

BC EST #D229/98
Reconsideration of BC EST #D069/97

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of
the *Employment Standards Act* R.S.B.C. 1996, C. 113

- by -

Cecilia Policarpio
("Policarpio")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Lorna Pawluk

FILE NO.: 98/184

DATE OF DECISION: August 12, 1998

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DECISION

OVERVIEW

This is an application for reconsideration under Section 116 of the *Employment Standards Act* of Decision BC EST #D069/97 issued by the Employment Standards Tribunal on February 18, 1997. That Decision confirmed Determination #CDET 004510 issued by the Director of Employment Standards on October 31, 1996. The adjudicator in BC EST #D069/97 varied the Determination to pay Cecilia Policarpio ("Policarpio" or the "employee") based on normal hours of work at 8 hours per day and section 34 (minimum daily hours) for work performed on Saturdays and Sundays. He also concluded that the employer had just cause to dismiss Policarpio and therefore found no liability under section 3 of the *Act* for compensation for length of service.

Policarpio has applied for a reconsideration of the Tribunal's decision on the grounds that the original adjudicator breached the rules of natural justice by refusing to grant an adjournment.

ISSUE TO BE DECIDED

The issue is whether there are grounds to reconsider BC EST #D069/97.

FACTS

This reconsideration arises from a complaint filed by Ms Policarpio in connection with her former employment as a domestic for Margaret Evans. Ms Policarpio claimed she had not been paid for all hours worked, in breach of the *Act*, and that she had been wrongfully dismissed from her position. Mrs. Evans is now deceased; her son Walter Evans is the executor of her estate. On October 31, 1996, the Director of Employment Standards issued Determination CDET 004510 which ordered the estate to pay Ms Policarpio \$3,599.39, to reflect a 10 hour work day, Monday through Friday and for certain weekend work. The Determination identified certain other contraventions of the *Act* but they did not affect Ms Policarpio's entitlement. The Determination also found the estate liable for compensation for length of service under section 63 of the *Act*. The executor appealed on behalf of the estate to the Tribunal which issued *BC EST #D069/97* (February 18, 1997) confirming payment of wages based on an 8 hour work day and wages for minimum hours of work under section 34. The original adjudicator concluded that the employer had just cause for termination and thus had no liability under section 63 of the *Act*.

On August 19, 1997, the Tribunal received a letter from legal counsel, Ms Ensminger at the West Coast Domestic Workers Association ("WCDWA") stating that Ms. Policarpio

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wished to apply for reconsideration under section 116 of the *Act*. No reason for the application was given, only that Ms Policarpio had instructed the association to bring the application on her behalf. (She had been previously represented by Mr. Cairns but he withdrew as counsel several days before the February 10, 1997 oral hearing which led to *BC EST #D069/97*.) On August 20, 1997, the Tribunal Registrar wrote back to Ms Ensminger indicating that the previous letter would not be considered an application for reconsideration. The Registrar's letter also enclosed an excerpt from *Zoltan Kiss B.C.E.S.T. #D 122/96* which outlined the grounds for reconsideration. On August 27, 1997, Ms Ensminger wrote back, saying that she would be away on vacation until September 8, 1997 and would not be able to prepare her submissions until she returned.

Nothing was heard from Ms Policarpio or the WCDWA until submissions dated March 12, 1998 and signed by Ms Chrest on behalf of the WCDWA. Those submissions argued that the original adjudicator breached the rules of natural justice by refusing to grant Ms Policarpio an adjournment to seek new legal counsel as her former representative had withdrawn from the case. It was submitted that Ms Policarpio had some difficulty with the English language and needed a representative to speak for her interests. She was taken by surprise as she had expected her representative to speak on her behalf at the hearing; on February 7th, she learned that he would not be attending the February 10th hearing. Finally, it is argued that the adjudicator failed to consider all of the factors relevant to Ms Policarpio's circumstances.

