

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 -

The Director of Employment Standards
("The Director")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATORS: Lorna Pawluk
Geoffrey Crampton
Richard Longpre

FILE No.: 98/91

DATE OF DECISION: April 28, 1998

BC EST #D131/98
Reconsideration of BC EST#D435/97

DECISION

OVERVIEW

This is an application under Section 116 of the *Employment Standards Act* for reconsideration of a Decision (BC EST #D435/97) issued by the Employment Standards Tribunal on September 12, 1997 (the "Original Decision"). The Original Decision varied a Determination issued on June 17, 1997 by the Director of Employment Standards; the Adjudicator ordered InterCan to pay \$3,600.00 to John Robert Dacre ("Dacre" or the employee).

The Director applies for reconsideration of the Tribunal's decision on the grounds that the Adjudicator committed an error of fact and law when he found that a settlement had been reached between Dacre and David Koonar ("Koonar") on behalf of InterCan and that the settlement ought to have been "crystallized into a Determination in favour of Dacre".

Dacre requested an oral hearing to be held in this case. The Registrar of the Tribunal made the decision, on a preliminary basis, to deny this request. There is discretion in the presiding panel, notwithstanding the preliminary decision, to hold an oral hearing if it is felt that one is necessary for a proper resolution of all of the outstanding questions. After examining the evidence and arguments, together with the Decision of the Adjudicator, we agree that an oral hearing is not necessary properly determine the questions which arise before us on the reconsideration application.

ISSUE TO BE DECIDED

The issue is whether the Adjudicator committed an error of fact or law which calls for reconsideration of the Original Decision (BC EST #D435/97) under section 116 of the *Act*.

FACTS

Dacre was employed with InterCan between early 1988 and February 19, 1997. He filed a complaint with the Employment Standards Branch claiming unpaid vacation pay for the period of March 1, 1996 to March 1, 1997. With the intervention and assistance of the Director's delegate, Koonar, on behalf of InterCan, and Dacre agreed to settle the claim for \$3,600.00, (six per cent of Koonar's wages for the period in question). Koonar agreed to arrange for an InterCan cheque to be sent to the Branch for payment of the settlement but no cheque was forthcoming. Nor was any other sum sent to fulfill the settlement agreement. The Director's delegate then issued a Determination, dated June 17, 1997, dismissing Dacre's claim for vacation pay on the grounds of a lack of evidence.

Dacre appealed to the Employment Standards Tribunal under section 112 of the *Act*; the Adjudicator in the Original Decision upheld the terms of the settlement. He concluded that Koonar, a vice-president of InterCan since 1989, had agreed to the settlement and that

BC EST #D131/98
Reconsideration of BC EST#D435/97

Intercan was renegeing because it "did not have sufficient records in its possession to justify paying Dacre any vacation pay". Intercan also argued that Dacre was not an Intercan employee but rather one of a related company, Lan Can Food Corp. The Adjudicator, in the Original Decision, did not determine the merits of Intercan's defence to Dacre's claim but rather concentrated on the settlement agreement and Intercan's failure to comply with its terms. The Adjudicator thus varied the Determination to require payment of \$3,600.00 plus interest in accordance with section 88 of the *Act*.

ANALYSIS

Section 116 of the *Act* confers reconsideration powers on the Tribunal:

- 116(1) On application under subsection (2) or on its own motion, the tribunal may
1. reconsider any order or decision of the tribunal, and
 2. 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.

A reconsideration application will succeed in narrow circumstances. *Zoltan Kiss* (BC EST #D122/96) outlines the principles used by this Tribunal in the exercise of its reconsideration powers:

- failure to comply with the principles of natural justice
- mistake of fact
- decision inconsistent with prior decisions indistinguishable on their facts
- significant new evidence not available to the first adjudicator
- mistake of law
- misunderstanding of or failure to deal with a serious issue
- clerical error

This is not an opportunity to rehear the evidence or to re-examine the arguments before the original Adjudicator. Rather, it provides a limited opportunity for review, on the grounds identified above.

The Director argues that the Adjudicator erred in finding that a settlement was reached between the parties and ought to have formed the basis of a Determination: "there can be no issue that the settlement agreement was a failed one". It is further argued that the Adjudicator's analysis in the Original Decision is contrary to section 78 of the *Act* and that the Director's Delegate did what the *Act* required by investigation the complaint and dismissing it under section 79(3).

BC EST #D131/98
Reconsideration of BC EST#D435/97

Dacre argues that the reconsideration application should be dismissed because the Delegate failed to carry out a proper investigation:

The delegate after talking to Bob Constabaris did not give me a chance to prove that Bob Constabaris's allegations were incorrect and if he had he would have made a different determination originally, thus making an appeal unnecessary. When the delegate was confronted on the phone of this fact his response was oh well you will be able to appeal the decision and any documents or facts could be presented at this time. It was 1 day from the time he talked to Bob Constabaris until his determination, with no input from myself. This is by far not a proper investigation.

He further takes issue with the Adjudicator's analysis of the evidence and submits that the evidence, in fact, supports a Determination which requires payment of vacation pay by Intercan.

Intercan Food Corporation did not file any submissions.

It is useful to begin the analysis in this case with a discussion of the relevant statutory provisions. Section 78 outlines the Director's powers to settle a complaint:

- 78(1) The director may do one or more of the following:
assist in settling a complaint or a matter investigated under section 76;
- (a) arrange that a person pay directly to an employee or other person any amount to be paid as a result of a settlement;
 - (b) receive on behalf of an employee or other person an amount to be paid as a result of that settlement.
- (2) The director must pay money received under subsection (1)(c) to the person on whose behalf the money was received.
- (3) If a person fails to comply with the terms of a settlement, the settlement is void and the director may
- (a) determine the amount the person would have been required to pay under section 79 had the settlement not been made, and
 - (b) require the person to pay that amount.

(Section 76 outlines the Director's powers and obligations to deal with a complaint while section 79 outlines the Director's powers to issue a Determination.)

Under section 78(1), the parties to a complaint, with or without the assistance of the Director, may settle a dispute on any terms they find appropriate. It is not necessary for the Director to approve the terms or to even inquire into the basis of the settlement. Where a settlement requires payment of money, the sum may be paid directly to the affected party or received by the Director on behalf of that person. The Director is then obliged by the terms

BC EST #D131/98
Reconsideration of BC EST#D435/97

of Section 78(2), to convey that money to the appropriate party. Section 78(3) outlines what happens when one of the parties fails to comply with the terms of a settlement: the settlement is "void" and under section 78(3)(a), the Director has the discretion to then proceed under section 79.

The Director is not obliged to proceed under section 79 but rather is granted the discretion to do so. Here, the Director's delegate investigated the complaint and issued a Determination in keeping with that investigation. The Adjudicator concluded that the Director's delegate should have, instead, incorporated the terms of the settlement into a Determination. However, we find that this conclusion misinterprets Section 78(3) by requiring the Director to exercise her discretion in a particular way. Thus, we find that the Original Decision contains an error of law and it should be varied.

In the result the Original Decision will be varied to the extent that it incorporated the terms of the settlement. The Adjudicator did not canvas the question of whether Intercan in fact owed Dacre for unpaid vacation pay. That question is referred back to the Adjudicator under Section 116 (1)(b).

ORDER

Pursuant to section 116 of the *Act*, we vary the Original Decision as described and refer the matter back to the Adjudicator to consider the question of vacation pay entitlement under the Determination dated June 17, 1997.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal

Geoffrey Crampton
Chair
Employment Standards Tribunal

Richard Longpre
Adjudicator
Employment Standards Tribunal