An Application for Reconsideration

- by -

Robert D. Clark
(the "Employee")

- 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:	Ib S. Petersen
FILE No.:	2001/535
DATE OF DECISION:	November 8, 2001

DECISION

SUBMISSIONS:

Mr. Bob Chapman	on behalf of Optimil Machinery Inc. (“Optimil” or the “Employer”)
Mr. Robert Clark	on behalf of himself
Ms. Judy McKay	on behalf of the Director

OVERVIEW

This is an application by Clark pursuant to Section 116 of the *Employment Standards Act* (the “*Act*”), with respect to a Decision of the Employment Standards Tribunal (the “Tribunal”) issued on June 11, 2001: *Robert D. Clark*, BCEST #D302/01 (the “Decision”). The appeal was heard on May 11, 2001. Broadly speaking, there were two issues before the Adjudicator: (1) did the Employer contravene Section 8, and (2) did the Delegate fail to deal with Clark’s termination claim. The Decision confirmed a determination issued by a Delegate of the Director on January 16, 2001 which concluded that Optimil had not contravened Section 8 of the Act (the “Determination”).

It is an understatement to say that Clark takes issue with the Decision. He takes issue with almost every aspect of the Decision, including the grammar, and, indeed, the Determination. The Director opposes the application and says, in brief, that the application does not meet the threshold tests established by the Tribunal for reconsideration. The Employer also opposes the application and, essentially, says that it is time to put some finality to this matter.

FACTS AND ANALYSIS

Section 116 of the *Act* provides for reconsideration of Tribunal decisions and orders. An application for reconsideration should succeed only where there has been a demonstrable breach of the principles of natural justice, where there is compelling new evidence not available at the original appeal, or where the adjudicator has made fundamental error of law. The Tribunal has emphasized that it will use the power to reconsider with caution in order to ensure finality of the Tribunal’s decisions and efficiency and fairness of the system (*Zoltan Kiss* (BCEST #D122/96). Consistent with those principles, the Tribunal has adopted an approach which resolves into a two stage analysis (see *Milan Holdings Inc.*, BCEST D#313/98, reconsideration of BCEST #D559/97).

At the first stage, the reconsideration panel decides “whether the matters raised in the application in fact warrant reconsideration” considering such factors as the timeliness of the application together with any valid reason for a delay; whether the primary focus is to have

the reconsideration panel "re-weigh" the evidence; whether the application arises out of a preliminary ruling made in the course of an appeal; whether the application raises 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; and whether the application raises an arguable case of sufficient merit to warrant reconsideration.

The panel in *Milan Holdings* noted:

> "After weighing these and other factors relevant to the matter before it, the panel may determine that the application is not appropriate for reconsideration. If so, it will typically give reasons for its decision not to reconsider the adjudicator's decision. Should the panel determine that one or more of the issues raised in the application is appropriate for reconsideration, the panel will then review the matter and make a decision. The focus of the reconsideration panel "on the merits" will in general be the correctness of the decision being reconsidered."

I am of the view that the application for reconsideration has not met the threshold test set out in *Milan Holdings* and does not warrant reconsideration.

I will briefly address Clark's application--the reconsideration application alone is some 50 pages--and numerous submissions, all of which I have carefully reviewed. In one submission to the Tribunal, he says that the Decision contain over 200 errors, including grammatical, from failure to comply with principles of natural justice, mistaking or misstating the facts, acting without jurisdiction, acting on fraudulent evidence, to acting "in any other way that was contrary to law." Clark's submissions are convoluted and filled with quotes from Tribunal decisions, mostly irrelevant and out of context.

In my view, the issues before the Adjudicator were relatively straightforward and, for the most part, the dispute involved factual issues. Did Clark show that the Delegate erred in his conclusion that Section 8 had not been contravened. The onus is on Clark to prove that. Clark argued that the Employer misrepresented the wage rate, the position being supervisory, and the building he was going to work in. The Adjudicator dealt with those arguments. He considered the evidence before him, given under oath or affirmation, and, it would appear, largely accepted the Employer's version of the facts. I am not going to second-guess that decision. The Adjudicator heard the evidence and was in a better position to assess what evidence to accept and the weight to be given to it. In my view, the Adjudicator's findings amply supports his conclusions and I am not persuaded that his Decision warrants reconsideration. As well, I am of the view, that the application does not raise 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.

With respect to the issue of Clark's termination, the Adjudicator noted:

> Clark did not claim length of service compensation in filing his Complaint. All that he has had to say in filling out his Complaint is that the foreman was looking for an excuse to get rid of him.
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> On appeal, Clark suddenly begins to speak of constructive dismissal. I find that what is arguing is that he was in effect forced to quit by the employer because Optimal allowed the circumstances and conditions of his employment to deteriorate to the point where they were intolerable.
>
> I have considered whether I should refer the matter of whether Clark may be entitled to the length of service compensation back to the Director and decided against doing so. He has not given me any reason to believe that Optimal was in any way responsible for that which led him to tender his resignation. As matters have been presented to me, I am led to believe that Clark quit because he could not get along with his fellow workers and he decided that he did not really want to be a production welder at Optimal but would return to school. The clear and unequivocal facts of this case are that he quit of his own free will.

The Adjudicator concluded that there was nothing before him to show that the Employer terminated his employment. The Appellant has the burden to show that there is a basis for referring one or more issues back to the Director, for example, because the Delegate did not deal with an issue he or she ought to have dealt with. In this case, as I read the Decision, the Adjudicator decided that there was no basis for referring the matter back.

In short, I agree with the Delegate's and the Employer's arguments. The application for reconsideration is simply a "re-hashing" of the arguments before the Adjudicator and, while I do not expect Clark to agree, it is time to put an end to the dispute.

ORDER

Pursuant to Section 115 of the Act, I order that the application for reconsideration of the Decision of the Tribunal, dated June 11, 2001, be dismissed.

Ib S. Petersen
Adjudicator
Employment Standards Tribunal