

An Application for Reconsideration

- by -

Don Folk Chevrolet Oldsmobile Inc.

- 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: Lorne D. Collingwood

FILE No.: 2001/497

DATE OF DECISION: October 17, 2001

DECISION

OVERVIEW

This application is by Don Folk Chevrolet Oldsmobile Inc. (“Don Folk” or “the employer”) and pursuant to section 116 of the *Employment Standards Act* (the “*Act*”). Don Folk is seeking reconsideration of a decision issued on June 26, 2001, BCEST Decision No. D340/01 (the “original decision”).

The original decision dealt with an appeal by Cliff Turick, formerly employed by Don Folk. It varies a Determination issued by a delegate of the Director of Employment Standards (“the Director”) on February 16, 2001. The delegate had concluded that Turick is not owed commissions and bonuses and that he is not entitled to compensation for length of service. In the original decision, an Adjudicator of the Tribunal confirms the Determination in all respects but what are found to be three sales by Turick and it orders Don Folk to pay Turick \$1,450.00 in commissions and bonuses with interest being over and above that.

Don Folk now seeks reconsideration of the original decision.

This application has been decided on the basis of written submissions.

ISSUES TO BE DECIDED

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. Should I be satisfied that the case is appropriate for reconsideration, the next step would be to revisit the factual underpinnings of the original decision.

FACTS

The original decision is that Turick is not owed commissions for either the Aurora sale or the Osmic deal but that he is owed commissions and bonuses because of three other sales, the Bailee sale, the one-ton truck sale and the Jesse James deal.

In respect to the Bailee sale, the delegate found that the sale was made by another person and that there is not evidence to support a conclusion that Turick was entitled to commission on a “house deal”. Turick on appeal claimed that the Bailee deal involved two salespersons, one being himself, and that, for his part, he was promised commission on a house deal and should have received a \$500 bonus, the house deal being the eighth sale that he made in a month. Don Folk, on appeal, chose to ignore the latter claim. The employer’s position, at least its initial position, was that Turick is not entitled to any commission on the Bailee deal and that it is company policy not to give house deals. The Adjudicator had the benefit of hearing

from two witnesses, one of which was for the employer, and both confirmed that Don Folk has in some rare instances given house deals as a way of compensating salespersons where it is difficult to determine which salesperson is due commission. On that basis, the Adjudicator was led to prefer the position of the Appellant over that of the employer and she awarded a \$150 commission on a house deal and, no evidence to the contrary, the \$500 bonus.

Don Folk, on applying for reconsideration, is seeking to introduce further evidence in respect to the matter of whether Turick was or was not promised a house deal and also the matter of whether he is or is not entitled to a bonus.

In respect to the one-ton truck deal, the delegate found that there is no evidence to support a conclusion that Turick even completed the necessary paperwork for a sale to occur. Turick on appeal claimed that he wrote up a sale for a one-ton truck and that the sale was both approved and recorded. Don Folk's initial position was that they had no record of the deal. At the conclusion of the appeal hearing, however, the evidence before the Adjudicator consisted of a photocopy of the logbook for November 28, 2000 and testimony by the witness for Don Folk which indicated that Turick had in fact sold the one-ton truck. The employer did produce a record which showed that no moneys were actually received from the customer in the month of the sale but it did not produce records for the following month and the witness for the employer allowed that the moneys might well have been received in December. The Adjudicator, noting that the employer's position lacked supporting evidence, has gone on to find that Turick's evidence is credible and that he should receive a commission of \$150 for the one-ton truck deal.

Don Folk, on applying for reconsideration, is seeking to argue that the original decision contravenes the employment contract even though it was never produced. It wants to introduce evidence which was not produced at the appeal stage but obviously available. And in that regard, it complains that the Adjudicator did not request the documents.

In respect to the Jesse James deal, the delegate again found that there is no evidence to support a conclusion that Turick even completed the necessary paperwork for a sale to occur. Turick on appeal claimed that he made the sale and that the truck was purchased by James through GMAC because of a difficulty in arranging financing. Don Folk's initial position, on appeal, is that the truck was sold to a Chrysler dealership and there is no evidence to show that James bought the truck. A hearing having been held, the employer's evidence became that James could not arrange financing through Don Folk and so he went to a Chrysler dealership and the Chrysler dealership bought the truck from Don Folk. The original decision is the truck was sold as a result of Turick's efforts and the commission should therefore go to him, not the fleet manager. The Adjudicator also awards a \$500 bonus, noting that the employer did not present evidence in respect to whether the sale was or was not Turick's eighth sale in the month.

Don Folk, on applying for reconsideration, complains that the Adjudicator misunderstood its position in that she refers to “the GMAC dealership” and not a Chrysler dealership. I find that the Adjudicator does in fact mistakenly refer to a GMAC dealership but that it is clear from her subsequent comments that she did know and understand that it was a Chrysler dealership that the truck was sold to, not GMAC.

