

An Application for Reconsideration

- by -

Patrick Ash op. as Spartan Refrigerator  
("Ash")

- 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:** Norma Edelman

**FILE No.:** 2002/395

**DATE OF DECISION:** October 23, 2002

## DECISION

### OVERVIEW

On July 8, 2002 the Employment Standards Tribunal (“the Tribunal”) received a request from Patrick Ash operating as Spartan Refrigeration (“Ash”) for reconsideration of Tribunal Decision BC EST #D263/02 rendered by Adjudicator Cindy J. Lombard on June 17, 2002. That Decision confirmed the two Determinations under appeal. One of these was a Determination dated October 26, 2001 that Ash owed former employee Alan Fontaine (“Fontaine”) \$2,856.61 plus interest. The other, bearing the same date, was a penalty Determination against Ash in the amount of \$300.00.

Adjudicator Lombard held an oral hearing on April 19, 2002 in Kelowna. At that hearing Ash was represented by Debra Willard (“Willard”) and Fontaine represented himself.

The *Act* intends that Adjudicator’s Appeal Decisions are “final and binding”. Therefore, the Tribunal only agrees to reconsider a Decision in exceptional circumstances. Reconsideration is not a right to which a party is automatically entitled, rather it is undertaken at the discretion of the Tribunal. The Tribunal uses its discretion with caution in order to ensure: finality of its decisions; efficiency and fairness of the appeal system and fair treatment of employers and employees.

The Tribunal will not normally agree to reconsider a Decision if the intent is simply to have the Tribunal “re-weigh” evidence previously considered or dismissed by the Adjudicator or to seek a “second opinion” when a party simply does not agree with the Adjudicator’s Decision. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.

Some of the reasons why the Tribunal might agree to reconsider an Order or Decision are:

- The Adjudicator failed to comply with the principles of natural justice;
- There is some mistake in stating the facts;
- The Decision is not consistent with other Decisions based on similar facts;
- Some significant and serious new evidence has become available that would have led the Adjudicator to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The Decision contains some serious clerical error.

### ISSUE

In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. In the present instance

Willard, representing Ash, does not make direct reference to any of the reasons for reconsideration noted above however she makes reference to the apparent refusal of the Adjudicator to accept new documentary evidence at the oral hearing.

## **ARGUMENT**

In the request for reconsideration Willard states, “I called Mr. Reeve the first week of April and ask if I could bring the extra documents to the meeting and he said yes that he would let the adjudicator know.” Willard stated that at the oral hearing, “...the adjudicator would not let myself, present these documents, did not and would not review the case. – I feel that there was a misunderstanding on my part as I believe that I could present the documentation needed, but was never given the opportunity, and am requesting a second hearing – due to the fact that I was unable to represent our case properly.” In the submission by Willard dated September 3, 2002 she stated, “...there was about 60 pages that had not been look at and was needed for the meeting and the arbitrator would not allowed any, at her discretion, but Mr Reeves assure me he would call, so obviously there was a lack of communication on that end.”

Fontaine, in his submission dated July 24, 2002, states “As for being allowed to bring other documents to the meeting, we both had almost 2 months to come up with more documentation.” He continued later, “...the only other documentation that she had brought with her was a letter signed by a contractor, which has no bearing on this case and should not even be presented. I’m not even sure if she had the letter with her at the time of the meeting, I never seen it or a copy of it.” Fontaine, in his July 24, 2002 submission, states his opinion that “...this is just another way for them to get out of paying me what is owed to me. This has been going on for over a year.”

## **THE FACTS AND ANALYSIS**

Willard did not identify, list or describe the documents that she states she wished to submit as evidence at the hearing beyond her statement that there were about sixty pages. There is no explanation for why this evidence was not produced during the investigation or submitted with the appeal or during the appeal process. The Oral Hearing Notice dated February 20, 2002 clearly states that, “Any final documents that you want the Adjudicator to consider must be delivered to the Tribunal no later than April 05, 2002 in order to be disclosed to the other parties. Documents received after this date may not be accepted by the Adjudicator.” Telephoning the Tribunal and telling the Administrator, as Willard apparently did, that further documents would be brought to an oral hearing, does not give a party an exemption from the procedural requirements of the Tribunal. Nor does it give a party an exemption from the principles of fairness to other parties on which those requirements are based. Furthermore, even if the unidentified documents had been delivered to the Tribunal in a timely manner, it is quite likely that the Adjudicator would have decided to ignore them based on the principles exemplified in the Tribunal’s numerous previous decisions on the admissability of evidence. (see *Tri-West Tractor Ltd. BC EST #D268/96*; *specialty Motor Cars (1970) Ltd. BC EST #D570/98*)

In the absence of any compelling evidence or argument that Tribunal Decision BC EST #D263/02 should be reconsidered the application for reconsideration cannot be accepted.

**ORDER**

Pursuant to section 116 of the *Act*, and for the reasons given above, the request for reconsideration of Tribunal Decision BC EST #D263/02 is refused.

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**Norma Edelman**  
**Vice-Chair**  
**Employment Standards Tribunal**