An Application for Reconsideration

- by -

644633 B.C. Ltd. operating as Domino's Pizza (Westbank)
(the “Employer”)

- 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: Kenneth Wm. Thornicroft

FILE No.: 2002/627

DATE OF DECISION: March 11, 2003

DECISION

THE APPLICATION

This is an application filed by 644633 B.C. Ltd. operating as Domino's Pizza (Westbank) [the "Employer"] pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of an adjudicator's decision issued on October 30th, 2002 (B.C.E.S.T. Decision No. D482/02).

The Employer says that the adjudicator erred in confirming the decision of a delegate of the Director of Employment Standards that there was no just cause to terminate its former employee, Mr. Ernst Tobias Jilg ("Jilg").

PREVIOUS PROCEEDINGS

The Employer operates a pizza business and Mr. Jilg was employed from September 1st, 1995 to April 27th, 2002 as a "shift runner" at a wage rate of $10 per hour. Following his termination, Mr. Jilg filed a complaint claiming compensation for length of service and vacation pay. During the course of her investigation, the delegate wrote to the Employer on three separate occasions, namely, June 4th, June 24th and finally on July 10th, 2002, seeking the Employer's position with respect to Mr. Jilg's complaint. The Employer simply ignored the delegate's repeated written requests even though the delegate's correspondence clearly indicated that she would be issuing a determination based solely on Mr. Jilg's evidence if the Employer failed to provide any relevant information.

Relying on the information provided by Mr. Jilg, and applying section 97 of the *Act* (sale of business or assets), the delegate determined that Mr. Jilg's service exceeded 6 years and awarded him the sum of $2,025.37 on account of compensation for length of service ($1,837.50), vacation pay and section 88 interest. In addition, the Director assessed a $0 penalty pursuant to section 98 of the *Act* and section 29 of the *Employment Standards Regulation.*

The Employer appealed the Determination and in its appeal documents the Employer asserted, among other things, that Mr. Jilg had only been employed for 27 days and that he was terminated for "food theft". As noted by the adjudicator, the Employer did not deny, nor did it even attempt to explain, why it failed to participate in the delegate's investigation. Applying the principles enunciated in *Tri-West Tractors Ltd.,* B.C.E.S.T. Decision No. D268/96, the adjudicator concluded that the appeal was not properly before the Tribunal. In essence, the Employer's refusal to participate in the investigation estopped it from raising issues on appeal that could have been initially advanced before the delegate during her original investigation. Further, and in any event, the adjudicator concluded that Mr. Jilg's employment was not affected by an asset sale that took place on or about April 1st, 2002 and, accordingly, his service commenced as of his original date of hire pursuant to section 97 of the *Act.*

THE APPLICATION FOR RECONSIDERATION

The Employer's request for reconsideration is contained in a letter dated December 1st, 2002. While I consider the application to be timely (see *Unisource Canada Inc.*, B.C.E.S.T. Decision No. D122/98 and *MacMillan Bloedel,* B.C.E.S.T. Decision No. D279/00), I do not consider that this is an appropriate case for the Tribunal to exercise its discretionary authority under section 116.

The Employer's December 1st submission asserts that it had just cause for termination. With respect to its failure to respond to the delegate's repeated written requests for information while she was investigating the matter, the Employer says that it tried to contact the delegate by telephone without success. The Employer says that it left "several" voice mail messages none of which was returned.

The Employer has not provided any particulars with respect to its efforts to contact the delegate. The delegate, on the other hand, has provided relevant information in this regard. This latter information indicates that the Employer did not attempt to contact the delegate until about 4 months *after* the Determination was issued and a demand for payment was delivered in writing. The delegate's submission was forwarded to the Employer on January 16th, 2003 and despite the Tribunal's request that any reply be filed by January 30th, the Employer once again chose not to respond. Thus, the delegate's assertions stand uncontradicted.

Applications for reconsideration do not proceed as a matter of statutory right. As noted in *Milan Holdings Inc.*, B.C.E.S.T. Decision No. D313/98, before considering the merits of the reconsideration application the Tribunal must first be satisfied that the issue(s) raised in the reconsideration request are sufficiently significant to warrant further inquiry. In this case, I see no error on the part of the adjudicator in dismissing the appeal on the basis of the *Tri-West Tractor* principle. Further, the Employer has not raised even a *prima facie* case that the application of that principle was inappropriate in this instance.

ORDER

The application for reconsideration is **refused** and, accordingly, the adjudicator's decision is confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal