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-

Linda L. Lohnes

("Lohnes")

-of a Decision issued by-

The Employment Standards Tribunal

(the "Tribunal")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: File No. 96/191

DATE OF DECISION: August 23rd, 1996

DECISION

OVERVIEW

Linda L. Lohnes ("Lohnes") has filed an application, pursuant to section 116 of the Employment Standards Act (the "Act"), for reconsideration of an adjudicator's decision to cancel Determination No. CDET 001289 issued by the Director of Employment Standards on February 22nd, 1996 (the "Determination"). Pursuant to the Determination, Lohnes was awarded the sum of $833.60 as severance pay (and interest) in lieu of notice of termination.

The adjudicator, following an oral hearing, issued a lengthy written decision in which she concluded that the employer, MEM Services Ltd. ("ServiceMaster") terminated Lohnes, on July 22nd, 1996, for just cause. In particular, Lohnes was absent from work without permission and had refused to return to work when called upon to do so.

ANALYSIS

The present application for reconsideration is contained in a letter to the Tribunal dated July 29th, 1996. Among other things, Lohnes contends that the adjudicator should not have relied on letters from persons who were not in attendance at the hearing. In particular, Lohnes refers to letters or reports apparently submitted by ServiceMaster from Sam Sharma, K. Kraft, W. Myers and T. Seaman.

I have carefully reviewed the extensive Reasons of the adjudicator in this matter. It is clear that the adjudicator did not rely on the evidence of any of Sharma, Kraft, Myrs or Seaman in reaching her conclusion that ServiceMaster had just cause to terminate Lohnes. The case turned on a credibility issue involving Lohnes and the two principals of ServiceMaster, Ron and Betty McGregor. In the end result, the adjudicator preferred the evidence of Ron and Betty McGregor over that of Lohnes. The adjudicator gave lengthy Reasons for her conclusion on this point which included a reference to corroborating notes from the Employment Standards Officer, the correspondence from the McGregors to Lohnes, and the admitted conduct of both Lohnes and the McGregors. Nowhere in her Reasons does the adjudicator say that she made a credibility determination based on the letters or reports of Sharma, Kraft, Myers or Seaman.

Lohnes also complains that she was "totally unprepared to defend [herself]" at the hearing. The short answer to this submission is that parties are themselves responsible for ensuring that they *are* prepared to present their case to the Tribunal. Lohnes also says that she was "upset and unwell" at the hearing; if she was not prepared to proceed on the day set for the hearing she should have asked for an adjournment. She did not do so. I might parenthetically add that, based on the record before me, it appears that Lohnes was able to make a full and complete submission to the adjudicator--her real complaint appears to be with the content of the adjudicator's award (she disagrees with it) rather than with the hearing process itself.

Finally, Lohnes submitted a letter from a J. Bejarano which letter was not given any weight by the adjudicator because Bejarano was not available for cross-examination. This evidence was properly excluded as hearsay evidence; Lohnes was free to call this person as a witness; she simply failed to do so.

The Tribunal has now issued several decisions regarding the permissible scope of review under section 116 of the Act (the "reconsideration" provision). In essence, the Tribunal has consistently held that applications for reconsideration should succeed only when there has been a demonstrable breach of the rules of natural justice, or where there is compelling new evidence that was not available at the time of the appeal hearing, or where the adjudicator has made a fundamental error of law. I am not satisfied that any of these criteria apply in the case at hand. I can see no basis for setting aside the decision of the adjudicator in this matter.

ORDER

The application to vary or cancel the decision of the adjudicator in this matter is refused.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal