

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration
pursuant to Section 116 of the
Employment Standards Act S.B.C. 1995, C. 38

-by-

Patrick Downton
("Downton")

and

Ravens Agri-Services & Products Inc.
("Ravens ")

-of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

Adjudicator: Mark Thompson

File No.: 96/552

Date of Decision: April 5, 1997

DECISION

OVERVIEW

This was an application in the first instance by Mr. Patrick Shane Downton ("Downton") under Section 116(2) of the *Employment Standards Act* (the "Act") for a reconsideration of Decision No. 369/96 (the "Decision") issued by the Tribunal on December 23, 1996.

Downton initiated the application on January 19, 1997. In its reply of January 31, 1997, Downton's former employer, Ravens Agri-Services & Products, Inc. ("Ravens"), also requested a reconsideration of the Decision. The Decision dealt with two issues: was Downton a manager as defined in the Act's regulation; and was Downton discharged for cause. The Adjudicator in the Decision found that Downton was not a manager under the Regulation and hence entitled to overtime pay. Secondly, the Adjudicator decided that Ravens had just cause to discharge Downton on February 28, 1996, so that Downton was not entitled to compensation for length of service.

Downton's application for reconsideration was based on his position that Ravens did not have just cause to discharge him. Ravens sought a "re-investigation" of Downton's status as a manager.

Downton stated his reasons for reconsideration in a letter to the Tribunal of January 19, 1997. He addressed a number of statements in the Adjudicator's decision that he believed were inaccurate. In particular, he pointed out that he had not received any warning regarding his work before February 26, two days before he was terminated. The decision noted that Ravens is a small company, and Downton objected to a different standard being applied to small employers. Downton disagreed with statements in the decision that he was guilty of insubordination or persistent tardiness. Finally, he stated that "the crew", not himself had damaged a company vehicle.

Ravens replied by reciting a number of incidents of Downton's poor performance, most of which had been presented to the Director in support of the original case. In addition, Ravens offered to make other witnesses available in support of its assertion that Downton was terminated for cause. Ravens also pointed out that the Branch does not require written warnings prior to dismissals for cause.

Ravens also requested a "re-investigation" of Downton's status as a manager. The request contained copies of a number of pages of Downton's time sheets to support its claim that there were errors in the original Determination regarding Downton's right to minimum daily pay. Ravens continued by providing a detailed description of Downton's duties with the company in support of its assertion that he was a manager and thus not entitled to overtime pay. The thrust of Ravens argument was that Downton supervised employees every day, and that a small firm would not have several managers with the authority to hire, fire and the like. Ravens also rebutted some statements from Downton made earlier in the proceedings.

Ms. Lynne Egan, the Director's delegate in the case, pointed out that Ravens had not challenged any of her calculations of wages owing earlier in the case.

RECONSIDERATION OF ORDERS AND DECISIONS

The language of the *Act* covering reconsideration of decisions of the Tribunal is quite general. Section 116(2) merely states that " *a person named in a decision or order of the tribunal may make an application*" [for reconsideration]. The Tribunal has provided additional guidance for adjudicators in previous decisions.

In *Zoltan T Kiss*, BC EST #122/96, the Tribunal set out the criteria for reconsideration of a decision as follows:

Section 116 does not set out the grounds on which a reconsideration may occur. Some of the more usual or typical grounds why the Tribunal ought to reconsider an order or a decision are:

a failure by the Adjudicator to comply with the principles of natural justice;

there is some mistake in stating the facts;

a failure to be consistent with other decisions which are not distinguishable on the facts;

some significant and serious new evidence has become available that would have led the Adjudicator to a different decision;

some serious mistake in applying the law;

some misunderstandings of or a failure to deal with a significant issue in the appeal; and

some clerical error exists in the decision.

This, of course, is not an exhaustive list of the possible grounds for reconsidering a decision or order.

The Tribunal in *Kiss* continued to state the rationale for exercising its power to reconsider orders and decisions with great caution: the finality of Tribunal decisions; the limited authority of the Tribunal to deal with determinations; the unfairness of the Tribunal allowing in effect a second hearing of an appeal to recite evidence previously presented and the goal of the legislation to provide speedy and relatively informal resolutions of disputes over the application of the *Act*. (See also, *Khalsa Diwan Society*, BC EST #D199/96.)

Before applying these principles, it is useful to recall the process by which issues reach the Tribunal. One of the parties, in this case, Downton, complains to the Director that its rights under the *Act* have been violated. Nonnally, the Director assigns a staff person from the Employment Standards Branch to investigate the complaint. Each party has the opportunity to persuade the Branch representative that his or her position is correct. The staff person, the Director's "Delegate", then issues a determination, including a finding of fact and an application of the statute. Any party affected by the determination has the right to appeal part or all of it to the Tribunal. All parties to the appeal have the right to appear before the Tribunal and present evidence and argument in support of their positions. The adjudicator appointed by the Tribunal then issues a decision.

The outcome of this process is that persons involved in a dispute over the application of the *Act* have had two previous proceedings in which to convince a neutral that their position is correct. *Kiss* and *Khalsa Diwan Society, supra* are clear that a request for reconsideration is not an opportunity for one party to re-argue its case unless there has been a serious flaw in the proceedings leading up to the request for reconsideration. Neither party in this case has demonstrated that the law was not applied correctly or that "significant and serious new evidence" has become available that leads to the conclusion that the decision of the Tribunal should be altered.

ANAL YSIS

Downton argued that he was put on probation on February 26 and tenninated two days later, too short a time for him to have responded to the warning. However, the Adjudicator concluded on p. 6 that Ravens would have been justified in terminating Downton on February 26 for a variety of performance problems. The Adjudicator also concluded that Downton had been dishonest in his dealings with Ravens. These conclusions stand unchallenged. Furthermore, Downton had the opportunity at the original Tribunal hearing to present all relevant evidence in support of his case. In noting that Ravens is a small employer, the Adjudicator was not stating a different legal standard for large and small employers, merely acknowledging that small employers often conduct their affairs less formally than larger organizations.

Ravens attempted to challenge the calculations in the Deterlnination used to establish wages owed to Downton. That evidence should have been presented to the adjudicator in the original hearing. It would be unfair, expensive and contrary to the purpose of the *Act* to "provide fair and efficient procedures for resolving disputes" to admit a new analysis of evidence before the parties and the Tribunal at this stage of the proceeding.

Ravens's argument about Downton' s managerial status consists either of a restatement of positions advanced to the adjudicator in the original decision or what appears to be evidence available on the date of the original hearing. Again Ravens had the opportunity to present evidence on Downton's duties to the adjudicator in the original hearing. The adjudicator carefully considered the evidence before him in making his decision that Downton was not a manager. The Adjudicator properly concluded that not every employee with supervisory responsibilities is a "manager" under the *Act*. There is no basis in Ravens's request for reconsideration for overturning that decision.

ORDER

Pursuant to Section 116 of the *Act*, I decline to vary or cancel the Decision.

Mark Thompson
Adjudicator
Employment Standards Tribunal