

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an application for reconsideration pursuant to Section 116 of the

*Employment Standards Act*, S.B.C. 1995, c. 38

-by-

Bicchieri Enterprises Ltd.

(“Bicchieri”)

-of a Decision issued by-

The Employment Standards Tribunal

(the “Tribunal”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** 96/438

**DATE OF DECISION:** November 26th, 1996

## **DECISION**

### **OVERVIEW**

This is an application filed by Bicchieri Enterprises Ltd. (“Bicchieri”) pursuant to section 116 of the Employment Standards Act (the “Act”) for reconsideration of an adjudicator’s decision to cancel Determination No. CDET 003120 (the “Determination”). The Determination was issued by the Director of Employment Standards on July 3rd, 1996. The Director held that Bicchieri owed a former employee, Lawrence S. Balitsky (“Balitsky”), the sum of \$88.17 on account of unpaid daily overtime earned during the period June 1st to 9th, 1995 and interest. Balitsky’s claim for termination pay was denied by the Director.

Balitsky appealed the Determination to the Tribunal. In a decision based on the parties’ written submissions, issued September 16th, 1996, the adjudicator held that:

- Balitsky was employed as a truck driver by Bicchieri from sometime in 1990 to June 1995, although there were several occasions during this period when Balitsky’s employment was suspended due to normal seasonal shutdowns in the Williams Lake area logging industry.
  
- Balitsky did not quit his job as a truck driver with Bicchieri in March 1995 but did, in fact, quit his job in August 1994. In each instance, the adjudicator reached his conclusion based on the Record of Employment (“ROE”) that was issued by Bicchieri. The ROE issued on August 25th, 1994 stated that Balitsky “quit”. Balitsky was once again employed by Bicchieri from October 3rd, 1994 to March 13th, 1995 when he was laid off due to a seasonal shutdown--the ROE issued in March 1995 stated that Balitsky was laid off due to a “shortage of work”.
  
- Following the March 1995 layoff, Balitsky returned to work on June 1st, 1995 and worked until June 9th, 1995 when he quit.

Accordingly, the adjudicator held that the relevant period of employment for purposes of determining Balitsky’s entitlement to overtime was from October 3rd,

1994 to June 9th, 1995. The Director determined that Balitsky quit his job in late February or early March 1995 and thus dismissed Balitsky's claim for any overtime allegedly earned during the October 3rd, 1994 to March 1995 period because Balitsky's complaint (dated October 18th, 1995) was filed outside the six-month limitation period provided for in section 74(3) of the Act.

However, as noted above, the adjudicator held that Balitsky did not quit in March 1995 and, as Balitsky's complaint was filed on October 18th, 1995, he was thus entitled to claim any unpaid overtime that may have been earned during the October 3/94 to June 9/95 period. The adjudicator's Order remitted the matter to the Director to determine what further overtime wages, if any, were owed to Balitsky.

Bicchieri's request for reconsideration is contained in two letters dated October 2nd and 14th, 1996, respectively. The first letter, addressed to the adjudicator, is essentially an *ad hominem* attack on the competence and integrity of the adjudicator and concludes with the declaration that that the employer does "not intend to give to this dishonest ex employee any additional cents of my hard worked money". In the second letter, addressed to the Tribunal's Registry Clerk, the employer reiterates its view of the "true facts" and, once again, questions the competence of the adjudicator.

## **ANALYSIS**

The Tribunal has issued several decisions regarding the permissible scope of review under section 116 of the Act (the "reconsideration" provision). In essence, the Tribunal has consistently held that applications for reconsideration should succeed only when there has been a demonstrable breach of the rules of natural justice, or where there is compelling new evidence that was not available at the time of the appeal hearing, or where the adjudicator has made a fundamental error of law. The reconsideration provision of the Act is not to be used as a second opportunity to challenge findings of fact made by the adjudicator, unless such findings can be characterized as lacking any evidentiary foundation whatsoever.

In this case, the adjudicator's critical findings of fact were based on the *employer's own documents*, namely, the Records of Employment. While it is clear

that the employer strongly disagrees with the adjudicator's findings of fact, my review of the record indicates that the adjudicator's factual conclusions were amply supported by evidentiary record before him.

**ORDER**

The application to vary or cancel the decision of the adjudicator in this matter is refused.

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**Kenneth Wm. Thornicroft, *Adjudicator***  
**Employment Standards Tribunal**