

An Application for Reconsideration

- by -

Scott C. Krakiwsky  
("Mr. Krakiwsky")

- 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:** Rajiv K. Gandhi

**FILE No.:** 2016A/40

**DATE OF DECISION:** April 28, 2016

## DECISION

### SUBMISSIONS

Scott C. Krakiwsky on his own behalf

### OVERVIEW

1. Scott C. Krakiwsky (“Mr. Krakiwsky”) seeks to have reconsidered a decision of the Employment Standards Tribunal (the “Tribunal”) issued on February 17, 2016 and reported at BC EST # D032/16 (the “Tribunal Decision”).
2. The original complaint was filed with the Employment Standards Branch on October 28, 2014. In it, Mr. Krakiwsky alleged certain contraventions of the *Employment Standards Act* (the “*Act*”) by his former employer, Angus One Professional Recruitment Ltd.
3. Although there appears to be some dispute with respect to the precise length of his employment, Mr. Krakiwsky’s last day of actual work with his former employer was September 30, 2014, approximately two years and four months after his first.
4. That original complaint was heard on May 25, 2015 (the “Hearing”), and a determination was issued by the Director of Employment Standards (the “Director”) on June 5, 2015 (the “Determination”).
5. Dissatisfied with the result, Mr. Krakiwsky filed an appeal with the Tribunal alleging that the Director erred in law and failed to observe the principles of natural justice, both grounds for appeal of the Determination under section 112 of the *Act*.
6. For those reasons explained in the Tribunal Decision, the appeal was dismissed except as it related to Mr. Krakiwsky’s annual vacation entitlement. On that issue, the Tribunal found that the employer had contravened section 57 of the *Act*, and returned the matter to the Director with instruction to determine both penalty and remedy, where appropriate.
7. By letter issued March 1, 2016 (the “Director’s Report”), the Director assessed an administrative penalty against the employer in the amount of \$500.00, but found that Mr. Krakiwsky, having previously received all vacation pay due to him, was not entitled to any other payment or remedy. That finding has not been appealed.
8. In submissions stretching the better part of twenty-eight pages, Mr. Krakiwsky now appears to say that the Tribunal Decision is incorrect, in most, if not all, material respects.

### THE FACTS AND ANALYSIS

9. In considering this application for reconsideration, I have reviewed more than four hundred pages of materials, including:
  - (a) Mr. Krakiwsky’s submissions delivered in the course of the original appeal on July 13, 2015, July 31, 2015, August 13, 2015, November 23, 2015, and January 26, 2016;
  - (b) the Director’s Record;

- (c) submissions from the Director, filed on August 5, 2015, November 5, 2015, January 7, 2016;
- (d) submissions from the employer, tendered on November 13, 2015 and January 15, 2016;
- (e) Tribunal Decision BC EST # D112/15;
- (f) Tribunal Decision BC EST # D032/16;
- (g) the Director's Report, dated March 1, 2016; and
- (h) Mr. Krakiwsky's submissions attached to the reconsideration application.

10. I adopt the facts set out in paragraphs 19 to 24, inclusive, of the Tribunal Decision, although for the sake of brevity, I will not repeat those facts in these reasons.

#### *Reconsideration*

11. In limited circumstances, a Tribunal decision may be reconsidered according to section 116 of the *Act*.
12. The discretion to do so must be exercised with restraint, and then only in a manner consistent with the underlying purpose of the statute and fair to the affected parties. (see *Milan Holdings Inc.*, BC EST # D313/98 at page 6, and *The Director of Employment Standards (Re Giovanni (John) and Carmen Valoroso)*, BC EST # RD046/01 at page 4)
13. The Tribunal has adopted a two-step approach when a request is made for reconsideration.
14. In the first, the applicant seeking reconsideration must satisfy the Tribunal that a question of fact, law, principle, or procedure, flowing from the Tribunal Decision, is so important that it warrants reconsideration. In the absence of exceptional circumstances, reconsideration is unlikely. (see *Tagirova and Baranova*, BC EST # RD065/16 at paragraphs 20 and 21) It should not be undertaken where the primary goal of the application is to "re-weigh" evidence already tendered.
15. If this threshold test is satisfied, the Tribunal in the second will then consider whether or not the Tribunal Decision is correct. If it is, the reconsideration will be refused. If it is not, the Tribunal Decision may be varied.

#### *The Threshold Test*

16. Mr. Krakiwsky's submissions are difficult to parse. Rather than address them in a linear fashion, I have considered the issues he raises with reference to the relevant provisions of the *Act* in order to determine what, if anything, satisfies the threshold test.

#### *Section 8*

17. Section 8 of the *Act* provides that:

- 8 *An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting any of the following:*
- (a) *the availability of a position;*
  - (b) *the type of work;*

- (c) *the wages;*
- (d) *the conditions of employment.*

18. Mr. Krakiwsky alleges that the employer made certain representations to him that were prohibited under section 8 of the *Act*.
19. He originally raised, and then abandoned this claim during the Hearing. His attempt to renew the argument on appeal was rebuffed by the Tribunal.
20. As part of this reconsideration application, Mr. Krakiwsky seeks once again to revisit section 8.
21. There is no legitimate basis upon which I can accede to that request. To do so at this stage would be patently unfair to the employer, and it would offend the principles of natural justice. If Mr. Krakiwsky intended to pursue a claim under section 8 of the *Act*, he should have done so during the Hearing.
22. In my view, the threshold test for reconsideration of any matter relating to section 8 has not been satisfied.
23. Even if I was to reconsider the issue, the Tribunal Decision is correct. Allegations of a section 8 breach, relating to representations alleged to have been made at the time Mr. Krakiwsky was hired, are barred by the limitation period in section 74(4) of the *Act*.

#### *Section 44*

24. According to section 44(a) of the *Act*:
- 44 *An employer must comply with section 45 or 46 in respect of an employee who has been employed by the employer for at least 30 calendar days before the statutory holiday and has*
- (a) *worked or earned wages for 15 of the 30 calendar days preceding the statutory holiday, or ...*
25. During the Hearing it was alleged by the employer, and the Director agreed that Mr. Krakiwsky took vacation for the period October 1 to October 16, 2014.
26. Mr. Krakiwsky contended otherwise. In support of his point of view, Mr. Krakiwsky argued that if he was on vacation, as suggested by the employer, he should have received statutory holiday pay for October 13, 2014 (Thanksgiving Day). The Director rejected that argument, relying on the provisions of Part 5 of the *Act* to conclude that there would be no Thanksgiving entitlement to statutory holiday pay.
27. On appeal, Mr. Krakiwsky submitted that vacation pay paid to him on account of vacation taken after September 30, 2014 (if it was vacation, that is) amounts to “wages earned” under section 44 of the *Act*, entitling him to statutory holiday pay for Thanksgiving. Mr. Krakiwsky said that because he did not receive the latter, the former could not be true. The Tribunal disagreed, and held that vacation pay earned and previously paid is not “earned wages” within the meaning of section 44 of the *Act*.
28. Mr. Krakiwsky says that amounts to an error in law on the part of the Tribunal. He offers several hypothetical examples to illustrate what he says is an absurdity in section 44 of the *Act* if the Tribunal’s interpretation of that provision is upheld.
29. With respect, Mr. Krakiwsky’s interpretation of section 44 and the examples in his submissions are all predicated upon a misinterpretation of the *Act*.

30. Vacation pay is earned by dint of an accrual calculated according to section 58(1) of the *Act*. It is not earned when it is paid, nor is it earned during vacation taken which in turn gives rise to a payment obligation under section 58(2). It is paid after the fact but, under section 58(1), vacation pay is earned when an employee works, not when an employee is on vacation. Vacation pay earned and previously paid outside the thirty-day window in relation to a given statutory holiday is not “earned wages” within the meaning of section 44 as it relates to that statutory holiday. The statute is unambiguous.
31. In my view, Mr. Krakiwsky raises no question concerning section 44 of the *Act* that is worthy of reconsideration, and I decline to do so.

*Section 57*

32. Section 57 of the *Act* addresses both the entitlement of an employee to annual vacation, and the obligation of an employer to ensure that annual vacation is taken.
33. Several pages of the submissions on reconsideration are devoted to the Tribunal’s ruling on this section, although I am unclear why.
34. Having decided that the Director erred in law when adjudicating the complaint under section 57 of the *Act*, the Tribunal returned the issue to the Director for determination of an appropriate remedy, resulting in the Director’s Report, which has not been appealed.
35. That is, Mr. Krakiwsky lost the point originally, won on appeal, and has now accepted (by default or otherwise) that the Director’s most recent ruling is correct.
36. Again, I find that the threshold point has not been satisfied. Mr. Krakiwsky raises no question concerning section 57 that is so important that it merits reconsideration.

*Section 83*

37. Mr. Krakiwsky also complains that the Tribunal’s failure to vary the Director’s Determination, as it relates to section 83 of the *Act*, is incorrect. He says that the Tribunal should have found there to be both a breach of natural justice and an error in law worthy of correction.
38. In support of his position, Mr. Krakiwsky argues that evidence in the Record has not been assessed to determine whether or not there has been a breach of section 83 of the *Act*. He is wrong. The Director did consider it, but found a set of facts that did not fall in line with conclusions drawn by Mr. Krakiwsky. There is nothing in those facts that is particularly remarkable, unreasonable, or unsupportable. There is no error in law, and the Tribunal is not entitled to substitute its own judgement in place of the Director, either on appeal or in the context of an application for reconsideration.
39. Mr. Krakiwsky further reiterates the argument on appeal that he was not given the opportunity to properly lead evidence at the Hearing with respect to the alleged section 83 contravention.
40. It seems to me that the entirety of Krakiwsky’s argument for reconsideration with respect to section 83 is a repeat of the same argument that was previously heard and rejected on appeal, and fully canvassed in the Tribunal Decision.

41. With respect to Mr. Krakiwsky, reconsideration does not allow one party another “kick at the can”. He must raise, but has failed to do so, some fact, law, procedure or principle which is important enough to merit review.
42. To the extent that I am wrong, I confirm the Tribunal Decision. There is nothing that I can see in my review of the evidence included in the Record or described in the Determination supporting the conclusion that there has been a breach of section 83 of the *Act*. Even if the threshold test had been met, I would not have overturned the Tribunal Decision.

*DB Schenker as Employer*

43. Finally, Mr. Krakiwsky appears to take issue with the fact that the Tribunal, having noted the Director’s failure to consider whether or not DB Schenker (a client of Angus One Professional Recruitment Ltd.) was, at relevant times, an employer in relation to Mr. Krakiwsky, declined to return that matter to the Director for further investigation.
44. Tribunal determined that it was not necessary to do so because Mr. Krakiwsky had been paid everything to which he was entitled, irrespective of who were his employers.
45. I am not prepared to find that the threshold test on this point has been satisfied. Even if DB Schenker were an employer, there is nothing in such a finding that would result in “more” for Mr. Krakiwsky. At this late stage, some 18 months after the end of Mr. Krakiwsky’s employment, there is little that the Director can do, even if the Director was inclined to take action. The circumstances necessary for reconsideration do not exist.
46. In the result, I find that Mr. Krakiwsky’s reconsideration application fails to satisfy the preliminary requirement for reconsideration.

**ORDER**

47. The Tribunal Decision is confirmed according to section 116 of the *Act*. Mr. Krakiwsky’s application for reconsideration is refused.

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**Rajiv K. Gandhi**  
**Member**  
**Employment Standards Tribunal**