

BC EST #D375/96
(Reconsideration of BC EST # D228/96)

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 -

639549 Alberta Ltd. dba Comtec Communications
("Comtec")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: David Stevenson

FILE No.: 96/164

DATE OF DECISION: December 20, 1996

DECISION

OVERVIEW

This is an application for reconsideration by 639549 Alberta Ltd. dba Comtec Communications (“Comtec”) pursuant to Section 116 of the *Employment Standards Act* (the “Act”) from a decision of Adjudicator Alfred C. Kempf, BC EST#D228/96. The decision confirmed, with one minor variance, a Determination of a delegate of the Director of the Employment Standards Branch (the “director”) in respect of claims by two employees of Comtec, Juanita Taylor (“Taylor”) and Ruth Manning (“Manning”). Comtec objects to several findings of fact and conclusions of fact made by the Adjudicator. They also object to the treatment received during the investigative and adjudicative process.

FACTS

The complaint by Taylor involved several unauthorized deductions from her wages, a breach of Section 21 of the *Act*, which prohibits any withholding, deduction or payment from the wages of an employee without signed authorization from the employee.

The complaint by Manning involved unauthorized deductions for days absent, statutory holiday pay and length of service compensation.

At the outset of the hearing Comtec abandoned its appeal involving Taylor.

The issues in the appeal involving Manning were, first, whether the contract of employment between her and Comtec allowed her to take a reasonable amount of time taken off work without reduction from her wage, whether Comtec had agreed to pay its employees for Boxing Day and whether, and if so in what circumstances, the *Act* permits the deduction of overpayment of wages.

The Adjudicator found, from the evidence presented, an agreement to allow employees an amount of time off work where the length of the absence and the basis for the absence is reasonable and justifiable. He also found, with the exception of a half day (4 hours), the absences of Manning were reasonable and justifiable.

He found evidence to support a conclusion Comtec had agreed to pay its employees for Boxing Day.

Finally, he concluded an employer could make deductions of overpayment from employees provided the employer acted promptly to rectify the overpayment and, if there

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was an issue of delay in recovering the overpayment, had demonstrated a lack of awareness of the overpayment and due diligence.

ANALYSIS

Section 116 is not a full fledged avenue of appeal from decisions of the Tribunal. The grounds upon which the Tribunal will give further consideration to an appeal are limited. They include:

- failure by the Adjudicator to comply with principles of natural justice;
- an error of fact on the face of the decision that is relevant to the decision reached;
- the discovery by one of the parties of new evidence that could not, with due diligence, have been discovered and made available to the Adjudicator at the time of the hearing;
- a serious error in interpreting the *Act*;
- a serious misunderstanding of or failure to address a significant issue in the appeal;
- a significant clerical error in the decision; and
- a failure by the Adjudicator to be consistent with previous decisions of the Tribunal which are indistinguishable on the facts.

There are sound policy reasons for limiting the scope of appeal under Section 116, see **Zoltan B. Kiss**, BC EST #D122/96.

The onus is on Comtec to show the application for reconsideration comes within one of the grounds which the Tribunal accepts as appropriate for reconsideration. They have not done so.

Comtec chose to abandon the appeal involving Taylor. On the basis of the material on record they were quite correct in their choice. The Adjudicator's advice to them about the relative merit of proceeding with the appeal on Taylor is consistent with the statutory purpose of keeping the dispute resolution process efficient.

The outcome of the appeal involving Manning was clearly driven by the Adjudicator's conclusions about the terms of the employment contract between Comtec and Manning. Those conclusions were based upon findings of fact which the Adjudicator was entitled to make. Comtec wonders about the relevance of those findings of fact, but in the main they are not challenged. In those areas where findings of fact in this reconsideration application are disputed it is apparent from the decision the same factual disputes were before the Adjudicator. The Adjudicator had the benefit of hearing the testimony of the witnesses, of observing their demeanour and of weighing all the evidence in the context of probabilities. He was in a better position to make the findings of fact necessary for the decision and Comtec has not established any ground upon which I should disturb them.

In any event, the Adjudicator's conclusion on whether paid time off and pay for Boxing Day could be implied into the contract of employment is a reasonable one based on the factual circumstances identified in the decision. Perhaps what Comtec fails to understand is in the absence of a written contract of employment with each employee, individually identifying terms and conditions of employment, it is probable all employees will be found to have the same terms and conditions of employment, unless there is some valid reason for treating some employees differently. In this case, based on the conclusion other employees were allowed time off with pay (a conclusion not challenged), no reason was given for disentitling Manning to that benefit. Similarly, in light of the conclusion other employees were paid for Boxing Day, no reason was advanced for not paying Manning for that day.

Comtec has provided no basis for disturbing the decision of Adjudicator Kempf.

ORDER

The application for reconsideration is refused.

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David Stevenson
Adjudicator
Employment Standards Tribunal