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 -

Neville Jewell
(the "Employee")

- of a Decision isssued by-

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Ib S. Petersen

FILE NO.: 98/291

DECISION DATE: July 8, 1998

-

COUNSEL/APPEARANCES

Mr. Neville Jewell on behalf of himself

Mr. Lawrence W. Coulter on behalf of the Performance Development Ltd.

OVERVIEW

This is an application by the Employee pursuant to Section 116 of the *Employment Standards Act* (the "*Act*"), against a Decision of the Employment Standards Tribunal (the "Tribunal") issued on October 15, 1997 (#D446/98). Following a hearing on July 28, 1997 and further written submissions on August 15 and 20, 1997, the Adjudicator found that Performance Development Ltd. (The "Employer") did not terminate the employment of Mr. Jewell for making a complaint under the *Act*. As such, the Employer did not contravene Section 83. The Decision cancelled a Determination dated January 9, 1997 which held that Mr. Jewell was entitled to payments on account of lost wages and vacation pay, for $6,569.96 plus interest for the period between October 21 and November 29, 1996. The Determination also indicated that further determinations would be issued until Mr. Jewell secured other employment. As of the date of the appeal hearing, the Director had not, however, issued other determinations against the Employer

ISSUES TO BE DECIDED

The issue to be decided in this Reconsideration application are whether the application is made in a timely fashion and, if yes, whether the Employee has grounds for reconsideration;

FACTS

The salient facts may be summarized as follows. Mr. Jewell was hired in October 1995 as shipper at the hourly rate of $12.00. On October 21, 1996, the Employer terminated Mr. Jewell's employment. At that time his hourly rate was $26.00. This occurred shortly after he had filed a complaint with the Employment Standards Branch regarding overtime wages. The Director's delegate found that the termination contravened Section 83 of the *Act*. The Employer appealed the Determination.

The issue before the Adjudicator was whether or not retaliatory measures were taken against Mr. Jewell "because a complaint or investigation may or has been made under the Act (Section 83)". As mentioned above, the Adjudicator

concluded that Mr. Jewell was not terminated from his employment because of a complaint or investigation. In other words, he was not terminated as a retaliatory measure. In the original Decision, at page 6, the Adjudicator found:

> "My task is complicated by the fact that the Determination itself does not set out any rational basis for concluding that the employer was acting in bad faith and the Director chose not to attend, call evidence, or make submissions on the evidence, at the appeal hearing. The Director appears to have drawn the inference that because the complaint was filed prior to Jewell's termination, the employer must have acted in bad faith. I cannot accept, absent any other evidence, that because some disciplinary or other action follows the filing of a complaint, Section 83 of the *Act* has been breached.
>
> The evidence before me clearly discloses that from early January 1996 the employer repeatedly made known to Jewell its dissatisfaction with his job performance. This dissatisfaction resulted in a gradual, but continual, "stripping away" of the additional responsibilities that had been given to him in late 1995 when his wage rate was more than doubled to $26 per hour. I accept that Jewell misrepresented his educational qualifications in order to secure additional responsibilities that he ultimately proved unable to handle.
>
> There is absolutely no evidence before me upon which I can reasonably conclude that the employer knew or suspected that Jewell had filed an overtime complaint and that, in turn, this complaint motivated the employer's actions. None of the Director's correspondence refers to Jewell being the complainant: Jewell sought from the Director, and was given, a promise of confidentiality. If the employer knew or suspected that Jewell was the complainant--the employer's evidence, which I accept, is that the suspected complainant was a former employee who had recently left the firm on bad terms...
>
> "The key point is that the employer believed that it had just cause to act as it did and the employer's rationale for acting did not include the knowledge or suspicion that Jewell had filed a complaint under the *Act*.

In the result, the Adjudicator cancelled the Determination.

Mr. Jewell filed an application for reconsideration on May 8, 1998, more than six months after the Decision was issued.

