Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Rhonda Bennett
("Bennett" or "employee")

- 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: Paul E. Love

FILE No.: 2001/013

DATE OF DECISION: May 16, 2001

DECISION

OVERVIEW

This is an application for reconsideration, made by Rhonda Bennett of a decision of the Employment Standards Tribunal ("Tribunal") dated November 9, 2000 (the "original decision"). The employee claims that the Tribunal erred in not permitting compensation for the use of a home office. The employee did not negotiate an amount to be paid by the employer for the use of her home as an office. The employee has no claim capable of enforcement as a contract because there is no contractual certainty concerning the amount to be paid. The employee says that the employer represented that it would pay a portion of the employee's rent and that the failure to pay is a misrepresentation within the meaning of s. 8 of the Employment Standards Act, R.S.B.C. 1986, c. 113 (the "Act"). In my view there was no "pre-contractual representation" and therefore s. 8 of the Act does not apply. If s. 8 is of application it is clear that any representation did not "induce" the employee to expend any money. The employee claims that a share of the rent is a business expense of the employer, within the meaning of s. 21(2) of the Act. With regard to s. 21 claim, the employee did not pay or incur any "business cost" on behalf of the employer. Further, the "expense" is not an expense which the employer required the employee to pay.

ISSUES TO BE DECIDED

As a threshold issue, is this a proper case for the exercise of the Tribunal's discretion to reconsider under s. 116 of the Act?

If this is a proper case for reconsideration, the issue raised by the Appellant is:

Did the Adjudicator err in finding that the claim for compensation for the use of the home office was not a claim falling within the application of s. 8 and s. 21 of the Act?

FACTS

This reconsideration application is decided upon written submissions of the employer, employee and counsel for the Director of Employment Standards. This case raises the novel issue of whether an employee, who uses a home office for employment purposes, is entitled to compensation, under the Act for the use of the space. The employee seeks compensation on the basis that while she was not out-of-pocket for rent, because 40% of her living space was now used as an office, the remaining personal space cost her more. She says that the adjudicator should award an amount by estimating the value of the loss: Harrison, BCEST #D217/96 (Stevenson).

I note that at all material times during the course of the relationship, the appellant worked from her home office. The employer closed down a Vancouver office, and this complaint arises from the date of the Vancouver office closure. The principal of the business carried on business from an office in Toronto.

Procedural History:

On September 21, 1999, a Delegate of the Director of Employment Standards issued a Determination finding that Ms. Bennett was not entitled to any wages on account of using her home as her office. This was appealed to the Tribunal, and came before Adjudicator Collingwood. In a decision dated January 24 (D044/00), Adjudicator Collingwood found that the claim of the employee was not a claim for wages, and that Ms. Bennett did not have a claim enforceable under the Act. Adjudicator Collingwood, however, found that the Delegate had not addressed the issue of whether the employer had represented to Ms. Bennett that it would pay a share of the rent, and had not addressed the issue of whether the employee had been required to pay the employer's business costs. Adjudicator Collingwood referred the matter back to the Delegate for an assessment of whether s. 8 and 21 of the Act had been contravened by the employer, and for an assessment of the quantum, if any of her entitlement if there was a breach of the Act.

The Delegate's report of June 12, 2000 following the Decision was that s. 8 and s. 21 of the Act were not contravened. Ms. Bennett appealed this Determination. The matter came back before a different adjudicator (Petersen). Adjudicator Petersen decided (BCEST #465/00) that Ms. Bennett was not entitled to compensation for the use of her home office and that the employer had not breached s. 8 or 21 of the Act.

The adjudicator found that s. 8 of the Act was not contravened, confirming the Delegate's conclusion that s. 8 of the Act was not contravened. The adjudicator said as follows:

> Bennett takes issue with the delegate's conclusions. She does not dispute that there was no agreement with respect to the amount to be paid. She states that she was influenced by the Employer's promise to compensate her. That may well be the case. However, I agree with the delegate that, in the circumstances, the Employer did not misrepresent the wages to be paid or any other term or condition of employment. The Adjudicator found that the Employer likely may have led Bennett to expect that she would be compensated for the use of her home as an office, she cannot point to any specific pre-contractual representation. Cheshire and Fifoot's , Law of contract (London: Butterworth, 1981) defines misrepresentation as follows (P 237):

A representation is a statement of fact made by one party to the contract (the representor) to the other (the representee) which, while not forming a term of the contract, yet is one of the

reasons that induces the representee to enter into the contract. A misrepresentation is simply a representation which is untrue.

In this case there is no representation of fact. At most, there is a promise. As I understand the law, the person who takes action on a promise "must show that this promise forms part of a valid contract". In my view, as there is no agreement with respect to the amount to be paid, or a formula to calculate such an amount, there was no meeting of the minds and there was no contract with respect to the payment of a share of the rent. I do not consider that either of the parties to this arrangement would have agreed to pay-or indeed-receive an undetermined amount. In any event, even if the Employer's statement (referred to by Bennett) that the employer would pay her share of the rent can be considered a representation of fact, I find it unlikely that a statement that the Employer would agree to pay an undetermined amount would have induced her to enter this arrangement.

With regard to s. 21, the adjudicator stated:

> In all of the circumstances of this case, I am of the view that the Employer did not "require" – within the meaning of Section 21(2) - Bennett to pay its business costs, I do not see any element of coercion. In the circumstances, I do not find that the fact that Bennett may have lost her job had the Employer closed down its business here completely constitutes coercion. What happened here was that the Employer closed down its office for bona fide business reasons and the parties agreed to carry on the business on the basis that the office would be located in Bennett's home. That arrangement benefited both parties: the Employer could carry on business and Bennett would keep her job. In my view, at the time the arrangement was entered into, it was a voluntary arrangement. That conclusion is supported by Bennett's own submissions. She states that the Employer led her to believe that it would pay a share of the rent, though no specific amount was agreed to. She also states that the employer would not allow her to use the portion of her home for income tax purposes. This does not indicate coercion. Rather it indicates that subsequently disagreement between the parties developed with respect to what the Employer had promised.

The Adjudicator stated that purely voluntary payments would not violate s. 21 of the Act, however, that statement was unnecessary for the reasoning of the appeal, because the employee had not made any payments on account of the employer's business.

The grounds of appeal appear to be as follows:

1. The adjudicator failed to apply the laws of natural justice in failing to find that there was no contract between the parties to pay rent, and failed to consider relevant evidence in

finding that there was no misrepresentation by the employer of the terms and conditions of employment.

2. The Adjudicator erred in holding that there was no misrepresentation under s. 8 of the Act.

3. The adjudicator erred in the application of s. 21 of the Act by failing to hold that the employer required the employee to pay a portion of the employer's business costs and the employee particularly takes issue that she participated voluntarily in the costs of the home office.

The employee seeks compensation for the use of her apartment as a home office in the amount of $3,520, plus interest. This calculation is based at 40 % of a monthly rent of $550.00 per month for 16 months. I note that this is a case where the employer compensated the employee for the costs of running an office, but the employee's allegation is that the employer ought to have paid for the use of the space as a business cost. I note Ms. Bennett also raised an issue that the employer would not permit her to claim the costs of the office on her income tax form. Ms. Bennett was an employee, and therefore would not be entitled to make a claim for a "business expense" of running an office in her home.

The employer says that the adjudicator considered the issue of misrepresentation at length. The employer alleges that the employee has failed to show inconsistency with any decision of the Tribunal indistinguishable from the facts. The employer supports the Decision that there was no requirement to pay business costs. The employer argues that there was no coercion of Ms. Bennett, and that it was a "win-win situation" for both parties.

ANALYSIS

In an application for reconsideration, the burden rests with the appellant, in this case the employee, to show that this is a proper case for reconsideration, and that the adjudicator erred such that I should vary, cancel or affirm the Decision. An application for reconsideration of a Tribunal' s decision involves a two stage analysis, as set out in Milan Holdings Ltd., BCEST #D186/97:

> At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration: Re British Columbia (Director of Employment Standards), BCEST #D122/98. In deciding this question, the Tribunal will consider and weigh a number of factors. For example, the following factors have been held to weigh against a reconsideration:
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> (a) Where the application has not been filed in a timely fashion and there is no valid cause for the delay: Re British Columbia

(Director of Employment Standards), BCEST # D122/98. In this context, the Tribunal will consider the prejudice to either party in proceeding with or refusing the reconsideration: Re Rescan Environmental Services Ltd. BC EST # D522/97 (Reconsideration of BCEST # D007/97).

(b) Where the application's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): Re Image House Inc., BC EST # D075/98 (Reconsideration of BC EST # D418/97); Alexander (c.o.b. Peregrine Consulting) BC EST # D095/98 (Reconsideration of BCEST # D574/97); 323573 BC Ltd. (c.o.b. Saltair Neighbourhood Pub), BC EST # D478/97 (Reconsideration of);

(c) Where the application arises out of a preliminary ruling made in the course of an appeal. "The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid multiplicity of proceedings, confusion or delay": World Project Management Inc., BC EST # D134/97 (Reconsideration of BC EST # D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.

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. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": Zoltan Kiss, supra. As noted in previous decisions,

> "The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons": Khalsa Diwan Society (BC EST # D199/96, reconsideration of BCEST #D114/96).

> After weighing these and other factors relevant to the matter before it, the Panel may determine that the application is not appropriate for reconsideration. If so, it will typically give reasons for its decision not to reconsider the adjudicator's decision. Should the Panel determine that one or more of the issues raised in the application is appropriate for reconsideration, the Panel will then review the matter and make a decision. The focus of the reconsideration panel "on the merits" will in general be with the correctness of the decision being reconsidered.

The very point of reconsideration being to provide a forum for sober reflection regarding questions which are considered sufficiently important to warrant such review, we consider it sensible to conclude that questions deem worthy of reconsideration - particularly questions of law - should be reviewed for correctness.

The reconsideration power is one to be exercised with caution. A non-exhaustive list of grounds for reconsideration include:

(a) a failure by the adjudicator to comply with the principles of natural justice;

(b) a. a mistake of fact;

(c) a. inconsistency with other decisions which cannot be distinguished;

(d) a. significant and serious new evidence that has become available and that would have lead the adjudicator to a different decision;

(e) a. misunderstanding or failing to deal with an issue;

(f) a. clerical error.

I turn now, to the grounds for reconsideration advanced by the employee.

Natural Justice & Failure to Consider Relevant Evidence

In this case it cannot be seriously contended that there was an error of natural justice. Natural justice, in the administrative law context, is a procedural concept, and consists of the right to present one’s case, challenge the case of the opponent, before an unbiased decision maker. The adjudicator considered the submissions of the parties, and addressed these submissions in the decision. The appellant apparently uses the term “natural justice” as synonymous with “equity or equitable” or “what is fair”. This is a misunderstanding of the concept of natural justice and this grounds for reconsideration does not meet the threshold for appeal set out above.

The adjudicator apparently considered the evidence with regard to why the employer shut down its Vancouver office, and why the employee assumed the office function. In my view the Adjudicator fully canvassed the facts surrounding the claims made by the employee. This ground of appeal does not meet the threshold for appeal set out above.

Error of Law

In considering the allegation of error, I find it helpful to consider the sub-issues of whether the claim is a claim for wages, a claim pursuant to a contract, an error in interpreting s. 8 of the Act and an error in interpreting s. 21 of the Act. The main issue is whether an employer can be obliged to pay a portion of the employee's rent, when the employee uses a part of a rental premises as a home office. The sub- issues raised by the Appellant are whether the Adjudicator erred in law in his interpretations of s. 8 and s. 21 of the Act, and the application to the facts of this case. I find that the appellant has met the threshold test for a reconsideration on the issues of the application of s. 8 and 21 of the Act and therefore address the merits of the complaints.

Is the Claim a Wage Claim:

Wages has been given a very broad definition under s. 1 of the Act, however, a claim for compensation for rent does not fall within that definition. The only possible method for the claim to be characterized as wages is under s. 21(3) of the Act, is if the claim can be characterized as an amount under s. 21(2) as an "employer business cost". Adjudicator Collingwood was correct when he indicated that there was no wage claim capable of enforcement under the Act.

Is the claim an amount payable pursuant to an employment contract?

Ms. Bennett is incorrect if she suggests that the employment relationship is anything more than a contract relationship. An employment contract is a special type of contract. There must still be an offer, acceptance, consideration and sufficient clarity about a contractual term before a contract is capable of enforcement. The employment relationship is a common-law contractual relationship, which is "regulated" by the Employment Standards Act. An employee may have other special obligations of a fiduciary nature to an employer, but this case does not raise any other issues.

As a matter of contract law the allegations related to "payment for the apartment" are not capable of enforcement. There is not sufficient certainty over the contractual term. "Price" is an essential part of contractual certainty, and the "price" must be clearly expressed or be capable of being ascertained. Ms. Bennett seeks to have this Tribunal enforce her version of what is fair, however, the Tribunal is a creature of statute, it has no equitable jurisdiction, and it cannot make a contract for the parties. There was a lack of clarity or certainty about the terms related to payment for the use of the apartment. The Act does not deal specifically with the use of the home office, and require an employer to compensate an employee for use

of the home as the workplace. The "home office" is a growing trend in employment relationships. The Act does not address as a minimum standard if and how an employee is to be compensated for the use of a home office. The employee was not put to any expense because she used the apartment, although there may well have been less useable space for her, in her home. I do not think that it is proper for the Tribunal to create a standard of compensation for "use of the home", where the parties have not made any agreement, and where the legislature has not addressed this point. The employee has not made out any contractual term which the employer breached, or any minimum employment standard which the employer has breached and therefore there is no remedy under the Act for Ms. Bennett's complaints. When the Tribunal finds that the Act has been breached, it can in the absence of records, and on the basis of evidence fashion a remedy for the breach: Harrison, BCEST #D 271/96 (Stevenson). In Harrison the Adjudicator found a breach of the Act, and here I find no such breach. Ms. Bennett is asking the Tribunal to create a contract for the parties where no contract existed.

Misrepresentation - s. 8:

Section 8 of the Act provides a remedy where the employer misrepresents the pre-hiring terms of employment. The Act applies to "pre-hiring representations": Harris, BCEST #D 124/97 (Pawluk). It is clear that the representations, if made, were not made at the time of hiring. The representations, if made, were made at a time when the employer instituted a change in the conditions of employment. Section 8 has no application to the facts of this case. If the representations were made at the time of hiring, it is clear that the statement made did not "induce" Ms. Bennett to change her position. She did not go out and rent space, or incur any out of pocket expenses as a result of anything said by the employer. I agree with Adjudicator Petersen that it seems unlikely that any person would be influenced by a discussion to pay a share of the expense, without quantifying the share to be paid. The analysis of the Adjudicator Petersen was not unreasonable. It is my view that he analysed the application of s. 8 to the facts of this case correctly, with the exception, that the adjudicator should have disposed of this claim, on the basis that s. 8 did not apply because there was no "pre-hiring" representation by the employer.

Application of s. 21 - Business Costs:

Section 21(2) of the Act reads as follows:

> An employer must not require an employee to pay any of the employer's business costs except as permitted by the regulations.

An amount which an employer has required an employee to pay is deemed to be wages under s. 21(3) of the Act, and recoverable by the employee under the Act.

The employee cannot point to any costs she incurred on the employer's behalf. She carried on the office in a residential premises in which she was already a tenant. She was obliged

to pay rent, and this was an obligation independent of any employment relationship. The employee's claim is for a notional allocation of her rent between space used for personal reasons, and space dedicated to the employer. In my view, in order to engage s. 21(2), there must be a payment made by the employee. A notional allocation does not trigger s. 21(2), because nothing is paid. In my view, this is a complete answer to the claims presented by the employee under s. 21 (2) of the *Act*.

Ms. Bennett's complaint of a reduction in useable space, and the lack of separation between home and work, is not a pecuniary claim. It is a complaint for frustration and inconvenience. The law of contract does not generally provide remedies for frustration, inconvenience. The Act certainly does not provide for any remedy for frustration and inconvenience associated with the use of a home as a work place.

Ms. Bennett submits that the Adjudicator erred in the interpretation of the word "require". She submits that there is a power imbalance in the relationship, and the word "require" must be given a wide interpretation. It may be that "but for" the employee's agreement to provide services from her home, that the employer agreed to continue to employ her. There is no coercive element. The appellant chose to accept a change in the conditions of employment, and did not negotiate any arrangement for compensation, and was not put to any out of pocket expenses, as a result of the changed circumstances.

In my view there is no question that the employer intended to cease its operations by closing down an office. An employer has the right to change its methods of doing business. There is no convincing evidence offered by the employee to show that the employer's decision was anything but a bona fide business decision. The employee had the opportunity to continue the employment relationship, or not. I need not speculate about Ms. Bennett's rights and remedies if she had chosen not to continue her employment when the employer eliminated the Vancouver office. I need not consider this point further, because the employee worked for many months under the changed circumstances, and therefore waived any constructive dismissal claim (if any) that she might have had.

Despite Ms. Bennett's submission of a power imbalance, there was a benefit to each party from a continuation of the relationship. Ms. Bennet claims that the benefits were not equal, but the law has never required that the parties "benefit equally" from a contract. There was no coercion, and therefore it cannot be said that the employer "required" the employee to pay the employer's business costs. I appreciate Ms. Bennett's point that the Tribunal has, in the past given a broad interpretation to the "require" and the Tribunal's jurisprudence requires an analysis of all the circumstances. Coercion is an issue of fact : Park Hotel (Edmonton Ltd. cob Dominion Hotel, BCEST #D 257/99 (Stevenson, Roberts, McConchie). The Adjudicator did refer to and quote from this case in the Decision and was aware of the Tribunal's approach to "require" in s. 21(2) of the Act. It cannot be said that the Adjudicator rendered a decision on the interpretation of "require" in s. 21(2)of the Act which was inconsistent with past adjudication decisions. In my view, the Adjudicator analysed all the facts relevant to the

interpretation of s. 21(2) , and the Adjudicator's decision was not unreasonable. The Adjudicator did not err in finding a lack of coercion.

For the above reasons I dismiss this application for reconsideration relating to a claim by Ms. Bennett for compensation for the use of a home office.

ORDER

Pursuant to section 116 of the Act, I order that the Decision in this matter, dated January 4, 2000 and November 9, 2000 be confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal