

An Application for Reconsideration

- by -

Merlin W. Thompson
(“Thompson”)

- 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: M. Gwendolynne Taylor

FILE No.: 2001/687

DATE OF DECISION: March 28, 2002

DECISION

OVERVIEW

This is an application, pursuant to section 116 of the *Employment Standards Act* (the “*Act*”), by Merlin W. Thompson (“Thompson”) for reconsideration of two decisions issued by the Employment Standards Tribunal (“Tribunal”). The following is a brief chronology of the appeal:

Determination by the Director	December 4, 2000
Hearing before the Tribunal	March 26, 2001
First decision of the Tribunal	April 18, 2001
Supplementary Report by the Director	July 4, 2001
Second decision of the Tribunal	August 31, 2001
Application for Reconsideration, by Thompson	September 25, 2001

The Director of Employment Standards (“Director”) issued the December 4, 2000 Determination, on a complaint filed by Thompson against his former employer Lorne W. Camozzi Co. Ltd. The main issue was whether Thompson was entitled to compensation based on a 15.5 hour day or a 10 hour day. The Director determined that the employer had not contravened either the regular and overtime provisions of the *Act* or the annual vacation and statutory holiday pay provisions of the *Skills Development and Fair Wage Act* (“*SDFWA*”), as alleged by Thompson. Thompson appealed to the Tribunal.

In the first decision, the Tribunal found that the Director had erred on one point, which it referred back to the Director for further consideration, and dismissed all other issues raised in the appeal.

The Director issued the Supplementary Report which awarded Thompson additional compensation of \$1,157.69. Both Thompson and the employer took issue with some aspects of that Determination. Based on the employer’s submissions, the Director amended the compensation award to \$1,061.23. The Supplementary Report was submitted to the Tribunal. Having considered the submissions of the employer and Thompson, the Tribunal concluded that the Director’s supplementary report was reasonable and justified a variance to the Determination, in the amount of \$1,061.23.

Thompson applied for reconsideration of the Tribunal’s decisions on the grounds that the Adjudicator did not apply the principles of natural justice and based his decision on the Director’s findings although the Director also had not applied the principles of natural justice. Thompson submits that the Director and Adjudicator relied on hearsay evidence that was not subject to cross-examination. Thompson maintains that the Director ignored some of his evidence which supported his contention that he worked in excess of 10 hours per day.

ISSUE

Did the Tribunal err in failing to apply the principles of natural justice?

THE FACTS

Thompson worked for Lorne W. Camozzi Co. Ltd. from July 19, 1999 to September 11, 1999, at a road building camp at Union Inlet, near Prince Rupert. He was a cook and first aid attendant being paid \$21.99 per hour plus \$4.00 benefits under the *Skills Development and Fair Wage Act*. The number of employees varied during Thompson's employment but generally was between 3 to 6 people. Representatives from the Ministry of Forests and the Workers Compensation Board attended the camp on occasion and they provided evidence to the Director.

Thompson was the sole first aid attendant until July 29, 2000, when another employee began to share the responsibility .

Thompson's primary contention was that he worked 15.5 hours a day, every day. The employer's position was that Thompson worked two 4 hour shifts per day and was paid for 10 hours per day. There were many disagreements over the facts in the evidence presented to the Director. The Director noted

The material submitted by each party presents a conflicting and sometimes confusing picture of the complainant's workday. As well, E. Thompson and several witnesses have pointed out that some of the witnesses, the complainant and E. Thompson have other interests in the outcome of this investigation and therefore their information must be viewed with care. E. Thompson and M. Thompson are brothers; Brenda Graham is daughter to E. Thompson and niece to the complainant and Walter Jarc is a son-in-law to E. Thompson.

The Director noted the varied and often conflicting information provided by the witnesses at pages 4 and 5 of the Determination. There was disagreement over most aspects of the evidence including the original discussion of the terms of Thompson's employment, the number of people employed in the camp, the number of hours Thompson worked per day, whether Thompson worked straight through the day or was on a split shift, the number of people present at meal times, and the reason for Thompson being fired.

In dealing with the "conflicting and sometimes confusing picture", the Director gave more weight to information provided by Brenda Graham than information provided by others. The director stated the rationale for taking that approach, at p. 6 of the Determination:

..., Brenda Graham has direct knowledge of the complainant's job. I believe that despite her interest her information has value to this investigation. She is a cook and did work in this camp after the complainant left. All other witnesses were observers, not cooks and could only give their impression of what they saw. Graham was very clear that she had no difficulty cooking three meals a day for up

to 8 people and cleaning the bunkhouses and camp area with time to spare. I note that she has also said that she was serving up to 8 people for meals rather than the 5-6 people that her father had stated.

The Director concluded the Determination with the following observations and finding:

I prefer to give more weight to Brenda Graham's information as it speaks directly to the complainant's job. As well I take into account that the complainant had other duties such as being one of the first aid attendants. I believe the complainant worked hard. But after examining the available information I have to find that on the balance of probabilities a 10-hour workday in this camp is consistent with the complainant's expected duties and therefore with (*sic*) the wages he was paid are correct.

ARGUMENT

Thompson submitted that the Director and Adjudicator breached the principles of natural justice by relying on hearsay evidence that was not subject to cross-examination. Thompson maintains that the Director and adjudicator ignored some of his evidence which supported his contention that he worked in excess of 10 hours per day.

Thompson's argument concerning hearsay evidence refers to the evidence of Brenda Graham, who took over part of Thompson's duties after he left. As noted above, the Director gave most weight to her evidence concerning the duties she performed.

Thompson submitted a letter from legal counsel dated April 2, 2001 which offered the opinion that a tribunal offends the principles of natural justice if it accepts hearsay evidence on important issues to be decided without giving an opportunity for cross-examination of the evidence. Counsel notes that the principle is that a party has the right to ask questions so that the tribunal can determine the truthfulness of such statements.

Thompson submitted that the evidence he presented from Charles Graham (August 14, 2001 and November 20, 2000), Cyr Blanshard, November 7, 2000, Larry Chipman, December 6, 2000, and Shawn Hedges, November 20, 2000 was ignored by the Director and the Adjudicator. Thompson also challenged the veracity of statements made by Elton Thompson, compared to statements from other witnesses.

ANALYSIS

As the Tribunal Adjudicator noted in the first decision, p. 4, an appeal from the Director's Determination is not a re-investigation. The Tribunal does not substitute its opinion for that of the Director, unless the appellant shows an error in the Determination sufficient to persuade the tribunal to vary or cancel the Determination.

Where it is only a conclusion of fact that is being challenged, the appellant must show that the conclusion of fact was simply based on wrong information, that it was manifestly unfair or that there was no rational basis upon which the findings of fact could be made (see *Re Mykonos Taverna, operating as the Achillion Restaurant*, BC EST #D576/98).

The Adjudicator considered Thompson's reasons for appeal at length, specifically as they applied to the Director's reliance and acceptance of the information provided by Brenda Graham and Thompson's argument that there was no comparison between the job he did and job she did. The Adjudicator found that Thompson's evidence and arguments raised in the Tribunal hearing, on this point, "added nothing to what was raised and considered during the investigation."

Section 77 of the *Act* provides that the Director "must make reasonable efforts to give a person under investigation an opportunity to respond." The Director referred to this at p. 5 of the Determination and noted that each party had been afforded the opportunity to present evidence and to respond.

Neither the Director nor the Tribunal is bound by strict rules of evidence. Even when the strict rules of evidence apply, hearsay evidence can be admitted, with caution. One of the cautions is that if it cannot be challenged by cross-examination, it should be given less weight than direct evidence. I do not fully accept the opinion given by counsel in the April 2, 2001 letter. Natural justice, frequently now referred to as the "duty of fairness", requires that a person be given an opportunity to know the case and make submissions, including being able to test adverse evidence. I would not agree that the principles extend to saying that hearsay statements "are not to be allowed."

The Adjudicator did not specifically refer to the issue concerning hearsay. However, the Adjudicator examined Thompson's submissions concerning the Brenda Graham evidence. The Director relied on that portion of her evidence that pertained to her employment. As the Adjudicator noted, Thompson did not challenge the truthfulness of this part of her evidence. He had the opportunity through his submissions to the Adjudicator and in this reconsideration to raise challenges. The challenges he has raised do not touch on the substance of her evidence which was the basis for the Director's finding.

In my view, Thompson had the opportunity to know the evidence the Director relied on and to present evidence and make submissions that would test the adverse evidence. Given that he was not present during her employment, it is not surprising that he did not raise challenges.

Thompson submitted that part of Graham's evidence was just what she had been told by her father and, therefore, could not be relied on. I find this is not supported by reference to the Determination, where the director noted that her evidence was at odds with her father's, in one respect. Further, I note that the portion of her testimony relied on by the Director was specifically related to her duties, not the general situation at the camp.

One of the primary differences between Thompson's and Graham's duties was that Thompson was a first aid attendant. The Adjudicator found that the Director had not considered the fact that Thompson was the only first aid attendant on site for a period of time and referred the case back for further consideration. It is apparent that the Adjudicator gave careful consideration to the issues raised by Thompson.

The other challenges raised by Thompson on appeal relate to the Director and Adjudicator not having accepted his evidence on the number of hours worked. I find that the Director considered the evidence he referred to, and even listed the witnesses on page 4 of the Determination. The Adjudicator considered the arguments raised by Thompson and determined that they had all been raised:

“either expressly or implicitly in the Determination. As noted above, Thompson's task on appeal is to show the answers given by the Director were wrong, not to simply raise them again and see if I am prepared to answer them differently.”

Similarly, the arguments Thompson presented concerning the veracity of Elton Thompson's evidence was considered by the Director and the Adjudicator.

In my view, the Director considered all of the evidence presented, noted that there were a number of conflicts and came to a determination based on an analysis and weighing of the evidence. The Adjudicator also considered the evidence. I find that Thompson has not demonstrated that either of them acted unreasonably or unfairly.

ORDER

The application to cancel or vary the decision of the Adjudicator is denied.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal