

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of a reconsideration pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, c.113

-by-

A.M.L. Holdings Ltd. operating Woodgrove Chrysler Jeep
("Woodgrove")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR:	C. L. Roberts
FILE NO:	98/598
DATE OF DECISION:	December 1, 1998

DECISION

This is a decision based on written submissions by Gordon E. Heys on behalf of Woodgrove, and William Mercier.

OVERVIEW

This is an application by A.M.L. Holdings Ltd. operating Woodgrove Chrysler Jeep ("Woodgrove"), under Section 116(2) of the *Employment Standards Act* ("the Act"), for a reconsideration of Decision #D232/98 (the "Original Decision") which was issued by the Tribunal on June 23, 1998.

The Original Decision upheld a Determination made by a delegate of the Director of Employment Standards on February 23, 1997. The Director's delegate found that the Woodgrove terminated William Mercier ("Mercier"), and contravened Section 63 of the Act.

ISSUE TO BE DECIDED

Whether the Tribunal correctly determined that Woodgrove had failed to establish that Mercier was not terminated, and upholding the Determination.

FACTS

Mercier's complaint to the Employment Standards Branch (that he had been dismissed from his job) was investigated by a delegate of the Director. The delegate stated that "Mr. Heys purported to change Mr. Mercier's remuneration from a salary to straight commission, " and found that Mr. Mercier had expressed his dissatisfaction with this arrangement. The Director's delegate determined that Mr. Heys terminated Mercier.

Woodgrove's appeal was held on May 1998. The Tribunal heard and considered the evidence of both Mercier and Heys. The Tribunal found that Woodgrove had not established that the Determination was incorrect. The credibility of the parties was an important factor, since Mercier and Heys' version of the circumstances surrounding the end of Mercier's employment conflicted. The Tribunal found that Heys had not provided sufficient evidence to support his version, and upheld the Determination.

ARGUMENT

Woodgrove contends that there should be a reconsideration of the Decision because:

1. the Tribunal made an error of law in setting out the issue to be decided;
2. Mercier lied to the Director's delegate;
3. Mercier gave different evidence to the Director's delegate than to the Tribunal;
4. The Tribunal erred in its interpretation of the payroll; and
5. The Director's delegate was under pressure from the Ombudsman to rule in favor of Mercier and told Mr. Heys that he would make his decision knowing that the decision would be appealed.

ANALYSIS

The Tribunal has established a two stage analysis for an exercise of the reconsideration power (see *Milan Holdings Ltd.* (BCEST #D313/98)). At the first stage, the panel decides whether the matters raised in the application in fact warrant reconsideration. Factors to consider at this stage include (a) whether the application was raised in a timely fashion, and (b) whether the application seeks to have the reconsidering panel "re - weigh" evidence already tendered before the adjudicator.

The primary factor weighing in favor of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases.

(Milan Holdings, p. 7)

The Tribunal has held that a reconsideration will only be granted in circumstances which demonstrate that there has been a breach of the rules of natural justice, where there is compelling new evidence that was not available at the new hearing, or where the adjudicator made a fundamental error of law (*Bicchieri Enterprises Ltd.* (BCEST #D335/96)).

This application for a reconsideration raises five issues. I find that four of those are, in essence, an attempt to have the Tribunal "re-weigh" the evidence. That is not a basis upon which the reconsideration power will be exercised. I have addressed each of those issues individually.

Woodgrove contends that the Tribunal erred when it misstated the issue.

The Tribunal framed the issue as follows: "Was Mr. Mercier dismissed or was he terminated."

I accept that the issue was whether Mercier quit or was fired, and that the Tribunal misstated the issue at that point in the decision. However, I note that the issue was correctly stated later on in the decision, where the analysis begins. I am unable to find that this misstatement constitutes an error of law. It is apparent that the question of whether Mercier was fired or quit was the central issue addressed by the Tribunal, and find no grounds to reconsider the decision on this basis.

Woodgrove contends that Mercier lied to the Director's delegate about whether A.M.L. Holdings was entitled to change his remuneration, and acknowledged that it was entitled to do so while giving evidence to the Tribunal.

An admission to the Tribunal during the hearing forms part of the evidence which is weighed, along with all of the other evidence, by the Tribunal. As it does not constitute new evidence, an error of law or a breach of natural justice, it does not form a basis for reconsideration.

Woodgrove argues that Mercier gave different evidence to the Director's delegate than to the Tribunal.

This is a matter to be argued before the Tribunal. A reconsideration is not a rehearing of evidence and arguments presented before the Tribunal, or an opportunity to make arguments which ought to have been raised at that time, but were not. I find this issue does not form a basis upon which the reconsideration power ought to be exercised.

Woodcock contends that the Tribunal erred in its interpretation of payroll documents.

This issue may constitute either a mistake of fact or an error of law, in which case the reconsideration power ought to be exercised. However, after reviewing the Determination, I am not persuaded the Tribunal made an error of interpretation. The Tribunal stated as follows:

"The employer did not tender sufficient documentary evidence at this hearing for me to make a finding concerning whether the employee was remunerated by way of commission or salary or both at the time immediately prior to the cessation of employment. While the employer filed some 1991 ledger sheets and a file note that he made during 1992 setting out the remuneration package, the employer did not file any ledger sheets showing the method of calculating Mr. Mercier's pay package in the periods prior to the cessation of employment. Mr. Mercier's evidence was that he was paid a salary of \$3,500. He filed some pay slips showing that he received at least \$3500 per month. In some months he also received a commission. Mr. Mercier also did not file any pay slips that related to the period of time immediately before the cessation of employment. I conclude that each party had a different view of the compensation structure, but from the evidence given at the hearing I am unable to prefer the view of the employer."

The claim that the Tribunal erred in an interpretation of documents has not been made out. As I understand this paragraph, the Tribunal found that there was insufficient evidence to support Woodgrove's argument that Mercier was paid on a commission basis. The undisputed evidence was that at some point in the employment relationship Mercier was paid a salary. Woodgrove failed to provide the Tribunal with sufficient evidence establishing to the Tribunal's satisfaction that the basis for the remuneration had changed prior to the time Mercier ceased working at Woodgrove.

The application for reconsideration on this ground also fails.

The final ground for reconsideration advanced by Woodgrove constitutes an allegation of a breach of natural justice.

This allegation, on its face, falls within the principles enunciated by the Tribunal in Milan Holdings.

Woodgrove contends that there was "outside interference with the process" specifically, that the Director's delegate was "under pressure from Mr. Mercier, the Ombudsman and another party to rule in favor of Mercier. I have been told by Mr. Glemnitz [the Director's delegate] that he didn't want to have anything more to do with this matter because of all the outside pressure, and ruled knowing that I would appeal his decision to the EST."

Woodgrove also alleged that

"We have discovered that when Mercier first made his complaint to Labour Standards, the information that he received was that he did not have a claim against Woodgrove Chrysler. He then went to the Ombudsman who called the Ministry of Labour, and the directors delegate, in order to get the issues to a higher level, and out of his area, made his decision knowing that we would appeal his decision."

Woodgrove provided no evidence in support of this allegation. However, Mercier provided a letter which he had sent to the Director of Employment Standards Branch on December 6, 1997 complaining about the length of time it was taking the delegate to investigate the complaint. That letter does not substantiate the allegation that Mercier pressured the Director's delegate to make a determination in his favor.

There is also no evidence that the Ombudsman "interfered" with the process, or even investigated a complaint from any of the parties.

Nevertheless, whether or not there were external influences on the investigative or decision making process of the Director's delegate, any procedural defects at that stage were cured at the Tribunal hearing. There is no suggestion by Woodgrove that the Tribunal was biased or subject to external pressures. Therefore, I cannot conclude that there was a breach of natural justice by the Tribunal, and the application for reconsideration on this ground is also denied.

ORDER

I order, pursuant to Section 116 of the *Act*, that the application for reconsideration is dismissed.

Carol Roberts
Adjudicator
Employment Standards Tribunal