

An Application for Reconsideration

- by -

Top Win Café 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.: 2001/863

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.

Reconsideration is not a right to which a party is automatically entitled, rather it is undertaken at the discretion of the Tribunal. The Tribunal will not normally agree to reconsider a Decision if the intent is simply to have the Tribunal “re-weigh” the evidence or argument previously considered at the original appeal.

The Tribunal considers that this application for reconsideration is simply a request to ‘re-argue’ the case or to seek a ‘second opinion’ and as such the Tribunal declines this request for reconsideration.

ISSUE:

Does this application meet the standard established by the Tribunal to warrant reconsideration and if so, should the original decision be cancelled, varied, or referred back to the original panel?

FACTS:

Top Win operated a restaurant. The employees were terminated without notice or compensation on July 6, 2000. On that day, the landlord had changed the locks 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.

The employer seeks reconsideration because:

- “1. There is no investigation of the true reason f 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 or verbal although the employer did try to ask various officers in ESB during the past year....
4. The Officer of ESB has the responsibility and obligation to explain and interpret the Employment Standards Act to both the employees and the employer...If the officer explained to the employer clearly the legal liability that they must to pay, the employer would definitely considered to accept the employee’s offer for minimizing the cost...

5. Both the Determination and the Decision did not consider the employees who had signed the letters of withdrawn.
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. Mitchell case ...
8. ESB provided incorrect information/concept to the employer...
9. According to the Decision of December 4,2001, (BC EST #D646/01), the case of Top Win's associated companies was referred back to the Director of ESB. For easy settlement, the case should be referred back to the Director too.

With respect to issue number 1 above, I note that the employer indicates his expectation that the adjudicator will conduct an investigation. However there is nothing in the material provided to the employer by the Tribunal to support this misunderstanding. The information provided continuously re-iterates that at appeal, the onus is on the appellant to show that the determination is wrong. Further, the reference to BC EST#314/97, issue number 7 above, is not particularly relevant to this matter and in any event, is an argument that should have been made at appeal, not in a request for reconsideration. The aspect of BC EST #D646/01 that was referred back for further investigation has no bearing on this request for reconsideration. This employer has had the benefit of settlement attempts by both the Employment Standards Branch and the Employment Standards Tribunal. The allegation that the employer was not properly apprised of the law has little credibility.

With respect to the other issues, these were thoroughly canvassed at appeal. The employer disagrees with the findings of the adjudicator and seeks to re-argue the case. That is not the purpose of the Tribunal's reconsideration power.

The employer has not raised any error of law or abuse of process that would warrant reconsideration.

ORDER:

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

Fern Jeffries
Chair
Employment Standards Tribunal