

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 -

First Equipment Centre Inc.
("First Equipment")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: David Stevenson

FILE N_{o.}: 98/191

DATE OF **D**ECISION: July 2, 1998

DECISION

OVERVIEW

This is an application for reconsideration pursuant to Section 116 of the *Employment Standards Act* (the "Act") by First Equipment Centre Inc. ("First Equipment") of a decision of the Employment Standards Tribunal (the "Tribunal") dated February 19, 1998 (the "original decision"). The original decision addressed the issue of whether the employment of Dale Eyben ("Eyben") was, by application of Section 97 of the Act, deemed to be continuous and uninterrupted during the disposition of the business of Case Corporation (Case Power & Equipment), Eyben's employer for approximately 12 years, to First Equipment and whether First equipment was obligated to pay length of service compensation to Eyben that included his service with case Corporation.

ISSUE TO BE DECIDED

The issue is whether First Equipment has established that this is an appropriate case for reconsideration and, if so, whether the Adjudicator erred in concluding First Equipment had an obligation to pay Eyben length of service compensation.

FACTS

It is unnecessary to recite the facts in full. There is no dispute about the facts nor have any additional facts been sought to be added in this reconsideration. What is obvious from the facts is that Eyben was never terminated by Case Corporation prior to the disposition. In that context, Section 29 of the *Interpretation Act*, R.S.B.C. 1996, c. 238 defines "dispose" as follows:

"dispose" means to transfer by any method and includes assign, give, sell, grant, charge, convey, bequeath, devise, lease, divest, release, and agree to do any of those things;

Also, Eyben had agreed to continue his employment with First Equipment in a position that was comparable, if not identical, to that which he held with Case Corporation. On December 20, 1996, he assumed the position he had accepted. On April 20, 1997 his employment was terminated.

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*
- (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 application under this section.*

BC EST #D282/98
Reconsideration of BC EST #D597/97

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

The circumstances in which an application for reconsideration will be successful are limited. Those circumstances have been identified in several decisions of the Tribunal, commencing with *Zoltan Kiss*, BC EST #D122/96, and include:

- failure to comply with the principles of natural justice
- mistake of law or fact
- significant new evidence that was not reasonably available to the original panel
- inconsistency between decisions of the tribunal that are indistinguishable on the critical facts
- misunderstanding or failure to deal with a serious issue
- clerical error

Reconsideration is not used simply to provide another opportunity to seek review of the evidence or to reargue a disagreement with the Determination before another panel of the Tribunal.

The essence of the application for reconsideration lies in two submissions made by Counsel for First Equipment. First, it is argued that Section 97 of the *Act* cannot be interpreted in a way that interferes with an employer's contractual freedom to determine who will be responsible for employment obligations to an employee of the business upon its disposition. Second, it is argued the Adjudicator should not have considered herself bound by the reasoning in the B.C. Court of appeal decision, *Helping Hands Agency v. British Columbia*, (1996) 131 D.L.R. (4th) 336 because the circumstances in that case were different than the case under appeal. While the submissions of Counsel for First Equipment are not framed in terms of the circumstances under which the Tribunal would grant reconsideration, it is apparent he is taking the position the Adjudicator in the original decision made a mistake in law or fact, causing her to misdirect herself as to the issue.

I disagree. Both arguments raised on this application were raised and considered, correctly I might add, in the original decision.

In reply to the first argument, the Adjudicator dealt with that position following at page 3 of the original decision:

First Equipment appeals the Determination with respect to the section 97 obligations, arguing that the amounts paid to Eyben by Case discharge obligations of First Equipment to Eyben. It is submitted that Section 97 of the *Act* is not intended to "interfere with the contractual freedom of the vendor and purchaser in determining who is responsible for the payment of those financial obligations". The legislation does not specifically state who should be responsible for paying total termination pay and First Equipment should not be required to make an additional payment.

In respect of the second argument, Counsel for First Equipment made the following point in a submission to the Tribunal, dated December 1, 1997, in support its appeal of the Determination:

6. Finally, we submit that the Court's decision to require the successor employer to pay accrued vacation pay in *Helping Hands, supra*, is also not inconsistent with our position in the present case. The facts in that case are also distinguishable, in that there was no agreement between the purchaser and the vendor as to who would be responsible for any outstanding employee obligations.

The applicability of the Court's decision in *Helping Hands v. British Columbia, supra*, to the circumstances before the original panel was canvassed in the original decision. This application is no more than a restatement of the above argument and does not meet any of the criteria for a successful application for reconsideration.

First Equipment has failed to establish that this is an appropriate case for reconsideration and, accordingly, their application is denied.

ORDER

Pursuant to section 116 of the *Act*, I order that the application for reconsideration be denied and the original decision confirmed.

David Stevenson
Adjudicator
Employment Standards Tribunal