

An Application for Reconsideration

- by -

W. Tobien Enterprises Ltd.

- 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: John M. Orr

FILE No.: 2001/266

DATE OF DECISION: July 3, 2001

DECISION

OVERVIEW

This is an application by W. Tobien Enterprises Ltd. (“Tobien”) under Section 116 (2) of the *Employment Standards Act* (the “Act”) for a reconsideration of a Decision #D121/01 (the “Original Decision”) which was issued by the Tribunal on March 12, 2001.

Tobien owned and operated the Riviera Motel in Osoyoos, British Columbia. In September 1999 Tobien hired Larry and Frances Depper (“the Deppers”) to manage the motel until June 1, 2000 when the employment was terminated. The Deppers claimed that they were dismissed without cause and were entitled to compensation for length of service and some unpaid wages. Tobien claimed that alternatively the Deppers quit or they were dismissed with just cause. It is alleged that the Deppers stole a considerable amount of money and defrauded the business by taking cash payments for rental units and not disclosing those rentals to the owner.

A determination was issued on November 03, 2000 in which the Director of Employment Standards (the “Director”) found that Tobien had dismissed the Deppers without just cause and without reasonable notice or compensation for length of service. Tobien appealed and on March 12, 2001 an adjudicator of the Tribunal dismissed the appeal and confirmed the determination.

Tobien has now applied for reconsideration of the original decision.

ANALYSIS

The exercise of the reconsideration discretion under section 116 of the *Act* is a two-stage process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. In deciding this question the Tribunal considers and weighs a number of factors such as whether the application is timely, whether it is an interlocutory matter, and whether its primary focus is to have the reconsideration panel effectively “re-weigh” evidence tendered before the adjudicator of the original decision.

The primary factor weighing in favour of reconsideration is whether the applicant has raised significant questions of law, fact, principle or procedure of sufficient merit to warrant the reconsideration. The reconsideration process will not be used to allow for a “re-weighing” of evidence or the seeking of a “second opinion” when a party simply does not agree with the original decision.

It is one of the defined purposes of the *Act* to provide a fair and efficient procedure for resolving disputes and it is consistent with such purposes that the Tribunal's decisions should

not be open to reconsideration unless there are compelling reasons: *Khalsa Diwan Society* BCEST #D199/96.

The circumstances in which an application for reconsideration will be successful will be limited. In a Reconsideration decision dated October 23, 1998, *The Director of Employment Standards*, BCEST #D475/98, the Adjudicator sets out those limits as follows:

- *failure to comply with the principles of natural justice;*
- *mistake of law or fact;*
- *significant new evidence that was not reasonably available to the original panel;*
- *inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;*
- *misunderstanding or failure to deal with a serious issue; and*
- *clerical error*

In my opinion this is not a case that warrants the exercise of the reconsideration discretion. The submission made by Tobien on this reconsideration application only reiterates the arguments that have already been decided by the director and by the adjudicator in the original decision. Essentially the issues come down to questions of fact that turn on the credibility of the evidence presented and the onus of proof on the parties.

If one accepted the submissions made by Tobien on paper it would certainly appear that the Deppers were a business-owner's worst nightmare. However, the Director's delegate and the adjudicator had the opportunity to assess and weigh the evidence in person. The Tribunal's adjudicator very carefully and clearly sets out the reasons for her assessment of the evidence, applied a rational approach to the weighing of the evidence, and concluded that the evidence was lacking to prove the allegations made by Tobien. The adjudicator sets out fully and fairly the evidence and arguments presented by the parties. She applies the proper burden of proof and makes significant findings of credibility.

In the application for reconsideration Tobien states, "I have nothing new to add other than reinforce my earlier statements". It is clear that Tobien simply wants a "second opinion". It is now a well-established principle of this Tribunal that we will not exercise the reconsideration discretion in such circumstances.

It is fully within the intent and purposes of the act that there be some finality to the decisions of the Tribunal. As stated above, reconsideration should be used sparingly and should not be

used to substitute my analysis and my opinion for that of the adjudicator who wrote the original decision.

I am not persuaded that there is a sufficient basis in fact or in law to warrant any interference in the decision made by the adjudicator in the original decision. Therefore I am not prepared to exercise my discretion to reconsider the original decision.

ORDER

The application to reconsider the decision of the adjudicator in this matter is dismissed.

John M. Orr
Adjudicator
Employment Standards Tribunal