

An Application for Reconsideration

- by -

Paradigm Management (B.C.) Ltd., operating as Expressions Hair Design
("Expressions Hair")

- 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: David B. Stevenson

FILE No.: 2002/634

DATE OF DECISION: April 1, 2003

DECISION

OVERVIEW

Pardigm Management (B.C.) Ltd., operating as Expressions Hair Design (“Expressions Hair”), seeks reconsideration under Section 116 of the *Employment Standards Act* (the “Act”) of a decision of the Tribunal, BC EST #D428/02, dated September 19, 2002 (the “original decision”). The original decision considered two appeals, one by Expressions Hair and the other by Catherine Richard (“Richard”), a former employee of Expressions Hair, of a Determination issued by a delegate of the Director of Employment Standards (the “Director”) on May 7, 2002.

Expressions Hair has filed two applications seeking reconsideration of different aspects of the original decision. On October 29, 2002, Expressions Hair filed an application seeking reconsideration of the original decision on the ground that the Adjudicator of the original decision had misunderstood or overlooked a serious issue, whether Expressions Hair had just cause to terminate Richard. Expressions Hair asks that the Tribunal order the Determination be referred back to the Director on the just cause issue.

On November 13, 2002, Expressions Hair filed an application seeking reconsideration of the original decision on the ground that the Adjudicator of the original decision had failed to deal with the issue of calculating statutory holiday pay for employees working the statutory holiday. Expressions Hair says the Tribunal should make a decision on this issue.

ISSUE

In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case is appropriate for reconsideration, the substantive issues raised in this application are whether Expressions Hair had just cause to terminate Richard and whether the Adjudicator of the original decision erred by failing to consider the issue of calculating statutory holiday pay.

ANALYSIS OF THRESHOLD ISSUE

The legislature has conferred an express reconsideration power on the Tribunal in Section 116 which provides:

- 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) cancel or vary the order or decision or refer the matter back to the original panel.*
- (2) The director or a person named in a decision or order of the tribunal may make an application under this section.*
- (3) An application may be made only once with respect to the same order or decision.*

Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal’s approach is grounded in the language and the purposes of the

Act. One of the purposes of the *Act*, found in subsection 2(d), is “to provide fair and efficient procedures for resolving disputes over the interpretation and application” of its provisions. Another stated purpose, found in subsection 2(b), is to “promote the fair treatment of employees and employers”. The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. An assessment is also made of the merits of the Adjudicator’s decision. Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. The circumstances where the Tribunal’s discretion will be exercised in favour of reconsideration are limited and have been identified by the tribunal as including:

- failure to comply with the principles of natural justice;
- mistake of law or fact;
- significant new evidence that was not reasonably available to the original panel;
- inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration.

I am not satisfied this application warrants reconsideration.

The first matter raised by Expressions Hair, the failure of the Adjudicator to deal with the question of just cause, fails on the facts. The original decision contains the following statements:

It should also be noted that Expressions Hair does not take the position that it terminated Ms. Richard for cause. . . .

For his part, Mr. Christie did not deny that he wished to terminate Ms. Richard. He acknowledged during his testimony that he might have said to Ms. Richards words to the effect that he had been looking for a reason to terminate her for some three years. . . .

. . . Ms. Richards spoke with Mr. Christie by telephone and asked that the ROE be changed from a “quit” to a “dismissal” (code “M”) but Mr. Christie refused. . . .

It must be remembered that the employer has never taken the position that it had just cause for termination; in fact, the employer says it *never* terminated Ms. Richard.

. . . the employer – on its own evidence – never disciplined Ms. Richard not did it terminate her employment.

It is ingenuous for Expressions Hair to suggest the Adjudicator of the original decision misunderstood or failed to consider a significant issue without ever having raised that issue. The reference to Richard having alluded to the question of just cause in appealing the Determination is irrelevant to the application, since Expressions Hair foreclosed any consideration of that question by taking the position Richard was neither disciplined nor terminated by them.

On the second matter raised by Expressions Hair, I agree entirely with how that matter was addressed by the Adjudicator of the original decision. In the circumstances, it was clearly appropriate for the Adjudicator of the original decision to have exercised his discretion under subsection 114(1) of the *Act*.

ORDER

Pursuant to Section 116 of the *Act*, I order the original decision, BC EST #D428/02, dated September 19, 2002, be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal