adjudicator fails to comply with the principles of natural justice;
- There is some mistake in stating the facts;
- The Decision is not consistent with other Decisions based on similar facts;
- Some significant and serious new evidence has become available that would have led the adjudicator to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The Decision contains some serious clerical error.

While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case. As outlined in the above-cited case:

> It would be both unfair and inefficient if the Tribunal were to allow, in effect, two hearings of each appeal where the appeal hearing becomes nothing more than a discovery process for a reconsideration application.

In this application for reconsideration, BWI argues that failure to refer specifically to the testimony provided at the hearing of another employee to the effect that the agreement was explained to Cooke and that she understood the agreement was significant and a basis for reconsideration. Further, BWI argues that two additional employees would also have confirmed that Cooke understood the agreement to be the same as they did and to be the same as the employer. BWI submits that this information comprises "overwhelming pieces of evidence that were failed to be considered and therefore lead to a serious mistake in this decision".

The delegate argues that this request for reconsideration should not be granted. She points out that the name of the witness who testified at the hearing was not provided to the delegate in the course of the initial investigation. Further, she points out that that the evidence of the additional two witnesses was not provided to the delegate in the course of the investigation. The delegate refers to the Tribunal's policy of not allowing a party to refuse to participate fully in the investigation and then expect the Tribunal to consider information that she have been provided during the initial investigation. (See Kaiser Stables, BC EST #D058/97). The delegate maintains that decisions made by the adjudicator with respect to hearing witnesses were correct and that the decision itself is a correct application of the law.

On the whole, I agree with the delegate. The adjudicator is clear that the decision is one in which the testimony about other people's interpretation of the contract or indeed of the employee's interpretation is largely unimportant. The adjudicator renders his decision

> "based on the language of the agreement and the parties intent as it is manifested in the agreement…If the parties had intended the provision to mean what the Employer now argues it means, the parties could have provided for that in their agreement. The agreement was drafted by the Employer."

The application fails to meet the standard for reconsideration established by the Tribunal. Essentially the applicant wants to re-argue the case. However the original decision makes it clear that the argument proposed by the employer is not one that will win at appeal.

ORDER

The application for reconsideration is dismissed; the Decision is confirmed.

Fern Jeffries
Adjudicator
Employment Standards Tribunal