In response, the Director provided a brief overview of events and submitted the following:

Having attended several Tribunal Appeal Hearings, it has been my experience, that one would not need or require representation to handle that process, as it is arms length, fair, and impartial. The actual procedure is normally explained at the start of the hearing by the Adjudicator and questions, etc., are always welcomed. In my phone discussions with Ms Policarpio during the course of my investigation I found her to be quite clear and precise in her statements to me in response to questions asked, and I did not find that she had any difficulty with the English language.
(reproduced as written)

On behalf of the estate, Mr. Evans argues that Ms Policarpio has excellent English language skills and that legal counsel was not necessary at the oral hearing. He further objected to the delay in bringing the reconsideration application:

The amount of time taken by Ms. Policarpio to appeal this matter goes well beyond any reasonable period. Surely an consideration of an appeal time frame of 30, 60 or even 90 days would be appropriate? Not 365 plus days!
(reproduced as written)

He further points out that he is not Ms Policarpio's former employer but rather is involved in these proceedings as executor of his mother's estate. Prior to his mother's death, he was acting under a power of attorney and not as an employer.

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In final response, Ms Chrest argues that if there are grounds for reconsideration this matter should be returned to the original adjudicator for a rehearing on the merits of the claim as reconsideration is not an appropriate forum. She further argued that Ms Policarpio ought not be penalized for Mr. Kairns' representation and behavior. It was further submitted that Ms Policarpio viewed Mr. Evans as her superior and was intimidated at the prospect of arguing the details of her case against him. As for delay, Ms Chrest points out that the WCDWA had written to the Tribunal on August 17, 1997 indicating the desire for reconsideration.

ANALYSIS

Section 116 of the *Act* confers reconsideration powers on the Tribunal:

- 116(1) On application under subsection (2) or on its own motion, the tribunal may reconsider any order or decision of the tribunal, and cancel or vary 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.

This is not an opportunity to revisit the evidence or reconsider the original arguments. A reconsideration application will succeed in narrow circumstances. *Zoltan Kiss B.C. E.S.T. #D122/96* outlines the grounds where this Tribunal will exercise its reconsideration powers:

- failure to comply with the principles of natural justice
- mistake of fact
- decision inconsistent with prior decisions indistinguishable on their facts
- significant new evidence not available to the first adjudicator
- mistake of law
- misunderstanding of or failure to deal with a serious issue clerical error.

While section 116 of the *Act* does not specify a time limit for applications, this Tribunal has considered the need to bring reconsideration applications in a timely way. In *Director of Employment standards v. Employment Standards Tribunal B.C.E.S.T. #D112/98*, the Tribunal concluded that an application for reconsideration must be filed within a reasonable time and what constitutes "reasonable time" depends on the circumstances of each case. Where good cause can be shown for the length of the delay, the Tribunal will exercise its discretion to proceed. In *B.C.E.S.T. #D122/98*, the Director waited six months before seeking reconsideration, arguing that the time was necessary in order to canvass the

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law and prepare properly. The Tribunal rejected this argument, finding that it did not justify the six month delay.

The facts of this case are different. The original decision, BC EST #D069/97, was made on February 18, 1997. The Tribunal heard nothing from the employee or WCDWA until the August 18, 1997 letter (received on August 19, 1997) from Ms Ensminger who advised that Ms Policarpio had instructed WCDWA to seek reconsideration. In the August 20, 1997 response from the Tribunal Registrar, it was clear that that the previous correspondence did not initiate the reconsideration process and that further steps had to be taken. Ms Ensminger replied that she would be away on vacation until September 8th and would prepare submissions after that. Over six months passed before anything else was heard from Ms Policarpio or her representative and that was the March 12, 1998 letter from Ms Chrest which outlined the grounds for the reconsideration application.

Clearly the initial correspondence between the Tribunal and WCDWA did not commence the reconsideration process. This is also true of the August 27, 1997 letter from Ms Ensminger saying that she could begin to prepare the application upon her return from vacation; that letter neither outlines the grounds for the reconsideration nor a date for when the completed submissions could be expected. The application was commenced only when the grounds were outlined and this did not take place until the March 12, 1998 letter reached the Tribunal. Thus, the application was more than a year late. This is an extended delay and the surrounding circumstances do not convince me that it was reasonable. No explanation was offered as to why it took over six months for the first letter of August 12, 1998 to reach the Tribunal or why there was a further seven month delay before the March 12, 1998 letter. I note that there was a change in representatives, but this is not offered as an explanation and the mere change of representatives does not justify the delay.

In light of this, I cannot find the application was filed within a reasonable time after the original decision. It is thus not necessary to deal with other arguments concerning the merits of Ms. Policarpio's claim.

ORDER

Pursuant to section 116 of the *Act*, the request for reconsideration is denied.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal