

An Application for Reconsideration

- by -

Kelly Lanz

- 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: Carol L. Roberts

FILE No.: 2003A/260

DATE OF DECISION: November 24, 2003

DECISION

SUBMISSIONS:

Kelly Lanz	On his own behalf
Carman J. Overholt	On behalf of Ratiopharm Inc.

OVERVIEW

This is an application by Kelly Lanz for a reconsideration of Decision #D264/03 (the "Original Decision"), issued by the Tribunal on September 2, 2003.

The *Employment Standards Act*, R.S.B.C. 1996 c. 113 ("Act") confers an express reconsideration power on the Tribunal. Section 116 provides

- (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.

The factual background is as follows. On March 8, 2002, Mr. Lanz filed a complaint with the Employment Standards Branch, alleging that his former employer, Ratiopharm Inc. ("Ratiopharm") owed him sales commissions.

The Director's delegate determined that a portion of Mr. Lanz's claim was outside the two year statutory time period for recovery of wages period established by s. 80(1) of the *Act*, and that there was insufficient evidence to establish Mr. Lanz's claim for the balance.

Mr. Lanz appealed the Determination contending that the delegate had failed to observe the principles of natural justice in making the Determination, and that new evidence had become available since the Determination had been issued. Mr. Lanz also contended that the delegate made factual errors.

The Tribunal held a hearing based on written submissions. In a decision rendered September 2, 2003, the adjudicator agreed that the delegate failed to observe the principles of natural justice in failing to disclose a Ratiopharm submission to Mr. Lanz for his response:

I agree with Lanz that there was new information and evidence contained in Ratiopharm's submission of November 5, 2002, and that it should have been disclosed to Lanz for his further comment or evidence. Therefore, I find that Lanz has substantiated grounds for appeal under s. 112(1)(b). I have reviewed and analyzed the many submissions and I am satisfied that I am in a position to adjudicate the appeal without the need for an oral hearing.

...

Lanz' claim is based on the policy applying to the sales of the individual products or to the individual account, i.e. London Drugs or Unipharm. In the November 5, 2002 submission, Ratiopharm submitted that commission entitlement is not calculated on the sales of one product or one customer. Rationpharm submitted that it is based on the global territory annual sales,

including other accounts that may not have been as profitable. Lanz did not respond to this submission. I find that Ratiopharm's submission is compelling. There is nothing in the evidence, particularly not in the general policy statement quoted above, that supports Lanz' position that the annual profitability objectives of each account or product are the base line.

The adjudicator also concluded that the "new evidence" was unrelated to the issues before the delegate or on appeal, and declined to consider it.

Mr. Lanz seeks reconsideration of the decision because

1. the principles of natural justice have not been complied with;
2. a serious mistake was made in applying the law and
3. significant new evidence has become available that would have led the adjudicator to a different decision.

Mr. Lanz submits that while the adjudicator agreed that the delegate had not observed the principles of natural justice, she then concluded that he was not entitled to further commissions, based on the information before her. He says that he did not reply to Ratiopharm's submission on how his commission entitlement was calculated because he "assumed it would be obvious to the Adjudicator that [R]atiopharm's November 5, 2002 statement was irrelevant to my claim". He further alleged that Ratiopharm's submission on how his commission entitlement was calculated was misleading.

Mr. Lanz's reconsideration application submissions relate, in essence, to his entitlement to commissions and constitute his reply to Ratiopharm's submissions on commission entitlements.

Counsel for Ratiopharm submits that Mr. Lanz's submissions do not meet the Tribunal's test for the exercise of the reconsideration power. He contends that Mr. Lanz's submissions are merely a reiteration of his previous submissions and an attempt to convince the Tribunal to substitute its views for those of the previous adjudicator.

Counsel for Ratiopharm further submits that, in the event the Tribunal finds grounds for the exercise of the reconsideration power, Mr. Lanz's submissions fail to demonstrate that Ratiopharm owes him additional sales commissions.

In his reply, Mr. Lanz asserts that the adjudicator made a mistake of fact on the determination of his commission entitlement, and sought to "provide the following evidence to support my assertion".

ANALYSIS

There are two issues on reconsideration: Does this request meet the threshold established by the Tribunal for reconsidering a decision. If so, should the decision be cancelled or varied or sent back to the Adjudicator?

1. The Threshold Test

The Tribunal reconsiders a Decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *Act*

detailed in Section 2 “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act.”

In *Milan Holdings (BCEST # D313/98)* the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases.

The Tribunal may agree to reconsider a Decision for a number of reasons, including:

- The adjudicator fails to comply with the principles of natural justice;
- There is some mistake in stating the facts;
- The Decision is not consistent with other Decisions based on similar facts;
- Some significant and serious new evidence has become available that would have led the Adjudicator to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The Decision contains a serious clerical error.

(Zoltan Kiss BC EST#D122/96)

While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.

Mr. Lanz’s application does not raise significant questions of law, principle or procedure. The sole basis for his application appears to be his allegation that the adjudicator made a factual error in determining that he was not entitled to further sales commissions. This was the central issue before not only the delegate at first instance, but the adjudicator. Where an applicant for review relies on this ground, he must show compelling evidence that that the factual conclusions were wrong.

The adjudicator concluded that Mr. Lanz had been denied natural justice when the delegate failed to disclose Ratiopharm’s November 5, 2002 submission to him. Having arrived at that conclusion, she then reviewed all of the submissions on appeal. Those submissions included Mr. Lanz’s response, or lack of it, to the previously undisclosed evidence. In other words, the adjudicator cured any defects in the original decision. Mr. Lanz did not respond to Ratiopharm’s submission that his commission entitlement was not calculated on the sales of one product or customer. The adjudicator found Ratiopharm’s evidence to be “compelling” and concluded that Mr. Lanz had not substantiated his claim for additional commissions.

Mr. Lanz contends that he did not respond to Ratiopharm’s submissions because he they were, in his view, irrelevant. Given that Mr. Lanz’s position was that he was denied natural justice in not being given an opportunity to respond to the November 5, 2002 documents, it is illogical for him now to say that he

did not respond to them because they were irrelevant. The reconsideration power does not exist to allow Mr. Lanz the opportunity to do what he failed to do in his appeal.

A review of Mr. Lanz's submissions discloses that he is attempting to reargue the issues advanced before the Director as well as the adjudicator. As noted above, the Tribunal will not exercise its reconsideration power where the applicant seeks, in essence, to "reargue" the case.

I find that Mr. Lanz has not established any of the factors set out in *Zoltan Kiss*, and his application discloses no significant questions of law, fact, principle or procedure. I find that the reconsideration power should not be exercised in this case.

ORDER

Pursuant to Section 116 of the Act I deny the application for reconsideration.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal