

BC EST #D275/98
Reconsideration of BC EST #D100/98

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 -

William Lavery
("Lavery")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR:	John M. Orr
FILE No:	98/352
DATE OF DECISION:	July 29, 1998

DECISION

OVERVIEW

This is an application by "Lavery" under Section 116 (2) of *the Employment Standards Act* (the "Act") for a reconsideration of Decision BC EST #D100/98 (the "Decision") which was issued by the Tribunal on March 13, 1998.

Mr Lavery submits in his application that the Adjudicator for the Tribunal "made a number of errors in Statutory law" in the Decision. He submits that although the Decision addresses three issues, i.e. overtime, commissions, and termination, the Adjudicator also accepted the employer's argument that he was not an employee. Lavery also makes extensive further submissions on the three issues, overtime, commissions, and termination, dealt with in the Decision.

PROCEDURAL HISTORY

The investigation of this matter was extensive. It involved a Director's Delegate and two accounting students. Lavery presented over 1800 pages of material. However much of the material was produced in stages and had to be requested by the Delegate. The Delegate issued a Determination #004731 on November 27, 1996. The Delegate found that Lavery was an employee of Ark Solar Products ("Ark") and that he was entitled to \$1293.43 in holiday pay and compensation for length of service. The Determination found that Lavery was not entitled to overtime pay and that he was not wrongfully terminated.

Lavery appealed to the Tribunal and after the first day of hearing on April 25, 1997, in which Lavery produced more information that had not previously been presented, the Delegate found that Lavery was entitled to an additional \$562.58 in commissions and holiday pay. A further Determination was issued dated December 17, 1997. All the amounts found to be owing were paid forthwith by Ark.

The hearing continued on February 18, 1998. The issues on the appeal were whether Lavery was entitled to overtime, whether he was entitled to more commissions than as calculated by the Delegate, and whether he had been wrongfully terminated. The issue as to whether Lavery was in fact an "employee" was not appealed by either party. The Adjudicator proceeded on the basis that Lavery was, in fact, an employee and carefully analyzed the evidence and the submissions made by Lavery.

The Adjudicator found that whether or not Lavery was wrongfully terminated he was paid the proper compensation for service as required by the *Act*. The Adjudicator pointed out that the Tribunal has no jurisdiction to grant damages for wrongful dismissal under the common law.

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The Adjudicator found that any "overtime" worked by Lavery was not at the direction of his employer and that she was unable to conclude that Ark directly or indirectly allowed Lavery to work overtime. The Adjudicator also found that there had been a fair and thorough investigation of Lavery's claims for commissions and that she was not persuaded that further commissions were owing.

The Adjudicator also made some comments about the failure of the employer to keep adequate records because Lavery submitted that such failure should be held against the employer as far as credibility was concerned. In assessing the credibility of certain evidence, in which the matter of proper records could be important, the Adjudicator found that the employer assumed that Lavery was a commissioned independent salesperson and not an employee and therefore there was an adequate explanation for the failure to keep records of hours worked.

On March 13, 1998 the Adjudicator confirmed the Determination of December 17, 1997.

Lavery, by undated letter received by the Tribunal on June 01, 1998, now applies pursuant to Section 116 of the *Act* for reconsideration of the Adjudicator's decision.

ANALYSIS

The Tribunal will grant a reconsideration where there is a demonstrable breach of the rules of natural justice, where there is compelling new evidence that was not available at the first hearing, or where the adjudicator made a fundamental error of law: *Bichieri Enterprises Ltd.* (BC EST #D335/96) and confirmed more recently in *The Director of Employment Standards* (BC EST #D 301/98).

This application for reconsideration does not allege any breach of the rules of natural justice and does not present any new evidence. Lavery alleges that the Adjudicator in the Decision "centred" her decision around the issue of Lavery's employee status while employed by Ark. He also claims that her decisions in regard to overtime, unjust dismissal, and unpaid commissions are wrong.

It is clear to me that the Adjudicator did not make an error in law on the issue of Lavery's employment status. The Delegate found that he was an employee and that issue was not appealed and did not form part of the decision. The issue about employment status is referred to only as an explanation for the employer's lack of time records for Lavery.

In this case Lavery's claims have received an exhaustive and thorough investigation by the Delegate and a two day hearing with examination and cross-examination. Much of Lavery's claims depend on the presentation of evidence and the credibility of the parties. On a reconsideration the Tribunal does not become involved in the investigation and assessment of credibility. It is not the role of the Tribunal on a request for reconsideration to substitute its opinion for that of the Adjudicator unless there is a clear and fundamental error in law. In this case the Adjudicator made a reasoned and reasonable decision based on the evidence presented and the submissions made to her and, as the Tribunal has held in many previous decisions, the power to reconsider will be exercised with caution in order to ensure finality of decisions and the efficiency and fairness of the system: *Zoltan Kiss*, BC EST#D122/96.

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It would be inappropriate in this case to allow, in effect, a new hearing of the appeal. An application for reconsideration is not an opportunity to rehear evidence or to re-examine arguments made before the original adjudicator. Lavery has had full and ample opportunity to present his case both to the Delegate and to the Adjudicator.

I have reviewed, in full, the extensive submissions presented by Lavery on this application and can find nothing that would persuade me that there has been a denial of natural justice, any significant new evidence, any misunderstanding of or failure to deal with a serious issue, or mistake of law.

ORDER

Pursuant to Section 116 of the *Act* I decline to vary or cancel the decision BC EST # D100/98.

John M. Orr
Adjudicator
Employment Standards Tribunal