

An application for Reconsideration

- by -

B.B.K. Contracting Ltd.
("BBK")

- 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 (as amended)

TRIBUNAL MEMBER: Shafik Bhalloo

FILE No.: 2007A/165

DATE OF DECISION: February 21, 2008

DECISION

OVERVIEW

1. B.B.K. Contracting Ltd. (“BBK”) seeks a reconsideration under Section 116 of the *Employment Standards Act* (the “Act”) of a Decision of the Employment Standards Tribunal B.C.E.S.T. #D113-07, dated November 28, 2007 (the “Original Decision”). The Original Decision confirmed the Determination made by a Delegate of the Director of Employment Standards (the “Director”) on July 26, 2007 (the “Determination”) that BBK owed Mr. John-James Wannop (“Mr. Wannop”) \$230.81 for unpaid wages, overtime pay, vacation pay and accrued interest thereon. The Original Decision also confirmed the Determination in respect of the three administrative penalties of \$500 each under section 29 of the *Employment Standards Regulation*, B.C. Reg 396/95 levied against BBK for contraventions of sections 16, 17 and 18 of the Act.

FACTS

2. BBK operated a silviculture business and employed Wannop as a silviculture worker from June 28, 2006 to July 25, 2006 when Wannop quit.
3. Wannop filed a complaint against BBK under Section 74 of the Act alleging that BBK contravened the Act by failing to pay him wages for travel time, overtime, vacation pay and minimum wage (the “Complaint”). Wannop also contended that BBK made unauthorized deductions from his wages.
4. The Delegate investigated the Complaint and, after consideration of the submissions of both parties, concluded that Wannop was owed \$230.81 for unpaid wages, overtime pay, vacation pay and accrued interest and made the Determination accordingly. The Delegate also concluded in the Determination that BBK contravened the Act when making deductions from Wannop’s wages the cost of food and repairing a brush saw. However, the Delegate found the deductions in relation to the cost of motel accommodations Wannop was provided appropriate. As a result of his conclusions above, the Delegate, in the Determination, imposed penalties of \$500.00 each pursuant to Section 29 of the Regulations against BBK for contraventions of Sections 16, 17 and 18 of the Act.
5. BBK appealed the Determination on the ground that the Director failed to observe the principles of natural justice in making the Determination.
6. The Member hearing the Appeal confirmed the Determination in the Original Decision and noted that BBK failed to discharge the burden placed on it to establish an error in the Determination, namely, that the Director failed to observe the principles of natural justice in making the Determination.
7. The Member also noted in the Original Decision that BBK’s appeal was largely based on its dispute with the findings of fact made by the Director in the Determination. In this regard, the Member opined that it is not appropriate for the Tribunal to interfere with the findings of fact made by the Director if they do not amount to the kind of errors contemplated by Section 112. The Member then went on to conclude that while errors of fact may, in certain circumstances, amount to errors in law, this was not such a case and dismissed BBK’s appeal.

8. In the reconsideration, BBK attaches a seven page written submission to its Reconsideration Application Form (the “Reconsideration Application”) and supplements that submission with a further two page final submission.
9. In the Reconsideration Application, in answer to paragraph 3 which requests the applicant to provide reasons for requesting a reconsideration, BBK responds as follows:

Please review our file again, because decision we receive is not fair for my self and my business. when we paid off money. Please review the latter issu by May03/07.from Mr. Delegate. (*sic*)

10. In the balance of the written submissions attached to the Reconsideration Application, including the final submission, BBK essentially explains its disagreement with the Determinations and the findings of fact in the Determination. The submissions BBK makes in this regard, with one exception, are to a large extent, submissions BBK already made to the Delegate during the investigation of the Complaint leading to the Determination and subsequently to the Member in its appeal of the Determination.
11. The exception in the submissions of BBK is the reference in BBK’s submissions by its representative, Mr. Balbir Khila (“Mr. Khila”), to a payroll book that he kept which purportedly contained accurate payroll information pertaining to Mr. Wannop but was not produced to the Delegate during the investigation. Apparently, Mr. Khila took this payroll book with him to India in or about December 2006 when he received a call from India advising him that his father was ill. BBK neither referred to this book during the investigation of the Complaint and before the Determination was made by the Director nor in its appeal of the Determination. Further, while BBK refers to the payroll book in the Reconsideration Application, it is not produced in the reconsideration nor does BBK provide particulars or sufficient particulars to be of any help.

ISSUES

12. In reconsideration applications there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the Act to reconsider the original decision. If the Tribunal, in the threshold issue, is satisfied that the case is appropriate for reconsideration, then the Tribunal will proceed to the next stage, which involves consideration of the substantive issue or the merits of the application. In this case, while BBK has not clearly indicated its dispute with the Original Decision, the question for the Tribunal, at the second stage, may be whether the Original Decision should be cancelled or varied or sent back to the Member.

ANALYSIS

13. Section 116 of the Act delineates the Tribunal’s power of reconsideration. As indicated by the Tribunal in *Re Ekman Land Surveying Ltd.*, [2002] B.C.E.S.T.D. No. 413 (QL), reconsideration is not a right to which a party is automatically entitled, rather it is undertaken at the discretion of the Tribunal. It is only in exceptional circumstances that the Tribunal will agree to reconsider a decision because the Act intends that the Tribunal appeal decisions be final and binding.
14. In *Milan Holdings Ltd.* [1998] B.C.E.S.T.D. No. 339 (QL), the Tribunal articulated a need for a principled and responsible approach to the reconsideration power in Section 116 of the Act. The Tribunal then went on to delineate a two-stage analysis for deciding whether it should exercise its discretionary

reconsideration power. In the first stage, the Tribunal is to decide whether the matter raised in the application for reconsideration warrants reconsideration. If the answer in the first stage is in the affirmative then, in the second-stage, the Tribunal is to consider the merits of the application.

15. What then are the considerations in the first stage of the analysis? According to the Tribunal in *Milan Holdings*, the following factors weigh against reconsideration:
- a) where the application has not been filed in a timely fashion and there is no valid cause for the delay;
 - b) where the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the Tribunal; and
 - c) the application arises out of a preliminary ruling made in the course of an appeal.
16. In *Re Zoltan Kiss* [1996] B.C.E.S.T.D. No. 129 (QL), the Tribunal delineated a non-exhaustive list of grounds in favour of exercising the reconsideration power under Section 116 of the Act. These grounds include:
- a) a failure by the adjudicator to comply with the principles of natural justice;
 - b) there is a mistake in stating the facts;
 - c) a failure to be consistent with other decisions which are not distinguishable on the facts;
 - d) some significant and serious new evidence has become available that would have led the adjudicator to a different decision;
 - e) some serious mistake in applying the law;
 - f) some misunderstandings of a failure to deal with a significant issue in the appeal; and
 - g) some clerical error exists in the decision.
17. In carefully reviewing BBK's Reconsideration Application, and particularly the lengthy written submissions of BBK in support thereof, I find that BBK has not discharged its onus to demonstrate an error in the decision appealed from based on any of the grounds delineated in the *Zoltan Kiss* decision. It is transparent to me that BBK is seeking this Tribunal to reweigh the evidence that was before the Delegate during the investigation of the Complaint and the evidence BBK re-presented in its appeal of the Determination. BBK's submission on the face page of the Reconsideration Application supports this conclusion very well as BBK states, under the heading "Reasons for Requesting a Reconsideration": "Please review our file again, because decision we receive is not fair...". BBK then attaches the lengthy written submissions, all of which are nothing short of reiteration and rearguing of its case and a challenge to the findings of fact by the Delegate. The Tribunal has indicated in no uncertain terms that reconsideration is not a further opportunity for a party dissatisfied with the decision of the appeal Tribunal to have its case reweighed.
18. Further, with respect to BBK's reference to the payroll document that its representative, Mr. Khila, took with him to India in December 2006, there is no explanation why that document was not previously

produced to the Delegate during the investigation of the Complaint and before the Determination was made. Surely BBK had that document during the investigation of the Complaint and before Mr. Khila took it with him to India. While I find it curious that Mr. Khila would take the document with him to India, I draw no conclusions on the veracity of BBK's submission on this point. However, when Khila returned from India and participated in the appeal of the Determination, one would think that BBK would at least produce the document then and let the Member determine whether it constituted new evidence under Section 112(1)(c) of the Act. However, BBK failed to adduce the document in the appeal of the Determination and has not offered any explanation for its said failure. In any event, had the document been produced at the appeal of the Determination, it is probable that the Member would have rejected as "new evidence" since there is no factual basis to support that it was not available to BBK for production to the Delegate during the investigation, in advance of Mr. Khila going to India. In any event, the mere reference to the document in the reconsideration application without more, in my view, does not bring the alleged document in the category of "significant" or "serious new evidence" that has now become available that would have led the adjudicator to a different decision.

19. Accordingly, BBK's request for reconsideration fails in the first stage of the two-stage analysis referred to in *Milan Holdings, supra*. Therefore, it is not necessary for me to pursue the analysis in the second stage—that is, consider the merits of the application.

ORDER

20. The Original Decision dated November 28, 2007 is confirmed with interest to be calculated to date.

Shafik Bhalloo
Member
Employment Standards Tribunal