ARGUMENTS

Mr. Jewell's disagrees with the Adjudicator's findings and conclusions with respect to Section 83 of the *Act*. The main thrust of his arguments may be summarized as follows. First, Mr. Jewell argues that new and significant evidence has become available that would have resulted in a different decision. This evidence consists of a documents, dated September 18, 1996, which is a written request from the Employer to Mr. Jewell with respect to a cheque for overtime wages. This document only became available through release of information under the Federal *Privacy Act* and shows, according to Mr. Jewell, that the Employer was aware of his claim for overtime wages before the termination. Second, Mr. Jewell also argues that the Adjudicator failed to comply with principles of natural justice. My understanding of this argument is that it includes that he takes issue with the Adjudicator telling the parties that the Employer had not adduced sufficient evidence to make out just cause for the termination. In the result, the Adjudicator, says Mr. Jewell, directed him to restrict his cross examination.

The Employer argues that the application is not filed on a timely basis and relies on the Tribunal's decision in *Unisource Canada Inc*. (BCEST #143/98). In the result, the application should be dismissed. The hearing was conducted on July 28, 1997 and the Decision was published on October 15, 1997. Until May 8, 1998, there was no indication from Mr. Jewell that he wanted to appeal the Decision. In this case, most of the content of the application for reconsideration was known to him at the time of the original hearing. The letter sought introduced by Mr. Jewell is neither relevant, significant or new evidence. The Employer notes that the application for reconsideration is simply an attempt to re-argue the merits of the case.

The Employee does not respond to the Employer's argument.

ANALYSIS

Section 116 of the *Act* provides (in part):

> 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.

An application for reconsideration should succeed only where there has been a demonstrable breach of the principles of natural justice, where there is compelling new evidence not available at the original appeal, or where the adjudicator has made fundamental error of law. In *Zoltan Kiss* (BCEST #D122/96), and other decisions, the Tribunal has emphasized that it will use the power to reconsider with caution in order to ensure finality of the Tribunal's decisions and efficiency and fairness of the system. There is no time limit provided for in the statute with respect to applications for reconsideration. The Legislature cannot have intended that decisions of the Tribunal could be reconsidered without regard for timing. In *Unisource Canada*, above, the tribunal stated, at page 9:

> The purposes of the *Act* require that the Tribunal avoid a multiplicity of proceedings and ensure that appeals are dealt with expeditiously, in a practical manner, and with due consideration of the principles of natural justice. In our view, this includes, generally, an expectation that one hearing will finally and conclusively resolve the dispute. ...
>
> In our view, an application for reconsideration must be filed within a reasonable time. What constitutes a "reasonable time" depends on the circumstances of each particular case. The Tribunal may be guided by the principles applied by the courts and the length of the delay may not be determinative. However, as noted by the courts, if good cause can be shown for a long delay, the Tribunal will exercise its discretion to reconsider. ...

In my view, there is no explanation for the delay in filing the application for reconsideration, which, in my view, is largely an attempt to re-argue the merits of the original Decision.

In any event, I agree with the Employer that the document referred to above is neither relevant, significant or new. As indicated by the cheque copied on the same sheet as the letter from the Employer to Mr. Jewell, written in response to the letter, he had knowledge of the document at the time of the hearing. As such it is not new. In any event, there is no clear or convincing connection between the letter to the complaint or investigation. At most, the letter indicates that the Employer and Mr. Jewell discussed his overtime hours (and for which he received payment before the termination). The Adjudicator was aware of that because Mr. Jewell had testified to such discussions.

Moreover, I am not satisfied that there was any breach of the principles of natural justice. If the Adjudicator expressed the view, before the completion of the case, that there was insufficient evidence to support a termination for cause, that conclusion would be in Mr. Jewell's favour and does not--*per se*--breach the principles of natural justice. Similarly, the argument that Mr. Jewell was restricted from introducing relevant evidence through cross examination does not have merit. While an Adjudicator must be careful not to restrict any party from introducing relevant evidence, an Adjudicator is not required to allow parties to introduce evidence relating to an issue that is no longer in dispute. In this case, the Adjudicator found against the Employer--that there was no cause for termination--and, therefore, as argued by the Employer, "ruled that any further evidence on the issue was irrelevant". In short, there was no need for him to cross examine the Employer's witnesses on that point and, in my view, he was not deprived of a fair hearing in accordance with the principles of natural justice.

ORDER

Pursuant to Section 116 of the *Act*, I order that the Decision (D#446/97), dated October 15, 1997 be confirmed.

_____

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal