An Application for Reconsideration

- by -

Black Fin Marina Ltd.
(“Black Fin” or the “Employer”)

- 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: Ib S. Petersen

FILE No.: 2003A/096

DATE OF DECISION: June 19, 2003

DECISION

APPEARANCES:

Mr. Murray Erickson	on behalf of the Employer
Ms. Sharlene Bentley	on behalf of herself
Mr. Ian MacNeill	on behalf of the Director

OVERVIEW

This is an application by Black Fin ("Black Fin or the "Employer") pursuant to Section 116 of the *Employment Standards Act* (the "*Act*"), against a Decision of the Employment Standards Tribunal (the "Tribunal") issued on March 18, 2003 (#D094/03) (the "Decision"). In the Decision the Adjudicator confirmed a Determination, dated December 9, 2002, which had found that Ms. Bentley was owed compensation for length of service based on eight years' service, eight weeks, for a total of $2,037.76.

ANALYSIS

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

In a recent decision the Tribunal summarized the principles with respect to reconsideration (Re *The Director of Employment Standards and Adam Ellison*, BC EST # RD122/03):

> 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:
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> - 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.

Fundamentally, the Applicant takes issue with Ms. Bentley's length of service and, thus, the amount of compensation she may be entitled to. As I understand it, Ms. Bentley was absent from work from late 1996 until September 1, 1997. The Employer's view now is that her employment was terminated and she started afresh in 1997. Ms. Bentley's view was that she was on pregnancy leave and her employment continued.

The application sets out three grounds for reconsideration. First, the Applicant says that an admission of fact regarding Ms. Bentley's length of service, that she "was employed ... from September 1, 1993-December 30, 2001," while "true," should have been considered in light of other information presented. Her employment was not continuous. Second, the Applicant says that a Record of Employment incorrectly cited in the Decision stated employment as September 1, 1993-December 30, 2001 when, in fact, the dates in the ROE were September 1, 1997-December 30, 2001," supporting its position on the issue of Ms. Bentley's length of service. Third, the Applicant says that the claim for compensation for length of service was not a part of the original complaint.

The Delegate and Ms. Bentley argue that the application is essentially an attempt to re-argue the matters before the Adjudicator in the original Decision.

After reviewing the original decision, the Determination and the material on file, I am not satisfied this is a case that raises a serious question regarding the original decision that warrants reconsideration. In my view, the application is little more than an attempt to rehash its case before the Adjudicator. There is, therefore, no need to proceed to the second stage of the reconsideration process.

In my view, nothing turns on the dates erroneously cited from the ROE. The agreed statement of facts, signed by the Employer, provided in clear language that Ms. Bentley "was employed ... from September 1, 1993-December 30, 2001." A statement attached to the agreed statement of facts specifies that she "was employed ... from September 1, 1993 as a fuel dock attendant. In September 1997 some

administrative duties were added ... and the position name changed to Marina manager." The Employer knew that Ms. Bentley had been on a pregnancy leave before signing the agreed statement of fact--there is a reference to that in the statement. Before the original panel, the Applicant argued that employment was not continuous. This issue was dealt with by the Adjudicator--correctly, in my view. There is no merit to the suggestion that the Adjudicator--short of duress, fraud or some other similar circumstance--should have allowed the Employer to resile from this admission.

The Employer reiterates its argument that it was not given proper notice of the claim for compensation length of service. This matter was, in my view, set out on with sufficient clarity in the agreed statement of facts, under the heading "Issues in Dispute," and was, moreover, set out on the complaint form. Under the heading "what do you believe you are owed?" Ms. Bentley filled in "compensation for length of service"--two months wages. It was also clear from the complaint form that Ms. Bentley considered that she had been employed for eight or more years. This was dealt by the adjudicator. He rejected, correctly, in my opinion, the suggestion that the Employer did not have sufficient notice. There is no merit to this ground.

In short, the application fails.

ORDER

Pursuant to Section 116 of the *Act*, the application for reconsideration is dismissed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal