

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 -

Allan W. Sproule Operating as Restech Food and Beverage Systems
("Restech")

- of a Determination issued by -

The Employment Standards Tribunal
(the "Director")

ADJUDICATOR: Lorna Pawluk

FILE NO.: 97/379

DATE OF DECISION: July 28, 1997

BC EST #D281/97
Reconsideration of BC EST #D096/97

DECISION

OVERVIEW

This is a reconsideration under Section 116 of the *Employment Standards Act* (the "Act") of Decision BC EST No. D096/97 ("the Decision") which was issued by the Employment Standards Tribunal (the "Tribunal") on March 11, 1997. That Decision confirmed Determination No. CDET 004382 which was issued by the Director of Employment Standards (the "Director") on October 21, 1996. The adjudicator concluded that Yoseff Samchuk had been terminated without written notice on January 5, 1996 and was entitled to \$996.97 as compensation in lieu of notice plus interest.

ISSUE TO BE DECIDED

The issue on reconsideration is whether the Tribunal failed to comply with the principles of natural justice by excusing a witness from further testimony after he had completed his testimony on behalf of the appellant on one issue and was not available to testify when the appellant sought to call him on another issue.

FACTS

Yoseff Samchuk ("Samchuk") was employed as a cook at Clancy's a restaurant managed by Allan W. Sproule operating as Restech Food & Beverage Systems ("Restech"). This reconsideration request arises from Samchuk's claim that he was terminated in breach of section 63 of the *Act*. An investigation carried out by an Employment Standards Officer (ESO) concluded that Samchuk was owed overtime, regular wages, statutory holiday pay and pay for working on a statutory holiday. He noted a letter dated January 5, 1996 from Allan Sproule ("Sproule") to Samchuk saying that (Sproule) was temporarily laid off due to a slowdown in business so that Samchuk was owed severance under section 63 of the *Act*. Sproule took issue with this finding, claiming that Samchuk had quit and appealed this issue to this Tribunal. Sproule said that Samchuk was given a written offer of alternate employment at the George and Dragon; Samchuk maintained that he did not receive the March 5, 1996 letter.

During the course of the hearing, Restech called the kitchen manager Torrie Miller to testify about Samchuk's hours of work and the restaurant's hours of operations. He was cross examined by Samchuk. Miller was asked by the adjudicator whether he had anything further to add and he said he did not; she then excused him and he left the room. Shortly after that the appellant turned to the issue of whether Samchuk had been fired or had quit and sought to call

BC EST #D281/97
Reconsideration of BC EST #D096/97

Miller to testify once more. By then Miller had left the building, thinking that his testimony had finished.

The Employment Standards Officer who first investigated the complaint and was the Director's delegate for CDET 004382 made submissions dated May 22, 1997 to this Tribunal on the reconsideration application. The submissions stated:

The Branch rejects Mr. Sproule's contention that there is a "procedural error" that was the Branch's responsibility to correct. However, Mr. Miller's departure did have the result that the appellant could not call a witness to testify on a matter about which the appellant claims he had direct knowledge.

The "recommendation" by the Branch of this application for reconsideration was limited to providing information to the appellant concerning the jurisdiction of the Tribunal to reconsider its own decisions, and suggesting this as a means for having its objections heard.

Sproule says that Miller would have confirmed that Samchuk was offered, and refused, alternate employment, so that Samchuk is not entitled to notice or severance. He says that the inability to call Miller because he was excused by the adjudicator prejudiced his case and by excusing Miller from the room and not telling him to remain in the building, the adjudicator committed a breach of procedural fairness.

ANALYSIS

Section 116 of the *Act* confers power on this Tribunal to reconsider orders and decisions:

- (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) *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 applicaiton under this section.*
- (3) *An application may be made only once with respect to the same order or decision.*

BC EST #D281/97
Reconsideration of BC EST #D096/97

In *Zoltan T. Kiss* BC EST No. D122/96, the Tribunal outlined some of the typical grounds for a successful reconsideration. These included failure by the adjudicator to comply with the principles of natural justice, the ground alleged here.

I cannot agree with Sproule that this action by the adjudicator was a procedural breach that constitutes grounds for reconsideration. Procedures before this Tribunal are less formal than procedures in a court of law and are sufficiently informal to permit lay persons to appear without the assistance of legal counsel. It was open to Sproule, when Miller was being excused, to advise the adjudicator that Miller's presence was necessary for other aspects of the case and that was not done. Under the circumstances, Sproule cannot now rely on this to secure a reconsideration. It was also open to Sproule to seek an adjournment to recall Miller, but he did not do so. Reconsideration is an extraordinary power, to be exercised only in the clearest of circumstances and such circumstances do not exist here.

ORDER

Pursuant to Section 116 of the *Act*, I decline to vary or cancel the Decision, or to refer the matter back to the original panel.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal