

EMPLOYMENT STANDARDS TRIBUNAL

In the Matter of a Reconsideration Pursuant to Section 116 of the
Employment Standards Act, R.S.B.C. 1996, c. 113

- by -

Dunn's Automatic transmission Ltd.
("DAT")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR:	Ian Lawson
FILE NO.:	97/800
DATE OF DECISION:	February 19, 1998

DECISION

OVERVIEW

This is a request by Dunn's Automatic Transmission Ltd. ("DAT") for reconsideration pursuant to section 116 of the *Act* of the decision of Adjudicator David Stevenson, made on September 5, 1997 (BC EST #D394/97). The decision denied an appeal by Dunn's Automatic Transmission Ltd. ("DAT") from a Determination issued by a delegate of the Director of Employment Standards on March 17, 1997. The Determination found that DAT had contravened section 63 of the *Employment Standards Act* (the "*Act*") by failing to pay compensation for length of service to Danny Spencer ("Spencer"), a former employee of the company. DAT was ordered to pay \$1,673.67 to Dunn in respect of these contraventions. On appeal, this Determination was confirmed.

The request for reconsideration was made on November 5, 1997, and the parties were allowed until November 27, 1997 to file written submissions. The request is now decided on the basis of these submissions.

ISSUE TO BE DECIDED

I must decide whether there are sufficient grounds to warrant setting aside or varying the Adjudicator's decision.

ANALYSIS

Kathy Dunn makes the following statement in her written submission on behalf of DAT:

At the hearing on August 11, 1997, Spencer was present. After five plus hours of testimony and cross-examination, Spencer was the last person I wanted to question. I was told by Mr. Stevenson that Spencer did not have to take the stand as Spencer had no questions for anyone, so therefore, Spencer did not have to answer any questions. This is unacceptable since Spencer has laid a complaint against me and I did not have the right to question his motives and the legitimacy of his complaint.

It states in the hearing pamphlet that: "each party will have an opportunity to cross-examine or ask questions of the other party and any witnesses." Spencer is one of the other party's [*sic*] involved, and we were not given the right to question him about his accusations.

At the appeal hearing DAT made an admission that Spencer was not given written notice of termination, which is required by section 63(3)(a) of the *Act*. In its written submission in support of its reconsideration request, DAT again acknowledged that Spencer did not receive written notice of termination.

I am satisfied that the Adjudicator erred in directing that Spencer was not required to be cross-examined by DAT at the hearing. Spencer is the complainant and DAT should have been given an opportunity to examine the basis for his complaint and challenge the credibility of his allegations, if DAT so wished. It is clear that DAT wished to subject Spencer to cross-examination at the

hearing. It may be that the Adjudicator refused to allow this cross-examination because it appeared to be admitted by DAT that no written notice of termination had been given to Spencer, which seemed to be the heart of the appeal. However, it could also be that some other, less obvious issue could have been discovered or explored through cross-examination, which would have been the first opportunity DAT had to challenge Spencer's complaint. The Adjudicator's failure to allow cross-examination was, in my view, a "demonstrable breach of the rules of natural justice" within the meaning of the decision of the Chair of this Tribunal in *Re Director of Employment Standards and the Employment Standards Tribunal*, BC EST #D344/96, p. 2.

Such a breach of natural justice would normally result in a re-hearing of the appeal. However, in this case, there is no dispute by any party that DAT failed to give written notice of termination to Spencer. Further, in its request for reconsideration, DAT presents no evidence or argument that might indicate some other issue is at stake which should be explored properly by cross-examination of Spencer. DAT quite rightly complains of being deprived of an opportunity to cross-examine Spencer, but at the same time, DAT does not alert me to the existence of any other important issue in the appeal apart from whether Spencer received written notice of termination. Even if DAT proves that Spencer is not a credible witness, DAT would lose the appeal on the merits because of its own admission. If DAT had not made this admission, there is no doubt in my mind that the appeal would have to be re-heard. This admission having been made, and finding that the notice issue is the only issue at stake in this appeal, it is my conclusion that a re-hearing would not result in any different decision. DAT would have its opportunity to cross-examine Spencer, but the same result would be arrived at by the Adjudicator conducting the re-hearing. For this reason alone, I dismiss the request for reconsideration.

ORDER

Pursuant to section 116(1) of the *Act*, I dismiss DAT's application for reconsideration.

Ian Lawson
Adjudicator
Employment Standards Tribunal