

An Application for Reconsideration

- by -

Estate of Dr. Robert H. Dykes

- 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

TRIBUNAL MEMBER: Alison H. Narod

FILE No.: 2004A/33

DATE OF DECISION: May 21, 2004

DECISION

OVERVIEW

This Decision concerns a request for reconsideration of a Decision of an Adjudicator dated February 10, 2004 respecting an appeal made by the Estate of Dr. Robert H. Dykes of two Determinations dated October 22, 2003. (The number appended to that Decision was D022/03” and is hereby corrected to read “D022/04”.)

In his Decision of February 10, 2004, the Adjudicator dismissed appeals of two Determinations dated October 22, 2003 issued by a Delegate of the Director. Among other things, in those Determinations, the Delegate ordered Dr. Dykes’ Estate to pay Monique Roy (“Roy”) an amount of \$13,504.70 as a result of contraventions of sections 18, 40, 45 and 48 of the *Employment Standards Act* (the “Act”) and to pay William Messner (“Messner”) an amount of \$8,546.28 as a result of contraventions of sections 18, 45 and 58 of the *Act*. In each Determination, the Estate was also ordered to pay the Director \$500 in administrative penalties (for a total of \$1,000). (The Original Decision included the penalties in the amounts owing to Roy and Messner and is hereby corrected to separate those amounts as listed in the Determination)

E. Kim Choquette, the sole Executor and Trustee of the Estate of Dr. Robert H. Dykes (“Choquette” or the “Executor”), seeks reconsideration of the two Determinations on the grounds that the Adjudicator was biased, engaged in an abuse of discretion and acted in bad faith.

ISSUE

The issue is whether or not the Decision of the Adjudicator ought to be reconsidered and set aside on the grounds that the Adjudicator was biased, engaged in an abuse of discretion or acted in bad faith, as alleged.

Relevant Statutory Provisions

Section 116 of the *Act* states:

116(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) confirm, vary or cancel the order or decision or refer the matter back to the original panel.

(1) Bias

The Executor alleges that the Adjudicator was biased by making a finding in favour of persons “who have a continuing history of being welfare recipients”. The Executor supplies no evidence in support of this allegation. Accordingly, there is no basis on which to conclude that the Adjudicator was biased, as alleged.

(2) Abuse of discretion

The Executor argues that the Adjudicator engaged in an abuse of discretion. The Executor argues that the Adjudicator ignored “the fact that neither party has any credible employment record of any kind, anywhere for the last five years. Their only claim to employment was as “employees” for Dr. Robert H. Dykes”.

The Executor’s submissions allege that every person who worked at Dr. Dykes’ farm or his medical office for the five years prior to his death were treated as independent contractors. No deductions were made from their pay for income tax purposes and they were represented to the Canada Customs and Revenue Agency (“CCRA”) as independent contractors.

Additionally, the Executor alleges that Messner’s claim for wages respecting work in connection with Dr. Dykes’ farm is not valid. There was no need for a handyman, because the doctor’s horses and livestock had been seized more than two years prior to his death and the farm itself was “lost” over a year prior to his death.

In response, Roy and Messner dispute the allegation that they were always treated as independent contractors. Roy says she was issued a Record of Employment for maternity leave, as well as T4 forms for income tax purposes. Messner says he did not work exclusively at the doctor’s farm. They say they have “work contracts” signed by Dr. Dykes.

The Delegate says that an application for reconsideration is not meant to provide parties another opportunity to re-argue their case. Notwithstanding that, the Delegate responds to certain points raised by the Executor. The Delegate says that the Executor did not allege that Roy and Messner were independent contractors during the investigation. Nor did he provide any evidence of this when he appealed the Determination. On the contrary, the Executor stated that he did not have an objection to the wage claim by Roy. The Delegate also says that although the Executor has claimed to have evidence in support of an allegation that Roy’s and Messner’s claims for wages were fabricated, he has failed to provide any evidence in support. The mere allegation without the supporting evidence is just that - an allegation.

I have reviewed the materials that were before the Adjudicator. They indicate that the Executor previously argued that Roy and Messner’s claims were fictional, fraudulent and unsubstantiated and that they were independent contractors and not employees. The Executor also argued that Roy and Messner were not entitled to wages claimed for work performed at the doctor’s farm, because it was sold five months before he died. In response, Roy and Messner said their work was not limited to farm work. They performed work in the doctor’s other office, they assisted him with activities he was unable to perform due to his illness and they assisted him with getting his affairs in order. Additionally, they said, the Executor acknowledged they were owed and would be paid wages and the Executor advised them not to go to “the labour board”.

In reply, the Executor disputed the facts asserted by Roy and Messner and, among other things, alleged that there was no evidence that either of them had been employed by Dr. Dykes at all. The Executor alleged that there was no documentation verifying that either were employed by or in a contractual relationship with Dr. Dykes.

Accordingly, the issue of whether or not Roy and Messner were employees as opposed to independent contractors and whether or not their claims were fictional, fraudulent and unsubstantiated were squarely

before the Adjudicator. With respect to the status of Roy and Messner, the Adjudicator determined that the Executor failed to demonstrate that the Delegate made any error in concluding that they were employees for the purposes of the *Act*. In his view, the Executor's submissions were no more than a series of suppositions, questions and comments. They did not show the Delegate was wrong.

With respect to the allegation that the claims were fictional, fraudulent and unsubstantiated, the Adjudicator concluded that there was nothing in the appeal, or in the material, that would allow a conclusion that the claims were fictional or fraudulent. They were substantiated to the Delegate's satisfaction from records provided by each of the Claimants. Additionally, there was no evidence the Delegate failed to observe the principles of natural justice. The Executor had ample opportunity to respond to the substance of the claims being made. The fact was that he had failed or refused to do so.

On reviewing the parties' submissions and the materials that were before the Adjudicator, it is my conclusion that the Adjudicator did not engage in an abuse of discretion in dismissing the appeal. He considered the evidence and the submissions and made a decision based on rational conclusions.

I note that an application for reconsideration is not an opportunity for an appellant to re-argue its case. Nor is it an opportunity for a reconsideration panel to consider the merits of the original case or its appeal, afresh.

Although it is not necessary to address the point, the fact that the CCRA may treat a person as an independent contractor as opposed to an employee for the purpose of its governing legislation is not determinative of whether or not that same person is an employee for the purposes of the *Act*. The two governing enactments have different objects and purposes and a person who is not an employee for the purposes of one may be an employee for the purposes of the other.

In short, there is no basis for setting aside the Adjudicator's determination on the basis of the allegation of abuse of discretion.

(3) Bad faith

The Executor argues that the Adjudicator ignored the fact that Roy's and Messner's claims were made after Roy made "illegal attempts" to access a bank account in which Dr. Dykes was a joint owner.

The Executor says that he has learned and will provide evidence that Roy is "the subject of a criminal and/or civil investigation for illegal use of the ATM card after the death of Dr. Dykes and illegally trying to cash cheques with stamped signatures after the death of Dr. Dykes". The Executor says that after these allegedly illegal activities failed, Roy and Messner concocted the claims herein. However, the Executor supplies no evidence that would support these allegations.

Roy and Messner emphatically deny these allegations and contend that they are lies.

As noted above, the Delegate points out that the Executor has failed to provide evidence supporting his allegation that Roy's and Messner's claims were fabricated.

After reviewing the parties' submissions and the materials that were before the Adjudicator, I am unable to conclude that the Adjudicator acted in bad faith by ignoring the Executor's allegations that Roy's and Messner's claims were fabricated after failed and illegal attempts to access Dr. Dykes' bank account. The

Executor did not allege in the appeal that Roy or Messner had engaged in “criminal” or “illegal” activities in connection with Dr. Dykes’ bank account. Nor would that allegation have necessarily altered any determination as to whether or not they were entitled to wages for work performed as former employees of Dr. Dykes. More importantly, however, there is no basis on which to conclude that the Adjudicator acted in bad faith by ignoring an allegation that was not specifically made in the submissions before him.

SUMMARY

I find that the allegations by the Executor in connection with the Adjudicator are frivolous and vexatious. They have no support in the evidence. I dismiss the application for reconsideration and confirm the Decision of the Adjudicator with the corrections I have listed above.



Alison H. Narod
Member
Employment Standards Tribunal