

An Application for Reconsideration

- by -

Daniel King

- 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

**TRIBUNAL MEMBER:** Carol L. Roberts

**FILE No.:** 2004A/204

**DATE OF DECISION:** January 20, 2005

## DECISION

### SUBMISSIONS:

Daniel King	on his own behalf
Tom Southwick, Q.C. Porter Ramsay Lawyers	on behalf of Fern's Airfreight (1996) Ltd.

### OVERVIEW

In a Determination dated July 7, 2004, a delegate of the Director of Employment Standards ("the delegate") concluded that Fern's Airfreight (1986) Ltd. had contravened the Act in failing to pay Daniel King vacation pay and statutory holiday pay. The delegate determined that Mr. King was entitled to a total amount, including interest, of \$2,997.35 ("the Determination"). Mr. King appealed the Determination to the Employment Standards Tribunal ("the Tribunal"). In a Decision (BC EST #D188/04) dated November 3, 2004 ("the Decision"), the Tribunal confirmed the Determination. However, upon the submission of the delegate, the Tribunal found that the delegate had erred in failing to award Mr. King wages for an additional statutory holiday, and determined that Mr. King was entitled to further wages of \$124.72.

On November 15, 2004, the Director's delegate varied his decision, and issued an amended Determination in the amount of \$3,161.25.

This is Mr. King's application pursuant to section 116 of the *Employment Standards Act* (the *Act*), for reconsideration of the Decision. The grounds for the application are that the Tribunal has failed to comply with the principles of natural justice and has made serious mistakes in applying the law.

### RECONSIDERATION ISSUES

Section 116 of the *Act* provides:

- (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.

Section 116 does not set out the grounds on which the Tribunal may reconsider a decision. The Tribunal uses its discretion to reconsider with caution, to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees, in keeping with the purpose of the *Act* "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act." (Section 2)

In *Milan Holdings* (BC EST # D313/98) the Tribunal set out a principled approach in determining when to exercise its discretion to reconsider. The primary factor weighing in favour 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.

In *Zoltan Kiss* (BC EST # D122/96), the Tribunal set out a number of grounds for reconsidering a decision:

- The adjudicator failed to comply with the principles of natural justice;
- There is some mistake in stating the facts;
- The Decision is not consistent with other Decisions based on similar facts;
- Some significant and serious new evidence has become available that would have led the Adjudicator to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The Decision contains some serious clerical error.

While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.

## **ARGUMENT**

Mr. King submits that the Tribunal member erred in determining his annual vacation pay, and that this mistake constitutes an error of law. Mr. King also submits that the delegate's decision with respect to his fuel cost was "not of natural justice".

Mr. King argues that the Tribunal member's statement that he was satisfied with the delegate's interpretation of the Act fails to comply with natural justice. He submits that his fuel expenses were to be included as part of his wage loss.

Counsel for Fern's Airfreight submits that Mr. King is abusing the appeal and reconsideration process. He submits that there is no mistake in applying the law or natural justice issues insofar as the Determination relates to the payment of gas. He says that the issue of mileage and gas bills was raised at the hearing and decided. He says that the delegate's determination was upheld on appeal to the Tribunal, and that it is inappropriate to have a rehearing on the issue.

## THE FACTS AND ANALYSIS

The facts relevant to this reconsideration are as follows.

Mr. King complained that he was owed annual vacation pay, statutory holiday pay, fuel, mileage and vehicle repair expenses.

With respect to the issue of vacation pay, the delegate concluded that, because Mr. King was employed for less than 24 months, he was entitled to vacation pay of 4% on his gross income for his entire period of employment. The delegate calculated his vacation pay on amounts reported on the employer's records to determine his gross income, not Mr. King's records. The Tribunal member concluded:

...I am not satisfied that King has raised any new or persuasive evidence that was not properly considered by the delegate. While King disagrees with the manner in which vacation pay was calculated I am not persuaded that there has been any error in law or breach of natural justice that would warrant any interference with the calculations performed by the delegate.

The delegate concluded that, because the statutory definition of wages did not include allowances or expenses, those claims were not recoverable. The delegate accepted that the commissions he received reimbursed him for those expenditures.

On appeal of the delegate's decision, the Tribunal member concluded as follows:

In regard to King's claim for reimbursement of fuel expenses incurred in performance of his employment duties, I am satisfied that the delegate properly interpreted the Act as not including reimbursement of allowances or expenses in a claim for 'wages'. Section 1 of the *Act* specifically excludes such items from the definition of wages. Section 70 provides for the Director to issue a determination for the payment of wages. It does not refer to reimbursement of expenses of the nature claimed by King.

As set out above, the Tribunal will reconsider a Decision only in exceptional circumstances. In this case, I am not persuaded that Mr. King has met the test for Reconsideration.

Mr. King's grounds of appeal of the Determination were the same as Mr. King currently advances in his request for reconsideration.

Mr. King's written submissions on appeal were considered by the Tribunal. I find no basis to conclude there was a denial of natural justice. Mr. King advanced the argument that the delegate's calculation of his vacation pay was wrong. The Tribunal concluded that there was no basis to interfere with the delegate's calculations. Mr. King continues to advance the same argument, without presenting any basis for his contention that the Tribunal erred of law.

Mr. King also advances the same arguments with respect to the fuel expenses. These arguments were considered, and rejected by the Tribunal.

In my view, none of the *Kiss* criteria have been met. Mr. King's application amounts, in essence, to an attempt to have the matter reheard. As noted above, this does not constitute grounds for reconsideration.

I conclude that Mr. King's submission fails to disclose significant issues of fact, principle and procedure that warrant exercising the discretion to grant reconsideration.

**ORDER**

Pursuant to Section 116 of the Act I deny the application for reconsideration.

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**Carol L. Roberts**  
**Member**  
**Employment Standards Tribunal**