

An Application for Reconsideration

- by -

Esposito Bros. Management Services Ltd. operating as Inn at Kings Crossing
(“Esposito”)

- 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: Fern Jeffries

FILE No.: 2002/252

DATE OF DECISION: July 15, 2002

DECISION

OVERVIEW

This is a request to reconsider a decision pursuant to Section 116 of the *Employment Standards Act* (the “*Act*”) that 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 employer, Esposito Bros. Management Services Ltd. operating as Inn at Kings Crossing, (“Esposito”) requests reconsideration of a decision that confirmed a determination awarding the former employee, Christine de Hann (“de Hann”) compensation for length of service.

This request is made on the basis that there is new information available and that the adjudicator erred in allowed de Hann’s spouse to both assist her at the hearing and provide testimony.

FACTS

Esposito employed de Hann as a server at a full service hotel from October 6, 1999 to January 6, 2001 when she was terminated. She complained that she was terminated without just cause and that unlawful deductions were made from her wages. The determination awarded her \$443.96 in outstanding wages and two weeks compensation for length of service in the amount of \$548.92. Interest was also awarded.

The employer conceded that \$443.96 was owing, but appealed the award for compensation for length of service. The appeal was heard at an oral hearing, April 4, 2002. The adjudicator heard evidence from Mr. Paul Esposito, Mr. Paul Esposito, Jr., Mr. Frank Esposito, and Ms. Rebecca Echon. The employee’s spouse assisted the employee at the hearing and gave evidence as he was present at the party that gave rise to the decision of the employer to dismiss the employee.

ISSUE

Does this application meet the threshold established for reconsideration? Did the adjudicator fail to comply with the principles of natural justice by finding that the employee’s spouse could both assist the employee and provide evidence? Did the adjudicator commit a serious error in law by finding that the employee’s behaviour did not constitute a serious breach of the employment relationship so as to provide ‘just cause’ for immediate dismissal without compensation or notice? Is there new information as submitted by the employer that was unavailable to the officer or to the adjudicator?

ANALYSIS

The *Act* intends that the Adjudicator’s Appeal Decision be “final and conclusive”. Therefore, the Tribunal only agrees to reconsider a Decision 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 reflects the purposes of the *Act* detailed in Section 2.

As established in *Milan Holdings* (BC EST # D313/98) the Tribunal has developed a principled approach in determining when to exercise its discretion to reconsider. 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.

Reasons the Tribunal may agree to reconsider a Decision are detailed in previous Tribunal cases. For example, BC EST #D122/96 describes these as:

- 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 some serious clerical error.

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. As outlined in the above-cited case:

It would be both unfair and inefficient if the Tribunal were to allow, in effect, two hearings of each appeal where the appeal hearing becomes nothing more than a discovery process for a reconsideration application.

In assessing the merits of Esposito's request for reconsideration against the standards established by the tribunal, I find that the request fails to qualify for reconsideration.

With respect to the grounds that there has been abuse of natural justice by allowing the employee's spouse to participate throughout the hearing as her assistant and then to provide evidence, I am not convinced that the adjudicator was incapable of assessing the weight to be given to the evidence of the employee's spouse. The employee's spouse testified after others and was subject to cross-examination. The oral hearing provided an opportunity for the adjudicator to assess the respective credibility of the parties. The adjudicator fully explained his assessment in the decision and came to the conclusion that:

"Ms. de Hann behaved in an inappropriate manner at the party. In my view, in the circumstances, her conduct may be characterized as "minor" misconduct. I am not prepared to accept that the Employer had "just case" for the termination."

The employer refers to role played by the employee's spouse as "counsel". The employer claims that there is a "conflict of interest", but I am unable to find any. Proceedings before the Tribunal are relatively informal. Adjudicators relax formal court procedures to accommodate parties who are unrepresented by legal counsel. While Esposito refers to de Hann's spouse as 'counsel', the term 'representative' may be more accurate as Mr. de Hann is a lay- person without formal legal training. The fact that Mr. de Hann was subject to cross examination balanced any advantage he may have had from hearing prior testimony and submissions from Esposito and his witnesses.

As a second ground for the request for reconsider, the employer claims that there is new evidence that was not previously available. However, I find that both the submissions of current and former employees and the Policies of the employer “as of February 1, 2001” could have been available to both the officer and the adjudicator. Moreover, I find that for the most part, these submissions and Esposito’s submissions merely re-argue the case that was unsuccessful at appeal.

For these reasons, I find that the request does not meet the threshold establishment by the Tribunal.

ORDER

The request for reconsideration is refused; the Decision is confirmed.

Fern Jeffries, Chair
Adjudicator
Employment Standards Tribunal