BC EST #D387/99
Reconsideration of BC EST #D279/99

EMPLOYMENT STANDARDS TRIBUNAL

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

Employment Standards Act, R.S.B.C. 1996, c. 113

-by-

Westmount Canopy Kingdom
a division of Rawhide Manufacturing Ltd.

("Westmount" or the "employer")

-of a Decision issued by-

The Employment Standards Tribunal

(the "Tribunal")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 1999/469

DATE OF DECISION: September 16th, 1999

DECISION

OVERVIEW

This is an application filed by Westmount Canopy Kingdom, a division of Rawhide Manufacturing Ltd. ("Westmount" or the "employer") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of an adjudicator's decision to confirm a determination that was issued by a delegate of the Director of Employment Standards on January 28th, 1999 under file number ER 019-105 (the "Determination").

The Director's delegate held that Westmount owed its former employee, Steve Hulme ("Hulme"), the sum of $1,691.65 on account of unpaid wages (the largest component of the award being 4 weeks' wages as compensation for length of service) and interest.

Westmount appealed the Determination to the Tribunal; the employer's appeal was heard on June 17th, 1999 and in a written decision issued on July 21st, 1999, a Tribunal adjudicator dismissed the appeal and confirmed the Determination. The sole issue in the appeal was whether or not Hulme was recalled--and refused such recall--in the 13-week period following his layoff by Westmount. The adjudicator, having heard the testimony of both the employer's president, Mr. Jim Turney, and Hulme found the latter's evidence to be more credible and thus held that Hulme had not been recalled and was, accordingly, entitled to 4 weeks' wages as compensation for length of service (see section 63 of the *Act*).

Westmount's request for reconsideration is contained in an undated written submission filed with the Tribunal on July 23rd, 1999 and a subsequent letter to the Tribunal dated July 27th, 1999; both documents are signed by Mr. Turney. The employer asserts that Hulme's claim for compensation for length of service is a "fraudulent claim for severance pay"; in its application for reconsideration the employer simply reiterates its position that Hulme was, in fact, recalled within the 13-week period following his layoff.

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.

This application is nothing more than an undisguised attempt to overturn the adjudicator's findings of fact. The employer obviously does not accept the decision of either the delegate, at first instance, or the adjudicator. Nevertheless, an application for reconsideration must inevitably fail

when, in effect, the only ground advanced for reconsideration is a bald rejection of the adjudicator's findings of fact.

There was starkly conflicting evidence before the adjudicator which necessitated the adjudicator making a credibility determination. Credibility findings are not reviewable by way of the reconsideration provision unless it can be said that the credibility determination made by the adjudicator is perverse--something that manifestly cannot be said in this case. The uncontroverted evidence before the adjudicator was that Hulme was laid off on December 12th, 1997. Turney testified that he telephoned Hulme "sometime in February 1998" and asked him to return to work but did not give a specific return to work date saying only that "things were picking up" and that Hulme should be back at work "in the next week or so". Turney's evidence was that Hulme refused the recall notice because he was then working somewhere else at a much higher hourly rate. The employer did not present any documentary or other *viva voce* evidence to corroborate its position.

Hulme, on the other hand, denied that Turney had ever telephoned him asking him to return to work. Further, Hulme's evidence was that he attended the employer's place of business in early January, mid-February and yet again in early March 1998 to inquire about the availability of work--each time he spoke with particular employees, none of whom was called by the employer to rebut Hulme's evidence even though Hulme's evidence on this point had been provided to the employer well prior to the appeal hearing.

The adjudicator quite rightly noted that, under the *Act*, a recall notice (unlike a notice of termination) need not be in writing, however, the adjudicator's decision did not turn on the legal question of whether or not written notice of recall was required, but rather, on the *evidentiary* question of whether or not the employer satisfied its burden of proving that Hulme was recalled within the 13-week period following his layoff.

In my view, the adjudicator, based on the evidence before him, came to an entirely correct decision. For the reasons set out at page 3 of the adjudicator's decision, it is apparent that the employer's evidence fell well short of establishing--and, as noted above, this was the *employer's* burden--that Hulme was recalled for work within the 13-week period following his layoff on December 12th, 1997.

This request for reconsideration is wholly without merit.

ORDER

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

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal