

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an application for reconsideration pursuant to Section 116  
of the *Employment Standards Act* R.S.B.C. 1996, C. 113

- by -

Robin Hood  
("Hood")

- of a Decision issued by -

The Employment Standards Tribunal  
(the "Tribunal")

<b>ADJUDICATOR:</b>	Mark Thompson
<b>FILE No.:</b>	98/704
<b>DATE OF DECISION:</b>	March 29, 1999

## **DECISION**

### **OVERVIEW**

This is an application for reconsideration pursuant to Section 116 of the *Employment Standards Act* (the "Act") by Robin Hood ("Hood") against a Decision of the Employment Standards Tribunal (the "Tribunal") BC EST #D483/98, dated October 22, 1998. The original Decision cancelled a Determination by the Director of Employment Standards (the "Director") relating to an appeal by Super Cat International Enterprises Ltd. ("Super Cat") The determination found that Hood was an employee under the Act and entitled to \$40,374.40 in unpaid wages. The adjudicator in the original Decision concluded that Hood was not an employee of Super Cat, so he could not claim unpaid wages.

Hood applied for a reconsideration of the Decision on the grounds that he was unaware of the nature of the appeal proceeding and consequently did not present crucial evidence to the Tribunal. In particular, Hood's counsel stated, the witnesses that Hood proposed to call would testify that he was always an employee of Super Cat.

Super Cat opposed the application on the grounds that Hood had received a full statement of the grounds for Super Cat's appeal of the Determination, and Hood had replied with a detailed letter in support of his position. Both parties received information from the Director of Employment Standards about the nature of the appeal procedure and had ample opportunity to seek advice or counsel in support of their cases.

The Director did not oppose the application for reconsideration, without stating any reasons to support that position.

This Decision is based on written submissions.

### **ISSUE TO BE DECIDED**

The issue to be decided in this case is whether Hood has brought this case within any of the established grounds on which the Tribunal should review the original decision. If Hood has met that test, the further issue of the disposition of the case must be decided.

### **FACTS**

The essential facts of the case are stated in the original Decision. Hood is a marine architect and a citizen of the Republic of South Africa, residing in Canada since 1995 under a work permit. The permit allowed him to work as a yacht broker. Hood met Michael Mosdell ("Mosdell") who asked him to design a small boat. After seeing the design, Mosdell and Hood went into the

business of making boats. Hood worked part time on the vessel while he also worked as a yacht broker. Mosdell also worked on the project on a part time basis.

In June of 1996 Mosdell and Hood incorporated Super Cat for the purpose of constructing catamaran boats. Mosdell was the president, secretary and sold shareholder. Earlier in the year, Hood's employment as a yacht broker ended when the business was sold. Mosdell placed an advertisement for a marine engineer (as an employee) and hired Hood. The adjudicator in the original Decision concluded that the advertisement was written to ensure that Hood was the successful applicant. In any case, Super Cat did offer Hood a position, and a consulting firm acting on behalf of Super Cat applied to Human Resources Development Canada (HRDC) for a work permit for Hood. On July 23, 1996, HRDC issued Hood a work permit.

The adjudicator in the original Decision found that Super Cat and Hood collaborated in making representations to HRDC that were less than truthful. Mosdell wished to assist Hood in becoming established in Canada, a goal Hood obviously shared. Persons who were familiar with the Super Cat business described Hood and Mosdell as partners. Mosdell financed the venture, but Hood was responsible for the operations. Payments to Hood by another company Mosdell controlled were described as loans. Mosdell testified that, had the business been successful, Hood would have received shares, a directorship and income from Super Cat. During the rather short life of Super Cat, Hood received neither shares nor a directorship. The business did not succeed, and Mosdell withdrew his financial support in October 1997.

Evidently, Hood and Mosdell had a serious falling out. While Hood was out of the country, Mosdell locked him out of the company's premises. Hood wrote to Mosdell in February 1998 alleging a breach of a joint venture agreement and asserted that Mosdell could be liable for damages. Subsequently, Hood filed a complaint with the Employment Standards Branch claiming unpaid wages and vacation pay for the period of June 1996 to November 1997. The Director's delegate found that Hood had been an employee of Super Cat, based on the advertisement Super Cat had placed for an employee, the requirements for a work permit for foreign nationals, a letter to HRDC from the consulting firm in support of Hood's application for a work permit and Super Cat's failure to offer Hood shares or a directorship.

The adjudicator reviewed these facts and concluded that "the true substance of this matter is a dispute concerning a business relationship between the parties." He noted that Hood's first recourse after the business closed was to allege a breach of a joint venture agreement. The adjudicator further noted that Hood ran Super Cat, exclusively during Mosdell's frequent absences from the country. Hood did not demand wages for almost 18 months, letting Super Cat's alleged liability accumulate during that time. The adjudicator also evaluated the credibility of the witnesses who appeared before him.

After reviewing all of the evidence and argument before him, the adjudicator cancelled the Determination, effectively denying Hood's claim for unpaid wages, on the grounds that Hood had not been an employee of Super Cat.

## **ANALYSIS**

Section 116(1) of the *Act* gives the Tribunal the authority to reconsider any order or decision of the Tribunal. On numerous occasions, the Tribunal has emphasized that the circumstances under which an application for reconsideration will be successful are limited (see Director of Employment Standards, BC EST #D475/98, Reconsideration of BC EST #D037/98). The relevant grounds for reconsideration include:

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

The grounds for Hood's request for reconsideration were that he was unaware of the formality of the appeal proceedings and the nature of the evidence he would be required to present. As a result, three witnesses who had knowledge of the case were not called to testify. According to Hood's counsel, these individuals would testify that he was an employee of Super Cat.

Counsel for Super Cat argued that the appeal of the Determination issued by a delegate of the Director of Employment Standards stated the reasons for the appeal in detail. Hood replied with a 14-page letter. All parties received a brochure explaining the nature of the proceeding, which included a statement that the parties would have to present evidence, usually by testimony of witnesses and oral statements. Under these circumstances, Hood could have prepared himself for the appeal hearing, including engaging counsel if he wished.

The arguments Hood raised in support of his request for reconsideration were the same positions he took in his post hearing statement to the adjudicator. The adjudicator considered them in some detail in the original Decision. The hearing before the adjudicator consumed a full day. Hood made filed a written submission after the hearing closed. In his submission, Hood stated that he was disadvantaged in the hearing because he misunderstood the nature of the proceeding. He stated that he had discussed the hearing with two potential witnesses, neither of whom was willing to appear. He requested that the hearing be re-opened to give him the opportunity to hear additional evidence.

The adjudicator considered this submission in some detail and concluded that Hood had "a very gentle experience with the adversarial process" and that it would have been helpful to hear from

"the two witnesses who Hood chose not to call" (p. 4). The adjudicator stated that Hood appeared prepared to participate and did give evidence, as well as cross-examining witnesses. However, because the two witnesses Hood mentioned did not appear, the adjudicator gave limited weight to letters from them. Finally, the adjudicator concluded (p. 4):

In my view, there was not a power imbalance between the parties such that this hearing could be considered to have been an unfair hearing. At no time during the hearing did Mr. Hood request an adjournment to obtain counsel.

Given the nature of the issue before him, the adjudicator based the original Decision on the evidence of the nature of the relationship between Super Cat and Hood and a brief statement of relevant case law. He also noted that Hood was an "articulate, bright and very talented individual."

The request for reconsideration fundamentally addresses one of the grounds for reconsideration cited above: a failure to comply with the principles of natural justice.

Hood's argument is identical to his post hearing statement. The issue of representation at the hearing was thoroughly reviewed by the adjudicator in the original Decision. He concluded that Hood had been afforded the opportunity to put his case before the Tribunal and that he had not been disadvantaged by his failure to be represented by counsel. After the hearing, Hood evidently had second thoughts and sought to re-open the proceeding to call two witnesses, an argument he repeated in the request for reconsideration (except that he wanted to call three witnesses). Many hearings of the Tribunal are conducted without counsel. Section 2 of the Act provides for "fair and efficient procedures for resolving disputes over the application and interpretation of this Act. The Tribunal normally declines to reconsider decisions when the appellant seeks to re-argue the original case, as Hood does here. Hood did not present any new evidence in support of his request. He merely stated that new witnesses would support his case.

In keeping with the purposes of the statute, the Tribunal should not provide multiple opportunities for parties to present their cases.

## **ORDER**

For these reasons, the request for reconsideration is denied. No further issue remains to be decided.

Mark Thompson  
Adjudicator  
Employment Standards Tribunal