

An Application for Reconsideration

- by -

Sal's Motors Ltd.
("Sal's")

- 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: David B. Stevenson

FILE No.: 2003A/235

DATE OF DECISION: November 5, 2003

DECISION

OVERVIEW

Sal's Motors Ltd. ("Sal's") seeks reconsideration under Section 116 of the *Employment Standards Act* (the "Act") of a decision made by an Adjudicator of the Tribunal, BC EST #D245/03, dated July 29, 2003 (the "original decision"). The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on May 9, 2002. The Determination had found that Sal's had contravened Part 8, Section 63 of the *Act* in respect of the employment of Gurdeep Bhatti ("Bhatti") and found Bhatti was owed an amount of \$5,650.68.

The original decision confirmed the Determination.

In this application, Sal's argues that the Adjudicator of the original decision "erred in law in his assessment of the facts, and in failing to refer to salient facts" in concluding Bhatti had not quit his employment with Sal's. This application also asserts the Adjudicator of the original decision relied upon Tribunal decisions which had no application to the issue raised in the appeal.

ISSUE

In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case is appropriate for reconsideration, the substantive issue raised in this application is whether the Adjudicator of the original decision failed to examine the relevant evidence, resulting in a failure to apply the law to the facts, and, if so, whether that error justifies the Tribunal reconsidering the original decisions.

ANALYSIS OF THRESHOLD ISSUE

The legislature has conferred an express reconsideration power on the Tribunal in Section 116 which provides:

- 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) confirm, vary or cancel 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.*

Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is "to provide fair and efficient procedures for resolving disputes over the interpretation and application" of its provisions. Another stated purpose, found in subsection 2(b), is to "promote the fair treatment of employees and employers". The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC

EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively “re-weigh” evidence already tendered before the Adjudicator (as distinct from tendering new evidence or demonstrating an important finding of fact made without a basis in the evidence) and come to a different conclusion. An assessment is also be made of the merits of the Adjudicator’s decision.

Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. The circumstances where the Tribunal’s discretion will be exercised in favour of reconsideration are limited and have been identified by the tribunal as including:

- 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; and
- clerical error.

If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration.

After reviewing the original decision, the material on file and the arguments of the parties to this application, I have decided this is a case that does not warrant reconsideration.

Both the Determination and the result of the original decision rested primarily on findings of fact set out in the Determination and, in particular, on the conclusion there was no evidence demonstrating an intention on the part of Bhatti to quit his employment with Sal’s. This application does no more than re-state the main point of argument made in the appeal, which is that by finding full time work with another employer approximately 2½ weeks after he was temporarily laid off from Sal’s and collecting his tools from Sal’s, Bhatti should be found to have quit his employment with Sal’s.

That argument was answered, correctly in my view, in both the Determination, “the *Act* does not require an employee to forfeit the right to earn wages while on temporary layoff”, and by the Adjudicator of the original decision, “I find that the Appellant’s assumption that the Respondent had quit falls short of proof of quit or resignation. . . .there is no evidence to suggest in the present case that by taking alternative employment that the Respondent had limited his availability for work with the Appellant or that he could not return to work with the Appellant”.

The application for reconsideration is denied.

ORDER

Pursuant to Section 116 of the *Act*, I order the original decisions, BC EST #D245/03, dated July 29, 2003, be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal