

An Application for Reconsideration

- by -

Hallstead Plumbing Inc.
("Hallstead")

- 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: Fern Jeffries, Chair

FILE No.: 2002/081

DATE OF DECISION: May 8, 2002

DECISION

OVERVIEW

This is a request from the employer, Hallstead Plumbing Inc. (“Hallstead”) to reconsider a decision pursuant to Section 116 of the *Employment Standards Act* (the “*Act*”) that provides:

- (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.

The Determination issued by the Director October 5, 2001 found that Hallstead had contravened the *Act* by not providing notice or compensation in lieu of notice to Debebe Asrate (“Asrate”) whose employment was terminated by Hallstead. The Appeal Decision was issued February 12, 2002, following the appeal hearing on February 7, 2002. The Adjudicator found that Hallstead failed to prove that there was ‘just cause’ for the dismissal and confirmed the Determination. Hallstead now seeks reconsideration, claiming a breach in the principles of natural justice.

FACTS:

The facts are fully articulated in the Decision. Essentially they are that Asrate was working as a service technician for Roto Rooter Corporation – Vancouver Division when Hallstead took over the operation on October 18, 2000. Asrate’s employment commenced on October 27, 1994. On March 7, 2001, O’Reilly and Mendenhall, the two co-owners of Hallstead dismissed Asrate.

Either Mendenhall and/or O’Reilly talked to Asrate on at least 4 occasions about deficiencies in his performance. On February 10, 2001, Mendenhall and O’Reilly met with Asrate. O’Reilly and Mendenhall maintain that at that meeting, they told him that his job was in jeopardy, that he was put on warning that further deficiencies in performance would result in the termination of employment. The next complaint about performance came on March 7, 2001 and at that time he was terminated.

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 issue raised is whether the original decision correctly concluded that Hallstead did not meet the burden of proof required to overturn the determination awarding compensation for length of service.

ANALYSIS

The Tribunal reconsiders a Decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *Act*

detailed in Section 2 “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this *Act*.”.

In *Milan Holdings* (BC EST # D313/98) the Tribunal set out a principled approach in determining when to exercise its discretion to reconsider. The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases.

The Tribunal may agree to reconsider a Decision for a number of reasons, including:

- The adjudicator fails to comply with the principles of natural justice;
- There is some mistake in stating the facts;
- The Decision is not consistent with other Decisions based on similar facts;
- Some significant and serious new evidence has become available that would have led the Adjudicator to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The Decision contains some serious clerical error.

Zolton Kiss, (BC EST#D122/96)

While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.

This application from Hallstead appears to do just that. While the application is made on the allegation of breach of natural justice, there is no substantiation. The Adjudicator is charged with determining credibility in the face of conflicting testimony and has done just that. The reasons provided in the Decision explain this. Further, the Decision makes it clear that the burden of proof with respect to a ‘just cause’ claim rests with the employer. This is substantiated in the reasons provided and precedents for this position are provided.

At reconsideration, Hallstead reargues the case. While I understand that Hallstead genuinely believes that it provided a clear warning to Asrate that his job was in danger, the Adjudicator found that this did not meet the established tests.

Hallstead also seeks reconsideration because it wishes to present new evidence that Asrate has a propensity to be deceitful. With respect, this information was available at the time of appeal. It could have been presented to the Adjudicator and the Adjudicator would have determined how much weight to assign to this. I do not accept the claim that there is “compelling new evidence” such that reconsideration is warranted.

In summary, the applicant has not met the threshold for reconsidering the adjudicator’s decision.

ORDER

Pursuant to Section 116 of the *Act*, I order the original decision, BC EST #D074/02 be confirmed.

Fern Jeffries
Adjudicator
Employment Standards Tribunal