

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act S.B.C. 1995, C. 38

- by -

Zoltan T. Kiss
("Kiss")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 95/004

DATE OF DECISION: **June 19, 1996**

DECISION

OVERVIEW

This is an application by Zoltan Kiss (“Kiss”) under Section 116(2) of *the Employment Standards Act* (the “*Act*”) for a reconsideration of Decision No. D091/96 (the “Decision”) which was issued by the Tribunal on May 17, 1996.

The Decision dealt with three appeals under Section 112 of the *Act* - one appeal by Burnaby Select Taxi Ltd. (“Select Taxi”) and two appeals by Kiss. Select Taxi’s appeal against Determination #CDET 000016 sought to have the Determination set aside pending the outcome of a study by an “inquiry commission” of the taxi industry. Kiss appealed Determination #CDET 000016 and Determination #CDET 000104. Kiss sought to have the Determination varied to include unpaid wages for the 24 month period prior to his complaint. Kiss’ appeal alleged that he was dismissed by Select Taxi for reasons related to his filing a complaint under the *Act*. That part of his appeal was dismissed.

Kiss filed a complaint under the former *Employment Standard Act* (S.B.C. 1980, Ch. 10) and the Determinations were issued after that *Act* was repealed. Section 128 of the current *Act* sets out the transitional provisions affecting such appeals.

The Decision varied Determination #CDET 000016 to include minimum daily pay owing to Kiss for July 7, 1995 in the amount of \$26.00 and to show unpaid wages owing to Kiss in the amount of \$2,535.87 for the period July 1, 1993 to June 30, 1995. The Decision also varied Determination #CDET 000104 to show severance pay was payable to Kiss in the amount of \$1,314.49.

Kiss makes this application for reconsideration on two grounds:

1. the Decision did not state that Select Taxi is required to pay interest on the unpaid wages; and
2. the Adjudicator erred when he decided that Select Taxi had not mistreated Kiss because of a complaint or investigation.

RECONSIDERATION OF ORDERS AND DECISIONS

Section 116 of the *Act* provides the mechanism for reconsideration of orders and decisions. Section 116 states:

- (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.
- (2) The director or a person named in a decision or order of the tribunal may make an application under this section.
- (3) An application may be made only once with respect to the same order or decision.

Section 116 does not set out the grounds on which a reconsideration may occur. Some of the more usual or typical grounds why the Tribunal ought to reconsider an order or a decision are:

- a failure by the Adjudicator to comply with the principles of natural justice;
- there is some mistake in stating the facts;
- a failure to be consistent with other decisions which are not distinguishable on the facts;
- some significant and serious new evidence has become available that would have led to the Adjudicator to a different decision;
- some serious mistake in applying the law;
- some misunderstandings of or a failure to deal with a significant issue in the appeal; and
- some clerical error exists in the decision.

This, of course, is not an exhaustive list of the possible grounds for reconsidering a decision or order.

There are also some important reasons why the Tribunal's statutory power to reconsider orders and decisions should be exercised with great caution, such as:

- Section 2(d) of the *Act* establishes one of the purposes of the *Act* as providing fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. Employers and employees should expect that, under normal circumstances, one hearing by the Tribunal will resolve their dispute finally and conclusively. If it were otherwise it would be neither fair nor efficient.

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- Section 115 of the *Act* establishes the Tribunal's authority to consider an appeal and limits the Tribunal to confirming, varying or cancelling the determination under appeal or referring the matter back to the Director of Employment Standards (presumably, for further investigation or other action). These limited options (confirm vary or cancel a determination) imply a degree of finality to Tribunal decisions or orders which is desirable. The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reason.
- It would be both unfair and inefficient if the Tribunal were to allow, in effect, two hearings of each appeal where the appeal hearing becomes nothing more than a discovery process for a reconsideration application.
- In his report, *Rights & Responsibilities in a Changing Workplace*, Professor Mark Thompson offers the following observation at page 134 as one reason for recommending the establishment of Tribunal:

The advice the Commission received from members of the community familiar with appeals system, the staff of the Minister and the Attorney General was almost unanimous. An appeals system should be relatively informal with the minimum possible reliance on lawyers. Cases should be decided quickly at the lowest possible cost to the parties and the Ministry. The process should not only be consistent with principles of natural justice, but be seen to meet those standards.

Professor Thompson also noted that the appeal process should not be protracted because many claimants (employees) "...need the monies in dispute quickly to meet their basic needs."

I will now deal separately with each ground for this reconsideration application.

Interest on Wages Owning

The Decision contained the following orders:

Pursuant to Section 115 of the *Act*, I make the following Orders:

1. That Determination number CDET 000016 be varied:
 - (a) to include minimum daily pay for July 7, 1995 of \$26.00; and
 - (b) to show the unpaid wage claim for the period July 1, 1993 to June 30, 1995 and the amount as \$2,535.87; and
2. That Determination number CDET 000104 be varied to show a severance pay entitlement to Kiss in the amount of \$1,314.49.

Kiss requests a reconsideration of the Order on the ground that "... it did not state that amount of wages the employer be required to pay shall be plus interest on those wages."

Section 80 of the *Act* states:

The amount of wages an employer may be required by a determination to pay an employee is limited to the amount that became payable in the period beginning

- (a) in the case of a complaint, 24 months before the earlier of the date of the complaint or the termination of the employment, and
- (b) in any other case, 24 months before the director first told the employer of the investigation that resulted in the determination, plus interest on those wages.

Section 128(3) of the *Act* sets out the relevant transitional provisions, and states:

If, before the repeal of the former *Act*, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under that *Act*, the complaint is to be treated for all purposes, including section 80 of this *Act*, as a complaint made under this *Act*.

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The Adjudicator considered these provisions of the *Act* at page 8 of his Decision:

Section 128(3) is a clear statement of legislative intent for the retrospective operation of Section 80 to complaints that were pending when the former Act was repealed. Kiss is therefore entitled to a claim period of 24 months prior to his complaint, which was July 5, 1995.

The documents calculating this period were prepared by the delegate and had been presented to all parties prior to February 28, 1995. They showed a total unpaid wage entitlement for Kiss of \$2,535.87 for the 24 month period. Select Taxi did not show that calculation to be wrong. The Determination will be varied to show this amount owing to Kiss as severance pay.

Section 88 of the *Act* states that interest is payable on those wages which “...an employer may be required by a determination to pay ...” The Decision contained an Order which varied two determinations. The requirement to pay interest on wages under Section 88 of the *Act* is not altered when a determination is varied as a result of an order by the Tribunal. Thus, it is not necessary for an order of the Tribunal to contain an express statement that interest is payable on unpaid wages.

Section 88 of the *Act* also sets out the method for calculating when an employer must pay interest.

Section 25 of the *Employment Standards Regulation* sets out the interest rate payable under Section 88(1) of the *Act*.

Section 88(3) of the *Act* states that interest payable under Section 88(1) “...is deemed to be wages and this *Act* applies to the recovery of those wages.”

The enforcement of any determination made under the *Act* rests with the Director of Employment Standards. The Director may rely on any provision of the *Act* to ensure compliance, particularly Parts 10 and 11 of the *Act*.

For all of these reasons, I reject the first ground of the application.

Mistreatment because of complaint of investigation

Kiss also requests a reconsideration of the Decision on the ground that it contained an error in law when it dismissed his appeal concerning an alleged violation of Section 83 of the *Act*.

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Section 83 states:

- (1) An employer must not
 - (a) refuse to employ or refuse to continue to employ a person,
 - (b) threaten to dismiss or otherwise threaten a person,
 - (c) discriminate against or threaten to discriminate against a person with respect to employment or a condition of employment, or
 - (d) intimidate or coerce or impose a monetary or other penalty on a person, because a complaint or investigation may be or has been made under this *Act* or because an appeal or other action may be or has been taken or information may be or has been supplied under this *Act*.
- (2) If satisfied that a person has contravened subsection (1), the director may make any determination authorized by section 79 (3) or (4).

The Decision deals with Kiss' appeal of Determination #CDET 000104 in the following manner:

Kiss filed an appeal of Determination number CDET 000104 challenging the conclusion of the delegate that he was not terminated for reasons prohibited by Section 83 of the Act. He also says that in any event he is entitled to severance pay. Select Taxi says that Kiss was not terminated for reasons prohibited by the Act and he is not entitled to severance pay because he quit.

ANALYSIS

Kiss has the burden of establishing on a balance of probabilities that the conclusion of the delegate on the Section 83 complaint was wrong. This requires, at a minimum, some evidence that the actions of Select Taxi were motivated in whole or in part by his direct or potential involvement under the Act. Kiss has not met this burden. On the evidence presented, I cannot conclude that the management of Select Taxi was even aware Kiss had filed a complaint with the Branch at the time of his termination. There was some evidence that Kiss had brought some employment standards booklets into the office, but there was nothing to suggest that Mr. Fisher held any negative view of Kiss doing that or that it was in his mind when he had his discussion with Kiss on the morning of July 7. There was considerable evidence from both parties about the discussion, but there was no suggestion in that evidence that either Kiss or Mr. Fisher made any reference to matters, current or potential, relating to the Act. In my experience, if Mr. Fisher was motivated to terminate Kiss for matters

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related to the Act, it would be unique that some reference or allusion to the Act, however small, was not made. According to Mr. Fisher, and I accept his evidence, he simply seized upon a comment made by Kiss during the discussion that he would quit if changes were not made and accepted that as a resignation.

The appeal on the Section 83 complaint is dismissed.

Kiss argues that the evidence presented at the appeal supports a finding the he was intimidated by Select Taxi as a result of his complaint to the Employment Standards Branch. He argues that:

The facts were clear. A complaint was filed on July 5, 1995. Select Taxi fired Kiss without just cause and without notice on July 7, 1995 - two days after the day that Kiss brought some ESB booklet into the office. That was an act of intimidation by the Company. To suggest that the action by the Company was OK and that they simply should pay severance now 10 months later is unjust and unreasonable.

This is a narrow ground for requesting a reconsideration. Kiss does not argue that the Decision makes some mistake in stating the facts. Nor does he argue that there is new evidence which would have led the Adjudicator to a different decision. Kiss argues that the Decision contains a mistake in applying the law such that the Decision is “unjust and unreasonable.” Kiss relies on Section 58 of the former *Act* (Improper treatment of employee) as the basis for his argument. However, Section 128(3) of the current *Act* (Transitional provisions) states:

Section 128, Transition from former *Act*

- (3) If, before the repeal of the former *Act*, no decision was made by the director, an authorized representative of the director or an officer on a complaint made under that *Act*, the complaint is to be treated for all purposes, including section 80 of this *Act*, as a complaint made under this *Act*.

Thus, the statutory provision which is relevant to this ground for reconsideration is Section 83 of the current *Act* (Employee not to be mistreated because of complaint or investigation). As noted above, the Adjudicator based his analysis of Kiss’ appeal on a application of the evidence against the provisions of Section 83 of the current *Act*.

I have reviewed the Decision as it relates to alleged improper treatment of Kiss by Select Taxi. I have not found any mistake in applying the law (Section 83) to the facts of the appeal.

ORDER

Pursuant to Section 116 of the *Act*, I decline to vary or cancel the Decision.

Geoffrey Crampton
Chair
Employment Standards Tribunal

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