

An Application for Reconsideration

- by -

Mt. Rocky Investment Ltd.

- of Decisions 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, Panel Chair
David B. Stevenson
Fern Jeffries

FILE No.: 2001/345

DATE OF DECISION: August 30, 2001

DECISION

OVERVIEW

This is an application by Mt. Rocky Investment Ltd. (“Mt. Rocky”) under Section 116 (2) of the *Employment Standards Act* (the “*Act*”) for a reconsideration of a Decision #D269/00 and #D142/01 (the “Original Decisions”) that was issued by the Tribunal on July 12, 2000 and March 23, 2001.

Mt. Rocky owned and operated a mushroom farm and employed Qing (Maureen) Zheng (“Zheng”) as a laboratory technician. In November 1998 Zheng commenced maternity leave. Two significant events occurred subsequently. Firstly, Zheng lost the use of accommodation that had been provided to her while she was working and secondly she was not returned to her position at the end of her leave.

Zheng filed a complaint dated May 17, 1999 alleging that she was entitled to compensation for length of service in the approximate amount of \$750.00. The Director’s delegate determined that she was entitled to \$786.18. Mt Rocky appealed and a Tribunal adjudicator confirmed the amount of compensation. However the adjudicator also found liability by Mt. Rocky in relation to the loss of housing and referred the matter back to the Director for further investigation (Decision #D269/00)

Subsequent to receipt of the delegate’s report the adjudicator found Mt. Rocky liable for the sum of \$3,158.27 plus interest (Decision #D142/01). Mt. Rocky has requested that the Tribunal reconsider these decisions.

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. The current suggested approach to the exercise of the reconsideration discretion under section 116 of the *Act* was set out by the Tribunal in *Milan Holdings Ltd.*, BCEST #D313/98. Without repeating the factors suggested in *Milan*, we are satisfied that this case meets the requirements of the first stage of the reconsideration process as the request for reconsideration and the circumstances surrounding the Tribunal Decision BCEST #D269/00 to refer back a matter to the Director raise an important issue about the scope of the review conducted by the Tribunal on an appeal. It raises the issue to what extent is the Tribunal’s review and adjudication limited by the grounds of the appeal itself.

In brief summary, the facts are that Zheng worked on the mushroom farm as a lab technician and was allowed to rent subsidized accommodation on the farm property while she was working there.

In November 1998 the employee commenced maternity leave for 6 months. She was told by the employer that she would have to pay market rent for the accommodation or to vacate. She vacated.

On April 30th 1999 the employee contacted the employer about her return to work. She was never returned to work because the business had been discontinued. She made a claim for compensation for length of employment.

On April 12, 2000 a Determination was issued in which the Director found that the employee was entitled to \$719.99 plus interest as compensation for length of service. The Director also imposed a \$0.00 penalty. In the Determination the Director refers to the matter about the loss of accommodation but makes no finding of liability for any breach of the *Act* in regard to this issue.

It is significant that the employee had made no claim in relation to the loss of subsidized housing and subsequent to the issuing of the Determination she did not appeal the lack of any such finding.

On April 28, 2000 Mt. Rocky appealed to the Tribunal. The only issue appealed was the award for compensation for length of service. The basis for the appeal was that because the business was discontinued there was no obligation to pay severance to employees who were on leave at the time. The appeal did not mention the penalty determination.

In a written decision BCEST #D269/00 (July 12, 2000) the Tribunal adjudicator agreed with the delegate and found that the employer was liable to pay compensation despite the shutdown of the business. However the adjudicator went further in her Decision.

The adjudicator found that:

“unless Zheng (*the employee*) gave written consent to the change (*i.e. the change in rent*), Mt. Rocky’s notification to Zheng on November 10, 1998 of a change in her rent because she was commencing maternity leave constituted a violation of section 54(2)(b) of the *Act*. Zheng did not refer in her submissions to giving written consent to the change, nor did the Determination address this matter as a violation of the *Act*.”

* * *

“I am unable, however, to say that the Director’s delegate considered the issue of a violation of section 54(2) of the *Act* and the effect of that additional violation on the appropriate amount of penalty to assess.”

The adjudicator then ordered that the Determination and Penalty be referred back to the Director “to address the matters raised in this decision”.

The Director's delegate responded by letter to the Tribunal dated December 14, 2000 and found that a further penalty, for the breach of section 54(2), would serve no labour relations purpose and declined to impose any further penalty. However, the delegate determined that pursuant to section 79(4)(c) and (d) of the *Act* the employee could be compensated for costs associated with the breach of section 54(2)(b). The delegate found these costs to be in the amount of \$2,438.28.

In her final adjudication (BCEST #D142/01 – March 23, 2001) the Tribunal's adjudicator varied the original determination to increase the amount payable from \$719.99 to \$3,158.27 plus interest.

The issue that clearly arises is whether it is appropriate for the Tribunal to initiate an additional ground for compensation for the employee when the employee had not included the matter in the original complaint, had not appealed the Determination, and where the sole ground for appeal was by the employer in relation to section 63.

The investigative and adjudicative schemes in the *Act* provide for clearly distinct jurisdictional roles for the Director and the Tribunal. The role of the Director is set out in Part 10 of the *Act*. Section 74 provides for complaints to be made to the Director and that a complaint must be in writing and must be delivered within 6 months after the last day of employment. Section 76 provides that the Director must investigate a complaint under section 74, and subsection (3) also allows the Director to conduct an investigation without receiving a complaint. The Director is given wide powers for such investigative procedures including the right of entry and seizure and has the power and authority of a commissioner under the *Inquiry Act*.

The jurisdiction of the Tribunal is found in Part 12 of the *Act*. The Tribunal is tasked with making recommendations to the Lieutenant Governor in Council about exclusions from the *Act*, hearing appeals and conducting reconsiderations. The Tribunal is also provided with broad powers under the *Inquiry Act* and powers of entry and seizure but such powers are only for "the purpose of an appeal, reconsideration or recommendation" and relate only to those things that "may be relevant to an appeal, reconsideration, or recommendation".

Pursuant to section 112 any person served with a determination may appeal and the Tribunal is authorised to dismiss the appeal without a hearing under certain circumstances (section 114) or to proceed to consider the appeal. Section 115 provides for the authority of the Tribunal upon considering the appeal.

- 115.** (1) After considering the appeal, the Tribunal may, by order,
- (a) confirm, vary or cancel the Determination under appeal, or
 - (b) refer the matter back to the Director.

The power of the Tribunal, after considering the appeal, is thus limited to those matters dealt with in the Determination or those matters under appeal. The Tribunal has not been given such broad remedial authority that would allow it to make a finding *ab initio* or of first instance. It is

not within the contemplation of the legislative scheme that the Tribunal, in addressing appeals, would be an investigative body that would involve itself in a broad review of all possible workplace infractions that might arise out of the submissions made or evidence led during an appeal. The Tribunal's powers should be limited to those matters under appeal by either or both parties.

Limiting the scope of the review conducted by the Tribunal to those matters under appeal and such matters that are necessarily incidental thereto is consistent with the purposes of the *Act* to provide a fair and efficient procedure for resolving disputes and to promote the fair treatment of employees and employers. This is also consistent with the role of the Tribunal as an independent adjudicative body. Expanding the role to include consideration of matters not under appeal may in fact compromise the independence of the Tribunal.

In this case the employee did not include any claim in relation to the loss of subsidized housing in her complaint. She only complained about the loss of her job at the end of her maternity leave and sought compensation for length of service. The Director's delegate made no finding in the Determination about the loss of housing and the employee did not appeal the lack of such a finding. The housing issue was not a matter contained in the complaint nor in the Determination. It was not a matter under appeal and therefore it was not a matter relevant to the issue under appeal, which was the employer's obligation to pay compensation for length of service.

In conclusion, therefore, Decision BC EST #D142/01 dated March 23, 2001 should be cancelled and Decision BC EST #D269/00 varied to order that the original Determination dated April 12, 2000 be confirmed in the amount of \$719.99 with interest thereon to run from February 28, 1999 as found by the adjudicator in Decision #D269/00.

ORDER

The application to reconsider the Decision of the adjudicator in this matter is granted. Pursuant to section 116 of the *Act* Decision BC EST #D142/01 dated March 23, 2001 is cancelled and Decision BC EST #D269/00 is varied to order that the Determination dated April 12, 2000 is confirmed in the amount of \$719.99 with interest thereon to run from February 28, 1999.

John M. Orr
Adjudicator
Employment Standards Tribunal

Fern Jeffries
Adjudicator
Employment Standards Tribunal

David B. Stevenson
Adjudicator
Employment Standards Tribunal