

An Application for Reconsideration

- by -

Peter Croft
("Croft")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2001/714

DATE OF DECISION: December 20, 2001

DECISION

INTRODUCTION

This is an application filed on October 9th, 2001 by Peter Croft (“Croft”) pursuant to section 116 of the *Employment Standards Act* (the “Act”) for reconsideration of two related decisions issued by an adjudicator (B.C.E.S.T. Decision Nos. D097/01 and D433/01 issued February 27th and August 16th, 2001, respectively).

PREVIOUS PROCEEDINGS

In a Determination issued on October 30th, 2000, a delegate of the Director of Employment Standards (the “delegate”) held that Peter Croft (operating as “Planet Dogs”--a daycare facility for dogs) did not owe any unpaid wages to the complainant, Rod Kenny (“Kenny”).

In essence, the delegate concluded that Croft and Kenny had once been partners in a dog daycare business and that any services performed by Kenny during the period spanned by his unpaid wage claim (save for November 1st, 1999) were not performed as an employee but rather as a former partner who was working in order to secure the repayment of certain monies that Croft was contractually obliged to pay Kenny pursuant to a partnership dissolution agreement.

Kenny appealed the Determination to the Tribunal and following an oral hearing held on February 19th, 2001 (at which both parties were represented by counsel), the adjudicator issued reasons for decision on February 27th, 2001 allowing the appeal.

The adjudicator held that the parties’ partnership was dissolved on April 12th, 1999 and that as and from that date until his termination on November 1st, 1999, Kenny worked at “Planet Dogs” as an employee of the business. The adjudicator referred the matter of Kenny’s unpaid wage claim back to the delegate for purposes of calculating “Kenny’s statutory entitlement based on minimum wages from April 12 to November 1 [1999]” (B.C.E.S.T. Decision No. D097/01 at page 9).

The delegate reviewed the matter of Kenny’s entitlement and on May 14th, 2001 issued a supplementary determination ordering Croft to pay Kenny the sum of \$9,836.85 on account of unpaid wages and accrued interest to May 14th, 2001. Mr. Kenny disputed the delegate’s calculations and thus the matter came back before the adjudicator. In reasons for decision issued on August 16th, 2001 (B.C.E.S.T. Decision No. D433/01), the adjudicator held that Kenny’s hourly wage rate was \$7.50 and that his entitlement ought to be based on his (Kenny’s) record of hours worked. Thus, in the end result, Croft was ordered to pay Kenny the sum of \$10,015.40 including accrued interest to May 14th, 2001.

THE APPLICATION FOR RECONSIDERATION

Croft's application for reconsideration is contained in a letter to the Tribunal dated September 20th and filed October 9th, 2001. In his application Croft says that "the combination of facts were misunderstood, significant issues in the appeal were overlooked and decisions were not at all consistent with other decisions based on the same facts".

In his submission (at page 2), Croft concedes that the adjudicator correctly held that the partnership agreement was dissolved on April 12th, 1999 but he disputes the adjudicator's finding that an employment relationship crystallized between the two parties as and from that date. In general terms, Croft simply states that the adjudicator erred in overturning the original October 30th, 2000 Determination.

ANALYSIS

Although this application is timely (see *Unisource Canada Inc.*, B.C.E.S.T. Decision No. D122/98 and *MacMillan Bloedel*, B.C.E.S.T. Decision No. D279/00), I am not satisfied that the application raises a serious question "of law, fact or principle or procedure [that is] so significant that [the adjudicator's decision] should be reviewed" in accordance with the first branch of the *Milan Holdings* test--see *Director of Employment Standards (Milan Holdings Inc.)*, B.C.E.S.T. Decision No. 313/98.

The Tribunal has consistently held that applications for reconsideration should succeed only when there has been a demonstrable breach of the rules of natural justice, or where there is compelling new evidence that was not available at the time of the appeal hearing, or where the adjudicator has made a fundamental error of law. 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.

The instant application essentially challenges findings of fact that were amply supported by the evidence before the adjudicator. Undoubtedly, the parties' evidence diverged markedly and, thus, the adjudicator was obliged to make certain findings of fact based, in part, on the parties' respective credibility.

The key issue in the appeal was whether or not Kenny was an "employee" as defined in the *Act*. The adjudicator, so far as I can gather, turned her mind to the relevant legal principles and applied those principles to the facts as she found them. Given the adjudicator's findings of fact, it is manifestly clear that an employment relationship did exist between the parties following the dissolution of their partnership.

Croft complains that the adjudicator admitted certain documents into evidence at the appeal hearing. The adjudicator's reasons for so doing are clearly set out in her decision and I cannot say that she made any fundamental error with respect to any of her evidentiary rulings. In determining what evidence will be received and considered, it should be noted that Tribunal

adjudicators are not bound by the formal rules of evidence or procedure which might otherwise apply in judicial proceedings (Rule 19, Tribunal Appeal Rules of Procedure).

I might add that section 108(2) of the *Act* gives an adjudicator the right to make all requisite findings of fact and law necessary to dispose of the appeal and, in so doing, the adjudicator is not bound, in any fashion, by findings of fact that might have been made by the delegate during the course of his or her investigation. Determinations made by the Director's delegates are not protected by any sort of privative clause (unlike decisions made by Tribunal adjudicators--see section 110 of the *Act*).

ORDER

The application for reconsideration is refused.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal