

An Application for Reconsideration

- by -

Top Gun Bowling Investments Ltd.

- 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.: 2001/835

DATE OF DECISION: January 31, 2002

DECISION

OVERVIEW

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.

The Determination found Top Gun Bowling Investments Ltd. owed five employees compensation for length of service as it had closed the business and terminated their employment without any notice, contrary to section 63(2)(b) of the *Employment Standards Act* (the “*Act*”)

The employer appealed this Determination claiming. As indicated in the Appeal Decision, the appeal was based on claims that:

- “a) Takimoto’s complaint was filed outside of the time period for such a complaint,
- b) the delegate’s investigation was insufficient,
- c) the employer did not have a sufficient opportunity to respond to the investigation, and
- d) the delegate failed to assist in settling matters, and failed to give Top Gun time to settle matters on its own.”

Further, Top Gun argued that it was not liable for compensation for length of service as under Section 65(1)(d) there is an exception made if the employees are “employed under a contract that is impossible to perform...” The Adjudicator analyzed each of the grounds for the appeal and decided to confirm the Determination.

The *Act* intends that the Tribunal’s decisions be “final and binding.” The Tribunal has therefore established a high standard that must be met in order to gain reconsideration of a final decision. There must be a serious error of law or clear denial of natural justice. This request does not meet that standard, as it appears to be simply a re-arguing of the case that was considered by the original adjudication. It is therefore denied.

ISSUE:

Does the original decision contain a serious error of law or has there been a violation of the principles of natural justice so as to warrant reconsideration of the decision?

FACTS:

Top Gun Bowling Investments Ltd. employed these employees at a bowling center. The lease of the bowling center was not renewed. The landlord closed the premises and the business could not continue.

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 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.

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.”

I find that the application from Top Gun Bowling Investments is merely a request to reconsider the facts and argument that were before the original adjudicator. The reconsideration application is based on the following:

- “1. There is no investigation of the true reason of the close of the business...”
- “2. The manner and investigation of the ESB was bias and was only favor to the employees...”
- “3. So far, there is no officer in ESB, who answered the employer’s question about the section 65 (1)(d) in writing...”
- “4. The Officer of the ESB has the responsibility and obligation to explain and interpret the Employment Standards Act to both the employees and the employer.”
- “5. In the Decision, the Adjudicator wrongfully missed the evidence about the employer of the complainants...”
- “6. In the Decision, there is no evidence showing that the Adjudicator did any investigation and verification about the verbal agreement/promise between the Officer and Top Gun...”
- “7. This case is not a simple case and Top Gun is not a professional to deal with the Employment Standards Act”.

With respect to numbers 1 through 5 above, these matters were thoroughly canvassed by the original adjudicator. Further, with respect to number 4 and number 7, I must point out that the employer has an obligation to know the law applicable to the business being conducted. With respect to number 6, the Tribunal is an adjudicative body not an investigative body. The employer alludes to a confidential agreement that it maintains cannot be produced, but if it could, it would prove his case. None of this is sufficient to warrant reconsideration.

I find that there has been no denial of natural justice and no error in law.

ORDER:

The request for reconsideration is denied and the decision is confirmed.

Fern Jeffries
Chair
Employment Standards Tribunal