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 -

Gerald Desilets operating as Desilets Trucking
("Desilets" or the "employer")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No: 2000/594

DATE OF DECISION: November 6, 2000

DECISION

OVERVIEW

This is an application filed by legal counsel on behalf of Gerald Desilets, operating as Desilets Trucking ("Desilets" or the "employer"), pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of Adjudicator Lombard's decision issued on April 14th, 2000 (BC EST #D148/00). The adjudicator held that Desilets' former employee, Richard Bucknell ("Bucknell"), did not quit his employment with Desilets and, accordingly, was entitled to three weeks' wages as compensation for length of service (see section 63 of the *Act*).

The matter of Bucknell's precise monetary entitlement was referred back to the delegate who, in turn, wrote to the Tribunal on June 8th, 2000 setting out his finding that Bucknell was entitled to the sum of $6,191.81 on account of compensation for length of service (including concomitant vacation pay and interest). Bucknell accepted the delegate's calculations but the employer did not, arguing that Bucknell's entitlement should be fixed at $4,863.69. However, inasmuch as the employer, unlike the delegate, incorrectly applied the formula set out in section 63(4) of the *Act*, Adjudicator Lombard confirmed the delegate's calculations (see *Bucknell*, BC EST #D336/00 issued August 14th, 2000) and ordered that amount to be paid by the employer to Bucknell.

It should be noted that *the employer does not seek to overturn, by way of reconsideration, the adjudicator's decision with respect to quantum, i.e.,* the August 14th, 2000 decision. The reconsideration request now before me concerns only the adjudicator's earlier April 14th decision that Bucknell had not quit his employment.

It is apparent that the employer delayed in applying for reconsideration pending the outcome of the quantum dispute. In my view, it was appropriate for the employer to hold his application for reconsideration in abeyance pending issuance of the quantum award so that, if there was to be a challenge to that latter decision, both the liability and quantum issues could be addressed in the same reconsideration application (see *World Project Management Inc.*, BC EST #D134/97). Inasmuch as the employer applied for reconsideration promptly after issuance of the quantum award, I do not consider this application to be untimely (see *Unisource Canada Inc.*, BC EST #D122/98 and *MacMillan Bloedel*, BC EST #D279/00).

BACKGROUND FACTS AND PREVIOUS PROCEEDINGS

On October 12th, 1999 a delegate of the Director of Employment Standards (the "delegate") issued a Determination under file number ER 91631 (the "Determination") in which the delegate held, among other things, that "I am satisfied Mr. Bucknell quit his employ" (p. 11). Accordingly, Bucknell's claim for compensation for length of service was dismissed [see section 63(3)(c) of the *Act*]. Bucknell was awarded $1,947.37 on account of unpaid overtime and statutory holiday pay; that latter sum has been paid and Bucknell's entitlement in that regard is not in dispute.

Bucknell appealed the delegate's decision that he (Bucknell) was not entitled to any compensation for length of service because he had quit. Bucknell's appeal was heard on January 24th, 2000 at which time both he and his wife testified in support of his claim that he had not quit his employment. Gerald Desilets testified on his own behalf and, in addition, also called four other witnesses, namely, James Major, Lloyd Manweiler, John Watson and Norm Black.

The critical events giving rise to these proceedings occurred on June 30th, 1998. As is apparent from the adjudicator's reasons for decision, there was a conflicting testimony at the appeal hearing as between Bucknell and Desilets regarding what each of them said during a telephone conversation in the late afternoon of the 30th. None of the other witnesses was privy to their conversation and thus had limited, if any, relevant probative evidence.

The adjudicator, entirely correctly in my view, observed that an employee cannot be taken to have quit his or her employment unless there is evidence that the employee intended to quit and actually carried out that intention by subsequent action [see *e.g., RTO (Rentown) Inc.*, BC EST #D409/97]. The key portions of the adjudicator's decision (at p. 4) are reproduced below:

> "In this case, Bucknell, if he in fact quit his job, did so in the heat of the moment, i.e., he had just finished a twelve hour working day which is confirmed by the employer, was in bed asleep when he received the call. It wasn't unreasonable in the circumstances that Bucknell said that he was too tired to do it particularly in the heat of the moment of being tired at the end of a long workday and having been woken up. In any event, it has been confirmed by the employer, Desilets [sic], that Bucknell did call back a short while later and stated in Desilets' words: 'I thought about it and I would like my job back'.
>
> The above facts do not demonstrate a real and continued intention on the part of Bucknell to terminate the employment relationship. Bucknell had then been employed with Desilets Trucking for nearly four years. Furthermore, Bucknell did not confirm his intention to quit by some subsequent conduct. To the contrary, just fifteen or twenty minutes later, according to the evidence of the employer, he said he didn't mean it".

THE APPLICATION FOR RECONSIDERATION

The request for reconsideration is contained in a letter to the Tribunal dated August 25th, 2000. In support of his reconsideration request, Desilets says that one witness, Angus Johnson, did not testify at the appeal hearing on behalf of the employer because the employer was "not...advised and not...aware of his right to subpoena witnesses" and that although "he had made arrangements for Mr. Johnson to appear, Mr. Johnson did not attend at the time and place of the hearing". Further, the employer says that the adjudicator did not properly weigh certain evidence and/or otherwise misconstrued the evidence before her. Attached to Desilets' legal counsel's August 25th letter is an affidavit (with some exhibits) sworn by Gerald Desilets.

Subsequently, on September 8th, 2000, the employer's legal counsel submitted a second affidavit, sworn by Angus Johnson, in support of the reconsideration request. This latter affidavit is not

probative with respect to the key June 30th conversation between Desilets and Bucknell. Thus, even if Mr. Johnson had attended the appeal hearing, I fail to see how his evidence would have had *any*, let alone a *material*, effect on the adjudicator's decision. Further, although Mr. Johnson did not attend the appeal hearing, it is apparent that the employer did not claim any prejudice from Johnson's failure to attend until after the adjudicator's decision (adverse to the employer) was in hand. One has to wonder why, if Johnson's evidence was so material, the employer never sought an adjournment so that Johnson's appearance at the appeal hearing could have been compelled by summons.

ANALYSIS

Applications for reconsideration do not proceed as a matter of statutory right. The Tribunal *may* reconsider a previous decision (see section 116 of the *Act*). In *Milan Holdings Ltd.*, BC EST #D313/98, the Tribunal stated that it would exercise its discretion to reconsider a previous decision on the basis of a two-part inquiry. First, the issue(s) raised in the reconsideration request must be sufficiently significant to warrant further inquiry and, second, assuming the first threshold has been satisfied, the Tribunal will then examine the merits of the application and decide if the adjudicator's decision ought to be overturned (*e.g.*, where the adjudicator has made a significant error in interpreting the *Act* or where there has been a failure to comply with the principles of natural justice) or referred back to the original adjudicator. In order to meet the first branch of the test, the applicant must raise a serious question "of law, fact or principle or procedure [that is] so significant that [the adjudicator's decision] should be reviewed" (*Milan Holdings* at p. 7).

In my view, the present application for reconsideration fails to pass the first *Milan Holdings* threshold. As previously noted, the affidavit evidence of Mr. Johnson is not probative on the key issue. As for the affidavit of Mr. Desilets, I do not find that it adds anything significant to the evidentiary record that was before the adjudicator. In my view, given the adjudicator's findings of fact, the conclusion that Bucknell did not quit his employment is, quite simply, unassailable. The Tribunal has repeatedly stressed that the reconsideration provision of the *Act* (section 116) is not to be used to simply re-argue the case on appeal. Applications for reconsideration will succeed only when there has been a demonstrable breach of the rules of natural justice (not applicable here), or where there is compelling new evidence that was not available at the time of the appeal hearing (there is none here), or where the adjudicator has made a fundamental error of law (I find no such error). 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. A reconsideration request will not succeed unless it can be said that the adjudicator's decision was obviously incorrect.

Even if I was satisfied that the first part of the *Milan Holdings* test was satisfied (and I am not), in any event, I do not find that there is any basis for reversing the adjudicator's decision (based on the evidence before her), that Bucknell did not quit his employment.

ORDER

The application to vary or cancel the decision of Adjudicator Lombard in this matter is refused.

Kenneth Wm. Thornicroft

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal