

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 -

Bruce Thompson and Faye Thompson and
TSI Telequip Services Inc.
("employer" or "TSI")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Paul E. Love

FILE No: 2000/285

DATE OF DECISION: August 18, 2000

DECISION

OVERVIEW

This is an application for reconsideration, on written submissions, from a decision where the Adjudicator confirmed that the company, Telequip Services Inc. ("TSI"), and its directors, Bruce Thompson and Faye Thompson, were obliged to pay to Mr. Morisseau, an employee, the sum of \$16,960.61 in respect of unpaid commissions, unpaid overrides, unpaid monthly and annual bonus, unpaid FONOROLA fees/commissions, unpaid vacation and unpaid salary plus interest. The reconsideration application, filed approximately 9 months after the Decision, was an attempt to re-litigate issues which were determined adversely to the appellants and on the basis of findings of adverse credibility against Mr. Thompson. I therefore dismissed the application for reconsideration the basis that it did not fall within the proper scope of and application for reconsideration.

ISSUE TO BE DECIDED

Does this application for reconsideration fall within the proper scope of the reconsideration power of the Tribunal?

FACTS

The full facts in this matter are set out by the Adjudicator in BC EST #D221.99, and I set out only the facts necessary to dispose of this application for reconsideration.

The Adjudicator's decision was rendered in this matter on June 3, 1999 after a 2-day hearing. The Adjudicator confirmed that the company and its directors were obliged to pay to Mr. Morriseau, an employee, the sum of \$16,960.61 in respect of unpaid commissions, unpaid overrides, unpaid monthly and annual bonus, unpaid FONOROLA fees/commissions, unpaid vacation and unpaid salary plus interest. In the decision, the Adjudicator also dismissed a cross-appeal by Mr. Morriseau. The employer applied for a reconsideration of this matter on April 4, 2000.

It is apparent from a review of the decision in this matter that the evidence of Mr. Thompson, director, was rejected by the Adjudicator on several material points:

The onus of proof in an appeal is on the Appellant, TSI. An adverse inference can be drawn from its failure to call Mr. Culling, and its failure to produce the reconciliation letter referred to in the November, 1997 Commission Statement to explain the differences between October and November statements respecting the voice mail sales to the Dakota and the Nelson. TSI failed to explain the discrepancies in the evidence.

I accept Mr. Morisseau's evidence that he sold a voice mail system to the Dakota Hotel and Mr. McCarthy's evidence that he understood there was an order for a voice mail system at the Dakota and that he did preparatory work for the system.

In view of the conflicting and unexplained evidence of TSI, I find it unlikely that Mr. Thompson was unaware, after his discussions with Mr. Culling in May 1997 and his review of Mr. Morisseau's July, 1997 Commission Statements, that Mr. Morisseau had sold a \$16,000.00 voice mail system to the Dakota. Although I am loathe to order that TSI pay a commission if it did not install a voice mail system, it has failed to discharge its onus and convince me on the evidence and on a balance of probabilities that the sale was not made and that a voice mail system to service the Dakota/Nelson, was not installed at that or another location owned by GEG.

Further, Mr. Thompson appears to have attempted to mislead the Adjudicator by filing a number of documents, which he claimed had been produced to the Delegate during the investigation, but in fact were new documents.

The Adjudicator preferred the evidence of Mr. McCarthy over the evidence given by Mr. Thompson when it came to the time period between the making the contract and cut-over. The employer did not explain the problem of separate invoicing with regard to a sale to the Nelson and Dakota. A key witness, Blaine Culling, who could have been called to explain whether a system was installed or not, was not called by the employer.

The Adjudicator rejected Mr. Thompson's evidence regarding the entitlement of Mr. Morriseau to a bonus. The adjudicator could not confidently rely on documentation of the employer with regard to vacation pay, as it was internally contradictory.

It is apparent that credibility figured very significantly in the Decision.

ANALYSIS

In this reconsideration application, the burden rests with the applicants, Mr. and Mrs. Thompson, and TSI, to demonstrate an error which falls within the scope of a reconsideration application.

Generally there is a heavy onus on the party seeking reconsideration to demonstrate:

- (a) procedural unfairness;
- (b) a fundamental error of law or fact;
- (c) come compelling new evidence that was not available at the initial appeal.

Generally, there is a two-stage process in a reconsideration application. The first stage is whether or not the application falls within the scope for reconsideration, and the second stage concerns

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the merits of the application. The reconsideration power is to be used sparingly: *Re Scott*, BC EST #D052/97.

In my view, it is unnecessary for me to consider the merits of this application, as the application does not fall within the scope for reconsideration. In its application for reconsideration dated April 4, 2000 the employer raises two grounds for reconsideration:

- 1) The Complainant – Christophe Morisseau lied under oath resulting in commissions being paid on a non-existent contract.
- 2) The Delegate of the ESB and the Adjudicator of the EST exceeded the jurisdiction of the *Employment Standards Act* on matters of commission payments and matters of contractual right per Part 3; Section 17 – Payday; Part 3; Section 18 – If Employment is Terminated and Part 14; Section 118 of the *Employment Standards Act*

In a letter of April 13, 2000 the employer characterizes these points as a matter of jurisdiction, and alleges that the Delegate and the Adjudicator exceed their respective jurisdictions in that:

- (a) That there was a sales contract in effect with regard to the Dakota Hotel. The employer alleges that there was no contract, and therefore the only jurisdiction was for the Delegate to enforce the minimum wage provisions of the *Act*;
- (b) The issue of whether a new contract was entered into is not within the jurisdiction of the Delegate or the Adjudicator.

The application for reconsideration is advanced some 9 months after the Decision was made. The only explanation advanced by the employer was that it recently became aware of s. 110 of the *Act*, that the Tribunal may reconsider matter of its own accord. The appellants do not elaborate in any material way on the grounds that are raised. The appellants have supplied no evidence in support of the propositions they advance.

The Delegate and this Tribunal have full jurisdiction to inquire into the contractual relationship between the parties, and to determine whether the employee has received the employment standards set out in the *Act*. It is apparent that the grounds for reconsideration raised by the appellants are merely its attempt to have this panel re-weigh the evidence, with regard to commissions and bonuses, that was before the Delegate, and before the Adjudicator. The points at issue were determined in part based on the Adjudicator's adverse findings concerning the credibility of Mr. Thompson. The Adjudicator was in the best position to assess the evidence and credibility of the parties at the two-day hearing. This case does not meet the standard for a reconsideration, and therefore I dismiss this application.

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ORDER

Pursuant to section 116 of the *Act*, I order the Decision in this matter, dated May 4, 2000, be confirmed

Paul E. Love
Adjudicator
Employment Standards Tribunal