Don Folk is seeking, for some unexplained reason, to revisit the matter of whether James actually went so far as to buy the truck from the Chrysler dealership. It also questions the logic of the decision to award Turick a commission for the James deal (the Chrysler dealership sale) and in that respect it claims that Turick, in effect, failed to do his job.

ANALYSIS

Section 116 of the *Act* provides the Tribunal with a discretionary power to reconsider its own orders and decisions.

- 116** (1) On application under subsection (2) or on its own motion, the tribunal **may**
- (a) reconsider any order or decision of the tribunal, and
 - (b) cancel or vary the order or decision or refer the matter back to the original panel.
- (2) The director or a person named in a decision or order of the tribunal may make an application under this section.
- (3) An application may be made only once with respect to the same order or decision.

(my emphasis)

The Tribunal has considered how that discretionary power should be exercised. The conclusion in *Milan Holdings Ltd.*, BCEST No. D313/98 is that a two-stage analysis is appropriate. I adopt that approach here.

At the first stage,

“the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration: *Re British Columbia (Director of Employment Standards)*, BC EST #D122/98. In deciding the question, the Tribunal will consider and weigh a number of factors. For example, the following factors have been held to weigh against a reconsideration:

- (a) where the application has not been filed in a timely fashion and there is no valid cause for the delay: see *Re British Columbia (Director of*

Employment Standards), BC EST #D122/98. In this context, the Tribunal will consider the prejudice to either party in proceeding with or refusing the reconsideration: *Re Rescan Environmental Services Ltd.*, BC EST #D522/97 (Reconsideration of BC EST #D007/97).

- (b) where the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the Adjudicator (as distinct from tendering new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): *Re Image House Inc.*, BC EST #D075/98 (Reconsideration of BC EST #D418/97); *Alexander (Perequine Consulting)*, BC EST #D095/98 (Reconsideration of BC EST #D574/97); *32353 BC Ltd., (c.o.b. Saltair Neighbourhood Pub)*, BC EST #D478/97 (Reconsideration of BC EST #D186/97).
- (c) Where the application arises out of a preliminary ruling made in the course of an appeal. "The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid a multiplicity of proceedings, confusion or delay": *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator."

One of the defined purposes of the Act is to provide fair and efficient procedures for resolving disputes and, in *Khalsa Diwan Society*, BCEST No. D199/96, the Tribunal found that reconsideration should only be where there is a compelling reason to do so.

The primary factor weighing in favour of reconsideration is whether the applicant has raised a significant question(s) of law, fact, principle or procedure which should be reviewed because of their importance to the parties and/or their implications for future cases. In *Milan*, the Tribunal had this to say, "At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration."

The circumstances in which an application for reconsideration will be successful are therefore limited. Those circumstances have been identified [*The Director of Employment Standards*, BCEST No. D475/98]. They are as follows:

- failure to comply with the principles of natural justice;
- mistake of law or fact;
- significant new evidence that was not reasonably available to the original panel;

- inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

In my opinion, this is not an appropriate case for reconsideration. The applicant does not make an arguable case for reconsideration.

It is irrelevant whether the truck that was sold to the Chrysler dealership was later bought by James. The same can be said of whether awarding commission on the James deal (the Chrysler dealership sale) is or is not tantamount to rewarding unsatisfactory performance. The employer's compensation scheme is that commissions are to be paid for, and strictly on the basis of, sales.

I am shown that the Adjudicator made a clerical error but find that it is of no importance to the original decision. As noted above, it is clear from the decision itself that the Adjudicator understood that it was not GMAC to which Don Folk sold the truck that Jesse James wanted but a Chrysler dealership. The decision to award Turick a commission does not in any way stem from the clerical error.

Don Folk claims that the Adjudicator is wrong on the facts but it is not that the Adjudicator has made a mistake of fact. The Adjudicator's conclusions reflect the evidence before her. It is said that the evidence was incomplete but it does not follow from such a complaint that the Tribunal will proceed with reconsideration.

Don Folk complains that the Adjudicator failed to request documents which were of vital importance to the appeal. It is not an Adjudicator's responsibility to do so.

In applying for reconsideration, Don Folk seeks another opportunity to present evidence and make arguments in a continuing attempt to show that Turick is not owed commissions and bonuses, at least not \$1,450 plus interest. (It offers to settle matters for \$600.) But the evidence was previously available. Don Folk has had ample opportunity to submit evidence and be heard. The applicant merely wants a chance to make up for the shortcomings of its earlier submissions. That is not what reconsideration is for.

ORDER

I will not reconsider the original decision, BCEST Decision No. D340/01. I will not, pursuant to section 116 of the Act, vary or cancel the decision, nor will I refer a matter back to the original panel. It follows that the original decision is confirmed.

Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal