

An Application for Reconsideration

- by -

Robert Bunyan
("Bunyan" or "employee")

- 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: Paul E. Love

FILE No.: 2000/648

DATE OF DECISION: February 23, 2001

DECISION

OVERVIEW

This is an application for reconsideration, made by Mr. Bunyan. The issue before the adjudicator was whether Mr. Bunyan was an employee or a manager. The employer alleged that the delegate of the Director of Employment Standards, erred in determining that Mr. Bunyan was an employee. The adjudicator determined that the Delegate erred, and that Mr. Bunyan was a manager. I determined this application on the written submissions of the parties. The employer seeks a fresh consideration of all his arguments by a new adjudicator. This case does not meet the threshold for a reconsideration application as Mr. Bunyan did not identify any fundamental error in the finding of facts, or application of law.

ISSUE TO BE DECIDED

Is this a proper case for reconsideration of the Decision of the Adjudicator?

FACTS

This is Mr. Bunyan's application for reconsideration of decision D367/00 made by Adjudicator Orr on September 8, 2000. The application for reconsideration proceeded on written submissions of the Mr. Bunyan and the employer. The Director of Employment Standards ("Director") did not make any written submissions in this case. The original decision was made after an oral hearing before the adjudicator, and oral evidence was given under oath or affirmation by a number of witnesses. The adjudicator found that Mr. Bunyan was a manager of Neil's Carpet Services Ltd., and therefore not entitled to overtime wages. This decision cancelled a Determination dated February 28, 2000, which found that Mr. Bunyan was an employee and entitled to the sum of \$8,0163 consisting of wages, overtime, vacation pay and interest.

It is unnecessary for me to set out in detail the facts in this case. Mr. Bunyan was employed at a rate of \$1,000 semi-weekly with commission. The employer operated a carpet cleaning and telemarketing service. Mr. Bunyan worked six days per week between 7:00 am and 8:00 pm. He would have a substantial entitlement under Part 4 of the Act, if he were an employee. The employer took the view, at all material times, that Mr. Bunyan was a manager, and therefore exempted from the hours of work and overtime provisions (Part 4) of the Act.

In the course of his decision the Adjudicator referred to s. 34 of the *Employment Standards Regulation* which provides that the wage and overtime provisions of the *Act* do not apply to a manager. The Adjudicator also referred to the definition of manager which meant

- (a) a person whose primary employment duties consist of supervising and directing other employees, or
- (b) a person employed in an executive capacity.

Employee's Arguments:

The grounds set out in the employee's notice applying for reconsideration are as follows:

1. In the decision, the adjudicator misstates the closing argument of Mr. Bunyan, noting that the submission of Mr. Bunyan was that Mr. Bunyan said "he felt like a manager", when Mr. Bunyan in fact said that he did not feel like a manager.
2. The adjudicator erred in finding that Mr. Bunyan could approve overtime.
3. "I was nothing more than a babysitter for a Ma & Pa small business and I would like to show this fairly. I do not feel I was afforded this at all."

Mr. Bunyan asks that this matter be heard again.

Although Mr. Bunyan has not identified the grounds of the appeal, in language consistent with the usual grounds advanced on reconsideration, in essence he alleges that the adjudicator erred in the finding of facts or law that he was a manager, and that he authorized overtime. He also alleges that the hearing was unfair.

Employer's Argument:

The employer submits that this case does not fall within any grounds for reconsideration identified in *Zoltan Kiss BCEST #D122/96*, and that the appeal should be dismissed as an appeal which does not meet the threshold test for reconsideration.

ISSUE

Is this a proper case for reconsideration?

ANALYSIS

In this reconsideration application, the burden rests with the applicant, in this case the employee, to demonstrate an error which falls within the scope of a reconsideration

application. Generally there is a heavy onus on the party seeking reconsideration to demonstrate:

- (a) procedural unfairness;
- (b) a fundamental error of law or fact;
- (c) some compelling new evidence that was not available at the initial appeal;
- (d) failure to deal with a significant issue;
- (e) clerical error.

Generally, there is a two stage process in a reconsideration application. The first stage is whether or not the application falls within the scope for reconsideration, and the second stage concerns the merits of the application. The employer in its written submissions resists the application for reconsideration on the basis of both stages of the analysis.

I note that consistent with the decisions of the Tribunal, the power to reconsider under s. 116 of the *Act*, is a power to be used sparingly, when proper grounds, are established by the party seeking the reconsideration. It is not a fresh opportunity for me to consider again the merits of the decision. I note that this application appears to be an attempt by the employee to have the appeal considered freshly by a new adjudicator.

Fairness of the Hearing:

I note that Mr. Bunyan suggests that he did not get a fair hearing, although he alleges no particulars supporting this allegation. There is nothing advanced by Mr. Bunyan that allows me to consider this as a serious issue. The employer's submission sets out that all parties were accorded the right to make an opening statement, call witnesses, cross-examine witnesses, and make closing argument. The adjudicator apparently also gave Mr. Bunyan considerable leeway in questions and submissions given that he was not represented by counsel. Mr. Bunyan does not meet the threshold test for reconsideration based on his bare allegation that the hearing was unfair.

Fundamental Error of Fact or Law:

From the manner in which the applicant framed the issues, it is apparent that the only possible grounds for reconsideration is if the submission can be considered to raise an issue of a fundamental error of law or fact. The applicant takes issue with the finding that he was a manager, and points to an error which he alleges the adjudicator made in misstating his submission. He alleges that the adjudicator erred in noting in the decision that Mr. Bunyan said "he felt like a manager" when he in fact said "he did not feel like a manager".

In this case the adjudicator had the benefit of hearing the oral evidence and submissions of the parties. A submission is not evidence. It is clear from a reading of the decision that the adjudicator did not base his decision on an admission from Mr. Bunyan that he was a manager. It is, however, apparent from perusing the decision that there was evidence before the adjudicator that Mr. Bunyan:

- (a) held the title of operations manager;
- (b) he hired all the employees;
- (c) he fired at least three employees;
- (d) he supervised all the employees;
- (e) he had the authority to discipline and did discipline employees;
- (f) he enforced company rules concerning appearance, dress code, timeliness and jewellery;
- (g) he developed rules and procedures for the workplace;
- (h) he settled disputes between employees;
- (i) he set hours of work, employee schedules, approved overtime, scheduled vacations, sick leaves and personal leaves

The adjudicator found as a fact that Mr. Bunyan's primary employment duties consisted of supervising and directing other employees. There was a sufficient evidentiary basis for the adjudicator to be satisfied that the employer had demonstrated an error in the determination, and that Mr. Bunyan was at all material times the manager. The Tribunal correctly placed the onus on the employer or appellant to establish error, and correctly applied a "strict interpretation" to the definition of manager, which is consistent with the Tribunal's previous decision making.

If the adjudicator misstated the appellant's submission, such a misstatement does not amount to a fundamental error of law. It is clear that the decision did not rest on an admission of Mr. Bunyan. There was any ample factual basis before the adjudicator to conclude that Mr. Bunyan was a manager. Any error made in the stating of the submission is not an error of substance such that I should cancel the decision.

Overtime Approval:

The adjudicator heard the evidence of witnesses called by the employer and by Mr. Bunyan concerning overtime. It cannot be said that this meets the threshold test for reconsideration, as there was apparently an evidentiary basis for the adjudicator's conclusion concerning

overtime approval. The applicant has not demonstrated any error in the findings made by the adjudicator.

I therefore find that the employee has not met the threshold test for a reconsideration and dismiss the application for reconsideration.

ORDER

Pursuant to section 116 of the *Act*, I order that the Decision in this matter, dated September 8, 2000 be confirmed.

PAUL E. LOVE

Paul E. Love
Adjudicator
Employment Standards Tribunal