

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 -

The Director of Employment Standards
("the Director")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR:	Mark Thompson
FILE NO.:	98/231
DATE OF DECISION:	October 13, 1998

DECISION

OVERVIEW

This is an application by the Director of Employment Standards (the "Director") pursuant to section 116 of the Employment Standards Act (the "Act") for reconsideration of an adjudicator's Decision #D116/98 (the "Decision") issued on March 11, 1998. The Decision varied a Determination (the "Determination") issued by a delegate of the Director on December 8, 1997. The Determination found that Victor Carpet Distributors Ltd. ("Victor") owed a former employee, Kevin Weddell ("Weddell"), a total of \$5,435.93 in unpaid wages, including overtime and statutory holiday pay. The Decision confirmed the Determination except that the amount owed to Weddell was reduced by one week's wages as compensation for length of service. After the appropriate reduction in vacation pay entitlement, the amount due to Weddell was \$4,644.01, plus interest from the date of the Determination.

The Director has requested reconsideration on the grounds that the adjudicator misunderstood a serious issue, i.e., entitlement to compensation for length of service, and arrived at an incorrect decision, thereby fulfilling the requirements for canceling the Decision.

Victor also requested reconsideration on the grounds that the employer had not terminated Weddell's employment and thus was not entitled to compensation for length of service. In addition, Victor argued that the Tribunal argued that the Tribunal had failed to comply with the principles of natural justice by failing to afford Victor the opportunity to present evidence rebutting statements made by Waddell regarding the hours he worked. Further, Victor argued that the adjudicator erred in law in holding that the employer could not argue that Weddell had quit and was not entitled to compensation for length of service. Finally, Victor argued that section 114 of the Act required the Tribunal to afford Victor a hearing.

FACTS

Weddell was employed at Victor from September 2, 1996 through March 10, 1997. The adjudicator found that Weddell was hired to work a 40-hour week from Monday to Friday and to seek contracts for floor covering with residential contractors. Weddell's salary was \$2,000 per month. In October 1996, Victor unilaterally changed some of the terms of Weddell's employment. In particular he was to work an extra hour each weekday and a shift on Saturday, without any change in his compensation. Weddell stated that he protested the new schedule without avail. When he found alternate employment, he resigned from Victor.

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Weddell filed a complaint seeking payment for overtime wages and statutory holiday pay for Thanksgiving and Remembrance Day in 1996, when he worked and did not receive extra compensation. Victor did not produce records of Weddell's hours of work, although it claimed that he did not work the number of hours stated on the complaint.

The Determination found that Weddell was entitled to pay for statutory holidays, overtime pay and vacation pay on the wages owed. The Determination did not refer to compensation for length of service.

The Decision upheld the Determination's conclusion that Weddell had worked the hours claimed in his complaint, in part because Victor failed to produce any records to rebut Weddell's assertions. The adjudicator further concluded that Victor was estopped from raising the argument that Weddell had quit his employment.

The Decision found that Victor's unilateral change in Weddell's hours of work constituted a substantial alteration of his terms and conditions of employment and was therefore tantamount to a termination under Section 66 of the Act. Therefore, Weddell was entitled to compensation for length of service. The Decision found that the Determination had included two weeks' pay as compensation for length of service when Weddell was entitled only to a single week. Accordingly, the Decision reduced the amount owed to Weddell by one week's wages under Section 63(1) of the Act. The Decision confirmed the Determination in all other respects.

ANALYSIS

Counsel for the Director argued that compensation for length of service was not an issue in this case. Weddell did not claim it, and the Determination did not find that he was entitled to such compensation. Victor had contended that Weddell had quit and thus was not entitled to compensation for length of service, and the issue was not addressed in the Determination. The adjudicator, however, concluded that Weddell was entitled to compensation because Victor had substantially altered Weddell's terms and conditions of employment. Counsel argued that the adjudicator made a serious error by varying the Determination to reduce the amount of wages owed by one week.

Victor argued that Weddell had accepted the unilateral alteration of his terms and conditions of employment and had continued to work thereafter. Consequently, he could not claim constructive dismissal after leaving Victor's employment. Further, the Tribunal had failed to comply with the principles of natural justice by denying Victor the opportunity to present evidence rebutting Weddell's claims regarding hours of work and by not affording Victor the opportunity for a hearing. Finally, Victor asserted that the Tribunal had made an error in law by finding that Victor was estopped from arguing that Weddell had quit and was not entitled to compensation for length of service. Victor was not represented by counsel during the investigation, but the relevant facts should have emerged during the investigation.

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The authority to reconsider a decision of the Tribunal rests with Section 116 of the Act. It states:

On application under subsection (2) or on its own motion, the tribunal may reconsider any order or decision of the tribunal, and cancel or vary the order or decision or refer the matter back to the original panel.

The Tribunal has held consistently that the circumstances under which an application for reconsideration will succeed are limited. The leading case on this point is Zoltan Kiss, BC EST #D122/96. The Tribunal identified some of the typical grounds on which the Tribunal would reconsider one of its own orders or decisions, including the following:

Some significant and serious evidence has become available that would have led the Adjudicator to a different decision;

Some serious mistake in applying the law

In Northland Properties Ltd., BC EST #D332/98, Reconsideration of BC EST #D004/98, the Tribunal reviewed these principles. It stated:

We are of the view that the phrases on which we have placed emphasis are important and not trivial because they lead us to conclude that we should not reconsider a decision merely because the Adjudicator analyzed and decided the case differently than we may. As the Tribunal noted in Zoltan Kiss, it should exercise its reconsideration powers with 'great caution'

In Director of Employment Standards, BC EST #D479/97, the Tribunal stated its approach to Section 116 as follows:

It is now firmly established that the Tribunal will not interpret the above provision [Section 116] to allow any dissatisfied party an automatic right of review. To the contrary, the Tribunal has stated the reconsideration provision will be used sparingly and has identified a number of grounds upon which the Tribunal may choose to reconsider an order or decision. These grounds may be summarized as cases demonstrating: a breach of the rules of natural justice; a significant error of fact that is either clear on the face of the record or that arises from the introduction of new evidence that is both relevant to the order or decision and was not reasonably available at the time of the original hearing to the party seeking to introduce it; a fundamental error of law; or an inconsistency with other decisions of the tribunal which are not distinguishable on their facts.

These principles apply to the case at hand. Counsel for the Director correctly stated that the issue of compensation for length of service had not been raised in Weddell's complaint or in the Determination. However, it does not follow that the adjudicator could not

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address the issue in his decision. The decision reviewed the evidence and interpreted both the current Act and the previous statute in reaching his conclusion. The reconsideration process should be reserved for "fundamental errors of law," (Director of Employment Standards, *supra*). With respect to the Director's argument, the adjudicator did not make a fundamental error of law in this case. There is no authority for the proposition that he could not address the issue of compensation for length of service. While the link between the Determination and the adjudicator's decision regarding compensation for length of service could have been drawn more clearly, that is not a ground for reconsideration, as stated in *Northland Properties Ltd.*, *supra*).

The same principle applies to Victor's first grounds for appeal. The adjudicator was within his authority to find that Weddell was constructively dismissed. Victor had ample opportunities to present evidence in support of its case. The Director's delegate issued a Demand for Employer Records and Victor failed to present any proof that Weddell's evidence was incorrect. The Registrar of the Tribunal notified Victor that it was obliged to provide records and documents in support of its position on appeal, and no records were produced. Victor cannot come forward in a reconsideration to claim that it not no opportunity to present its documents. As the Tribunal has stated in *Kaiser Stables Ltd.* (BC EST #D58/97), a party cannot use an appeal process to reinvestigate a complaint or to produce evidence that should have been produced earlier in the proceeding. Victor chose not to be represented by counsel until the reconsideration. That decision, and the consequences arising from it, does not constitute grounds for reconsideration. The procedures for reconsideration are governed by Section 116 of the Act. Counsel for Victor based his argument on the requirement for a hearing on Section 114 of the Act. In any case, the Tribunal has the authority to determine when an oral hearing should be held. No argument in support of an oral hearing was presented except that Victor claimed the right to present evidence that it apparently had failed to produce during the investigation and the appeal..

ORDER

For these reasons, pursuant to Section 115 of the *Act*, Decision BC EST #D116/98 is confirmed.

Mark Thompson
Adjudicator
Employment Standards Tribunal