

An Application for Reconsideration

- by -

Bruce Deacon operating Quesnel Lake Lodge

- 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.: 2001/358

DATE OF DECISION: July 16, 2001

DECISION

OVERVIEW

This is an application by Bruce Deacon operating Quesnel Lake Lodge (“Deacon”) under Section 116 (2) of the *Employment Standards Act* (the “Act”) for a reconsideration of a Decision #D170/01 (the “Original Decision”) that was issued by the Tribunal on April 11, 2001.

Deacon owned and operated the Quesnel Lake Lodge in Likely, British Columbia. He employed Norma Nohels (“Nohels”) as a barmaid from May 16, 1995 to May 23, 2000 when the employment was terminated. Nohels claimed that she was dismissed without cause and was entitled to compensation for length of service and some unpaid wages. Deacon claimed that Nohels quit or terminated her own employment.

A determination was issued on December 01, 2000 in which the Director of Employment Standards (the “Director”) found that Deacon had dismissed Nohels without just cause and without reasonable notice or compensation for length of service. Deacon appealed and on March 29, 2001 an adjudicator of the Tribunal held a hearing at which Deacon and Nohels both appeared and testified. The adjudicator dismissed the appeal and confirmed the determination.

Deacon 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 Deacon 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 Deacon on paper it would certainly appear that Nohels would not be a very credible witness. 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 his 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 Deacon. The adjudicator sets out fully and fairly the evidence and arguments presented by the parties. He applies the proper burden of proof and makes significant findings of credibility.

It is clear that Deacon 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