

An Application for Reconsideration

- by -

Rebecca Spinner
("Spinner")

- 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: William Reeve

FILE No.: 2003/34

DATE OF DECISION: July 8, 2003

DECISION

OVERVIEW

This is a Request for Reconsideration (the “Request”) pursuant to section 116 of the *Employment Standards Act* (the “*Act*”). The Request was filed by Rebecca Spinner (“Spinner”). The applicant seeks reconsideration of Decision BC EST #D099/03 rendered by Adjudicator Carol L. Roberts on March 25, 2003. That Decision Ordered that the Determination under appeal be referred back to the Delegate of the Director of Employment Standards (the “Director”) “...to investigate what additional amounts, if any, may be owed to Ms. Spinner as a result of the production of additional records.”

Subsequent to the rendering of Decision BC EST #D099/03 a settlement agreement between the parties was made. Several weeks later the present Request was filed by Ms. Spinner.

This Decision is made based on the text of Decision BC EST #D099/03, on the text of the Determination under review in that Decision, on the written records of the settlement submitted to the Tribunal by the Delegate, on the written Request submitted by Ms. Spinner and on the correspondence of the Tribunal in response to that Request. The other parties were not advised of the Request nor were they invited to respond to it.

ISSUE

The issue is whether the Tribunal should exercise its discretion under section 116 of the *Act* to reconsider Decision BC EST #D099/03. That section of the *Act* states,

- 116**(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) confirm, vary or cancel 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.

The first issue to address is whether the Tribunal should exercise its discretion to reconsider the Decision. If it is decided that the request raises sufficient reasons to justify a Reconsideration then the Tribunal may vary or cancel the Decision or refer the matter back to the original panel.

THE FACTS

In response to an appeal filed by Ms. Spinner the Tribunal issued Decision BC EST #D099/03 on March 25, 2003. The Decision stated that the issues to be decided were whether the Delegate,

1. correctly calculated the wages owed to Ms. Spinner; and
2. erred in determining that Ms. Spinner’s employment was not terminated because she filed a complaint with the Employment Standards Branch.

With respect to the second issue the Adjudicator concluded,

“I find there was sufficient evidence to support the delegate’s conclusion that Ms. Spinner’s employment was terminated because of reasons unrelated to the filing of her second complaint, and dismiss the appeal in this respect.”

With respect to the first issue the Adjudicator ordered,

“I Order, pursuant to Section 115 of the Act, that the Determination, dated November 27, 2002 be referred back to the delegate to investigate what additional amounts, if any, may be owed to Ms. Spinner as a result of the production of additional records.”

When a referral-back order such as this is issued, the Tribunal expects to receive, subsequently, either a referral-back report from the Director or advice that the matter has been settled. On May 14, 2003 the Delegate sent to the Tribunal a short report advising that the matter was settled. The report stated in part,

“-- As requested here are all the signed documents putting a final closure on this file.

“-- You will notice Ms. Spinner also signed a receipt of payment form for \$535.00 This money had been paid near the beginning of the dispute & has been sitting in trust awaiting the outcome/decision on the other issues.

“-- Everything is now resolved.”

Attached to the report was a document entitled “Receipt of Payment and Termination of Complaint”. In it Ms. Spinner acknowledged receipt of three payment amounts, \$28.33, \$2,953.87 and \$435.42, described as being “in settlement of my complaint.” It stated further that, “I understand that the investigation into my complaint is complete and that no further action will be taken on my behalf under the British Columbia Employment Standards Act.” It was dated May 8, 2003 and signed by “R. Spinner.” Another similar form, referring to an amount of \$535.00, dated May 7, 2003, and signed by “R. Spinner” was also provided by the Delegate. The delegate’s submission also included a document entitled “Settlement Agreement” that set out the terms of a settlement between the parties. It stated in part,

“This agreement contains the entire agreement between the parties in respect of the complaint(s) and replaces all other representations or agreements. This agreement comprises full and final settlement of any and all issues arising from the complaint(s).”

The document is signed by “R. Spinner” and refers to April 2003 although no date in the month has been entered.

In the Request dated May 29, 2003 Ms. Spinner refers to the issue of the circumstances of her termination but makes no reference whatsoever to the settlement.

Following receipt of the Request, acting in my role as Tribunal Administrator, I wrote to Ms. Spinner on June 2, 2003 asking her to explain the Request in relation to the settlement documents. The letter advised her that if the Tribunal did not receive an adequate explanation it might decide to dismiss the Request. Ms. Spinner was given until June 6, 2003 to respond. No response was received. On June 9, 2003 I received a telephone call from Ms. Spinner, responding to a telephone message that had been left for her when her Request had been first received by the Tribunal. In the course of our conversation she acknowledged receipt of my letter of June 2, 2003 but stated that she had not opened it. Asked to explain

how, after accepting settlement money and signing documents that indicated acceptance of a “full and final settlement” she could be requesting that there be a reconsideration of the Tribunal’s Decision she stated that she was in a hurry and had not read what she signed. She was urged to respond in writing to the letter of June 2, 2003, however no response has been received.

