

**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 -

Karen Eakin

(“Eakin”)

- of a Determination issued by -

The Director Of Employment Standards  
(the “Director”)

**ADJUDICATOR:** Lorna Pawluk

**FILE NO.:** 97/721

**DATE OF DECISION:** December 15, 1997

**DECISION**

**OVERVIEW**

This is a reconsideration, under Section 116 of the *Employment Standards Act* (the "Act"), of Decision No. D332/96 which was issued by the Employment Standards Tribunal on November 19, 1996. That Decision varied Determination #CDET 003041 which was issued by the Director of Employment Standards on June 26, 1996. The adjudicator concluded that Eakin must pay 5% of her net commission earnings (after taxes and expenses) payable from May 1, 1995 to December 28, 1995 to Karen Schafflik

Eakin applies for reconsideration of the Tribunal's decision on the grounds that the adjudicator erred in accepting the evidence of Schafflik over that of Eakin.

**ISSUE TO BE DECIDED**

The issue is whether Schafflik is owed a percentage of Eakin's net commission earnings as part of her salary.

**FACTS**

On April 20, 1995, Schafflik began to work as an assistant to Eakin, who is a realtor. On December 28, 1997 Eakin terminated Schafflik's employment and paid her one week's severance. Schafflik filed a complaint under the *Act* claiming that she was owed 5% of Eakin's commissions for the period of employment.

The Director's delegate investigated the complaint and found that while Schafflik was owed an additional week for compensation for length of service she was not entitled to payment for the commission. After interviewing Scott Kendrou on behalf of Eakin and Kevin Cuning on behalf Schafflik, the Employment Standards Officer concluded

The copy of the employment contract provided by the Employee is unreliable because it appears to have been altered.

A meeting was scheduled for June 11, 1996. The purpose of the meeting was to examine the original copy of the employment contract and discuss the issues in dispute. The Employee left a voice mail message canceling the June 11, 1996 meeting. The Employee has not provided a current address or phone number to the Branch.

This led the Director's delegate to dismiss the complaint with respect to the commission.

Schafflik appealed to this Tribunal and in Decision BC EST #D332/96, the adjudicator allowed the appeal. After listening to the testimony of several witnesses at a oral hearing,

the adjudicator preferred the testimony of Schafflik over that of Eakin. She described Schafflik's testimony as consistent, noting that neither Kendrew nor Neal were present when the contract was signed and could not recall the precise terms. She noted that both Eakin and Kendrew claimed to have had the contract (Eakin, the original, and Kendrew, a copy) but no longer had them and could not explain why they no longer had the copies even though it was obvious fairly soon after Schafflik's termination that the contract would be in dispute. Finally, the adjudicator could not conclude from the face of the document itself that it had been altered after it had been signed.

It is from this Decision that the employer seeks reconsideration under section 116 of the *Act*. On behalf of Eakin, Mr. Williams argues that the Employment Standards Officer did not accept the document as authentic and found it had been altered by addition of "+5% of net commission". He also points out that Eakin had moved from Brown Brothers to Remax in early July, 1995 and that Brown Brothers was unable to provide the original document. This, he maintains, "is consistent with Eakin's assertion that Schafflik somehow obtained the original agreement and altered it". Mr. Williams noted that other evidence supported Eakin's version of events. The Manager at Brown Brothers, Graham Kendrew, even though not a party to the agreement, was under the impression that 5% commission was payable after one full year of employment. Ron Neal, one of Eakin's co-workers, also testified that the industry standard was to make this type of payment to an Assistant only after a full year of employment and that a commission of 5% was high. It is Mr. Williams' assertion that given the unreliability of the written agreement, the adjudicator should have placed more weight on the evidence of Kendrew and Neal.

## **ANALYSIS**

An application for reconsideration under section 116 of the *Act* is not an opportunity to reargue the merits of the case. The scope of review on reconsideration is narrow; typical grounds were outlined by this Tribunal in *Zoltan Kiss* (BC EST #D122/96):

- a failure by the Adjudicator to comply with the principles of natural justice;
- a mistake in stating the facts;
- a failure to be consistent with other decisions in distinguishable on the facts;
- significant and serious new evidence that would have led the Adjudicator to a different decision;
- misunderstandings of or a failure to deal with a significant issue in appeal; and
- a clerical error in the decision.

In *British Columbi, Director of Employment Standards* (BC EST #D344/96), the adjudicator found that reconsideration is not a second opportunity to challenge findings of facts made in the Decision, particularly where such findings follow an oral hearing, unless they can be shown to lack evidentiary foundation. The main thrust of the appellant's argument is that the contract was modified after it had been signed by inclusion of "plus 5% commission". But like the adjudicator, I do not find that the evidence establishes such an alteration. The adjudicator found that the evidence did not establish an alteration of the contract and that she preferred Schafflik's testimony over that presented on behalf of Eakin. This decision was made after an oral hearing and after the adjudicator heard the testimony of several witnesses. Thus, the original decision does not lack evidentiary foundation and there is no new evidence to establish alteration of the document. Under such circumstances, reconsideration will not succeed.

**ORDER**

Pursuant to section 115 of the *Act*, I confirm the original Decison BC EST #D332/96.

**Lorna Pawluk  
Adjudicator  
Employment Standards Tribunal**