ANALYSIS

The *Act* intends that Adjudicator’s appeal Decisions are “final and binding”. Therefore, the Tribunal only agrees to reconsider a Decision in exceptional circumstances. Reconsideration is not a right to which a party is automatically entitled, rather it is undertaken at the discretion of the Tribunal. The Tribunal will not normally agree to reconsider a Decision if the intent is to have the Tribunal “re-weigh” evidence previously considered or dismissed by an Adjudicator or to seek a “second opinion” when a party does not agree with an Adjudicator’s Decision. The grounds on which a reconsideration might occur are described in a number of previous Tribunal decisions, notably the *Zoltan Kiss Decision* (BC EST #D122/96) and the *Milan Holdings Decision* (BC EST#D313/98).

Some of the reasons why the Tribunal might agree to reconsider an order or Decision are:

- The Adjudicator failed 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.

The issue raised in the Request appears to a question of when the employer became aware of a complaint made by Ms. Spinner and whether the employer decided to terminate Ms. Spinner’s employment before or after becoming aware of the complaint. These matters relate to Ms. Spinner’s complaint that she was terminated as a result of her filing a complaint in violation of section 83 of the *Act*. The information obtained by Ms. Spinner, through a request under the *Freedom of Information and Protection of Privacy Act*, indicates that the employer was seeking advice from the Delegate on the employer’s exact obligations under the *Act* on a date after it became aware of the complaint by Ms. Spinner. This issue of the sequence of events was addressed by the parties in the oral hearing held by the Adjudicator. The Adjudicator stated in her findings, after weighing the evidence,

“I find there was sufficient evidence to support the delegate’s conclusion that Ms. Spinner’s employment was terminated because of reasons unrelated to the filing of her second complaint, and dismiss the appeal in this respect.”

Previously the Delegate had investigated the same issues and had reached a similar conclusion which was that there were a number of reasons, unrelated to the filing of Ms. Spinner’s complaint, that led to the ending of the employment relationship. I note that the document submitted as evidence by ‘Ms. Spinner in her Request was one that was apparently in the hands of the Delegate when the Delegate concluded that there had not been a violation of section 83 of the *Act*.

The document attached by Ms. Spinner to her Request does not meet the test of being something that would have led the Adjudicator to a different decision. At best it could be described as illustrative of the variety of not necessarily consistent evidence from different parties that the Adjudicator was called upon to weigh in reaching her decision. The Adjudicator had evidence from all parties on the issue of whether there was a violation of section 83 of the *Act*. She weighed that evidence and came to the same conclusion that had earlier been reached by the Delegate.

I find, therefore, that the Request does not have sufficient merit to justify a reconsideration of the Decision. No convincing reason has been presented as to why the original Decision is sufficiently flawed that the Tribunal would be justified in exercising its discretion to reconsider the matter. The present Request fails to meet the standards set out in the earlier decisions noted above. The issue raised by Ms. Spinner in the Request appears to be an attempt to revisit the issue of the circumstances of her termination, an issue already considered and decided by the Adjudicator in the original Decision.

Even if I had found that there was good reason to reconsider the Decision on the basis of the evidence and submissions from Ms. Spinner there exists a second reason why the Decision should not be reconsidered. The Request ignores the settlement reached by the parties.

The documents submitted by the Delegate show that the three essential elements of a binding settlement agreement were present. There was an offer by the employer, the offer was accepted by Ms. Spinner and consideration flowed to Ms. Spinner from the employer. There has been no challenge raised by Ms. Spinner to the existence or to the binding nature of the settlement agreement, nor has there been any explanation as to why the Request was made, about three weeks after the settlement was perfected through an exchange of cheques. Ms. Spinner states that she did not read what she was signing when she signed the settlement documents. This may be true in a literal sense however it is hard to believe that she did not understand that there was a settlement agreement or that by putting her signature on the documents and accepting the cheques that were proffered to her that she was accepting and completing the settlement. She has not argued that the settlement was reached under any circumstance that would cast a shade on its validity or justify its being ignored or overturned.

Given these facts concerning the settlement the Tribunal could reasonably conclude that this Request is not brought in good faith. To reconsider a matter in such circumstances would not be an appropriate exercise of the Tribunal's discretion.

ORDER

Pursuant to section 116 of the *Act* the Tribunal, for the reasons given above, declines to exercise its discretion to reconsider the Decision.

William Reeve
Adjudicator
Employment Standards Tribunal