

An Application for Reconsideration

- by -

Ken Eng  
("Mr. Eng")

- 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.:** 2008A/119

**DATE OF DECISION:** December 29, 2008

## DECISION

### OVERVIEW AND FACTS

1. Ken Eng (“Mr. Eng”) was employed by 0698094 B.C. Ltd. carrying on business as Anderson By Design (“Anderson”) from July 26 to October 24, 2007 at a construction project at the Crawford Bay Secondary School (the “Project”). Anderson is a construction company and Mr. Eng was hired by Anderson to complete some drawings of walls and design and construct three workstations for three subtrades and supervise production at the stations on the Project.
2. On Tuesday, October 16, 2007, Mr. Eng was injured in a motor vehicle accident and missed work the next day, Wednesday, October 17, but returned to work the day after, Thursday, October 18, although he was having difficulty walking. Sam Anderson (“Mr. Anderson”), the owner of Anderson, subsequently, on Friday, October 19, asked Mr. Eng to go home and not return until he had a doctor’s note. When Mr. Eng returned to work on Tuesday October 23 with a doctor’s note stating that he was capable of working, Mr. Anderson terminated his employment. Very shortly thereafter, on October 25, Mr. Eng filed a complaint with the Employment Standards Branch (the “Complaint”) alleging that Anderson contravened the *Employment Standards Act* (the “Act”) by failing to pay him compensation for length of service contrary to Section 63. Mr. Eng also claimed he was owed annual vacation pay pursuant to Section 58 and hourly wages pursuant to Section 18 of the *Act*.
3. The delegate of the Director investigated the Complaint and the Director issued a determination on January 21, 2008 (the “Determination”) concluding that Anderson had not contravened the *Act* and did not owe any wages to Mr. Eng and no further action would be taken with respect to the Complaint (the “Determination”).
4. The Determination was based on the delegate’s very brief and succinct analysis which I reproduce verbatim below:

Section 63 of the Act requires employers to pay compensation for length of service to terminated employees. This is commonly called severance pay. After three consecutive months of service, employees are entitled to one week’s length of service compensation.

The Act, however, contemplates a number of exceptions to this general provision. One of these exceptions is for employees “employed at one or more construction sites by an employer whose principal business is construction”.

Mr. Eng’s claim for length of service compensation must fail on two accounts.

First, Mr. Eng’s Complaint and Information form shows he was employed for less than three consecutive months. Therefore, no compensation for length of service is payable.

Second, Mr. Eng was clearly employed by an employer whose principal business is construction. Therefore, he is also not entitled to length of service compensation according to this section of the Act.

Mr. Eng argues he is entitled to length of service compensation because he was hired to complete a specific work within twelve months but was terminated before the specific work was

contemplated. Mr. Anderson denies Mr. Eng was hired on this basis, and there is no evidence to corroborate this claim. Therefore, I cannot find Mr. Eng was hired for a specific work.

5. On February 12, 2008, Mr. Eng appealed the Determination pursuant to Section 112 of the *Act*. The Tribunal issued its decision in the appeal on April 30, 2008 (the “First Decision”) confirming the Determination in all respects but two. First, the Tribunal found that the Delegate failed to observe the principles of natural justice in failing to address in the Determination Mr. Eng’s allegation that he had been mistreated because he complained under the *Act*, contrary to Section 83 of the *Act* (which makes it an offence to mistreat an employee because of complaint or investigation). In this regard, the Tribunal referred the matter back to the Director for further investigation. Secondly, the Tribunal also ordered that the Determination be varied to account for Mr. Eng’s entitlement to vacation pay for July 2007 in the amount of \$29.02, along with any interest payable on the said amount under Section 88(1).
6. On April 30, 2008, the Tribunal forwarded the First Decision to the parties noting that the Determination was being referred back to the Director on the two basis noted above. In response to the referral back, the delegate, on behalf of the Director, issued a report dated June 19, 2008 (the “Report”). In the Report, the delegate noted that in his further investigation, as a result of the referral back in the First Decision, he asked Mr. Eng, on May 8, 2008, to provide him with details of his allegations in support of his complaint under section 83 of the *Act*, the names of any persons who may have witnessed the behaviour prohibited under section 83, and any evidence that the alleged behaviour was motivated by grounds prohibited in Section 83 of the *Act*. Mr. Eng responded to the delegate’s request in his letter of May 28, 2008 to the delegate (the “Letter”) wherein he stated that Mark Johnston, (“Mr. Johnston”) who was contracted by Anderson to prefabricate the walls on the Project, advised him that if he hired him, Mr. Anderson would “make his contract obligations difficult” and “would do something to antagonize his work project”. The delegate indicates that he contacted Mr. Johnston who indicated that Mr. Anderson had not spoken to him about Mr. Eng at any time and that he was unaware that Mr. Eng was pursuing an employment standards complaint against Anderson. The delegate also indicated in the Report that Mr. Johnston advised that Mr. Eng contacted him a few days after he had been terminated from his employment with Anderson and he then told Mr. Eng that he would not be hiring him. According to the delegate, Mr. Johnston’s stated reason for not hiring Mr. Eng was that he, as a subcontractor, would not hire anyone who had just been fired by the general contractor.
7. The delegate also spoke with Mr. Anderson in preparing the Report and states in the report that Mr. Anderson informed him that he had not spoken with any potential employers in the area of the Project regarding Mr. Eng, but if he had been asked to opine on Mr. Eng, he would not have given a positive reference s Mr. Eng was, in his view, unreliable, unaccountable and irresponsible.
8. The delegate also notes in the Report that Mr. Eng, in the Letter, alleges that Martin Hamilton (“Mr. Hamilton”), a supervisor in the employ of Anderson, assaulted him. More specifically, the delegate indicates that Mr. Eng stated in his letter that Mr. Hamilton interrupted a conversation he was having in the local pub and “began talking about the worksite”. The delegate further notes that Mr. Eng noted in his letter that he responded to Mr. Hamilton by asking him “to avoid contact with him and as he turned away, Mr. Hamilton attacked him”. The delegate states in the report that according to Mr. Eng, it was Mr. Hamilton who instigated the encounter because Mr. Hamilton was employed by Anderson and therefore Anderson should be held accountable for the actions of its supervisor.
9. The delegate notes in the Report that Mr. Hamilton apparently took over the duties of Mr. Eng on the Project after Mr. Eng was terminated from his employment. The delegate also notes in the Report that

Mr. Hamilton has a different view of the altercation with Mr. Eng. According to Mr. Hamilton, states the delegate, Mr. Eng was constantly harassing him about the worksite and attacking his ability to do the job. After the termination of Mr. Eng's employment, Mr. Hamilton indicated that Mr. Eng came at him with his fists raised and it was in response to Mr. Eng's behaviour that the altercation occurred where he put Mr. Eng down on the ground. The delegate also notes in the Report that Mr. Hamilton told him that he is 47 years old and not a violent person but when Mr. Eng came at him with his fists raised, he felt he had no choice but to protect himself. The delegate further notes that Mr. Hamilton also indicated that he was not aware that Mr. Eng was taking any action under the *Act* against Anderson.

10. Finally, the delegate notes in the Report that Mr. Eng, in the Letter, relied upon Mr. Anderson's appeal submissions to the Tribunal, that Mr. Eng's name should be flagged to save future employers the time and frustration he experienced in dealing with Mr. Eng, as evidence of contravention of Section 83 of the *Act* on the part of Anderson.
11. The delegate, after reviewing the foregoing evidence in the report concludes that in his view there is not any evidence of a contravention of Section 83 in relation to Mr. Eng. More specifically, the delegate explained in the Report that Mr. Johnston's decision to not hire Mr. Eng was unrelated to any complaint or investigation undertaken under the *Act* and besides, Mr. Johnston was not aware of Mr. Eng's complaint or any proceeding under the *Act*.
12. With respect to the altercation at the pub between Mr. Hamilton and Mr. Eng, the delegate noted in the report that there was no evidence that the altercation occurred because of any action Mr. Eng was pursuing under the *Act* and, as in the case of Mr. Johnston, Mr. Hamilton was also not aware that Mr. Eng had filed the Complaint.
13. Finally, with respect to Mr. Anderson's request that the Tribunal flag Mr. Eng's name, the delegate notes that while this request may be unusual and inappropriate, it does not constitute an act of discrimination with respect to employment or an act of coercion or intimidation within the meaning of section 83 of the *Act*. In the circumstances, the delegate concluded in the Report that there was no contravention of Section 83 of the *Act* in relation to Mr. Eng.
14. With respect to the second aspect of the referral back by the Tribunal in the First Decision, namely, the entitlement of Mr. Eng to \$29.92 in annual vacation pay and any interest thereon, the delegate notes that in his investigation, he discovered that Anderson voluntarily remitted to Mr. Eng \$29.92 in vacation pay upon discovery by Anderson of the error in its bookkeeping. With respect to the interest on the said vacation pay, the delegate noted that the interest calculated on the vacation pay from the date it was due, namely, October 29, 2007 until February 26, 2008, the Tribunal's deemed date of payment, amounted to \$0.62 and that Anderson had sent a cheque for this amount to Mr. Eng.
15. The Tribunal, after receiving the Report forwarded the same to the parties and afforded the latter an opportunity to respond. Both parties responded to the Report and the Tribunal Member considered the Report together with both parties' responses in making the second determination on September 11, 2008 (the "Second Decision") confirming both the Report and the Determination. In particular, in the Second Decision, the Member stated:

In this case, there is no objective evidence that any employer contravened section 83. With respect to the subcontractor, the Delegate found no evidence to show that this refusal to hire Mr. Eng was motivated by any knowledge of Mr. Eng's Employment Standards complaint. The subcontractor simply did not know about the complaint and regardless of Mr. Eng's allegation that

the Delegate should have informed the subcontractor about it (in my view, the Delegate has no such obligation), there is no evidence that the subcontractor acted with improper motive.

With respect to the supervisor, the Delegate found that whatever the cause of the altercation between him and Mr. Eng (not surprisingly, they put forward different versions of the altercation and its causes), there is no evidence that the altercation took place because of any action Mr. Eng was taking under the *Act*. Mr. Eng alleges in his reply that contrary to the supervisor's statement to the Delegate, the supervisor knew about Mr. Eng's complaint. Even if that were so (and no such finding it made here), mere knowledge of the complaint does not necessarily constitute evidence that the employer's action was motivated by the complaint. Further, speaking more broadly, it should be remembered that the supervisor was acting on behalf of the Employer during the altercation. In other words, there is simply no evidence that the altercation was the action of an employer motivated by an employee's access to or potential access to Employment Standards entitlements.

I agree with the Delegate that Mr. Anderson's request to have Mr. Eng's name flagged, made in the course of correspondence with the Tribunal with respect to the original appeal, does not constitute a contravention of section 83.

Having reviewed the delegate's decision on the referral back, and the submissions of the parties, I confirm the Report and find no basis to interfere with the conclusions found within.

16. Mr. Eng, understandably, is dissatisfied with the Second Decision as well as the Determination, and has filed an application pursuant to Section 116 of the *Act* for reconsideration of the Second Decision.
17. Pursuant to Section 36 of the *Administrative Tribunal's Act* (the "ATA"), which is incorporated into the *Act* (S. 103), and Rule 17 of the Tribunal Rules of Practice and Procedure, the Tribunal may hold any combination of written, electronic and oral hearings. In my view, an oral hearing of the reconsideration application is not necessary and therefore, I propose to adjudicate Mr. Eng's reconsideration application based on the written submissions of the parties and a review of the Determination, the First Decision and the Second Decision.

## ISSUES

18. 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 considering the threshold issue, is satisfied that the case is appropriate for reconsideration, then the Tribunal will consider the substantive issues or the merits of the application. In this case, the substantive issues may be reduced to two, namely:
  - i. Whether the delegate erred in concluding in the Report that there was not any or sufficient evidence that Mr. Eng was mistreated in contravention of Section 83 of the *Act* because he pursued the Complaint against Anderson; and
  - ii. Whether the delegate erred in concluding in the Determination that Mr. Eng was not entitled to compensation for length of service under section 63 of the *Act*?

## ARGUMENT

### *(i) Mr. Eng's submissions*

19. I have very carefully reviewed all of Mr. Eng's submissions starting from his appeal of the Determination, his submissions in response to the Report (which the Tribunal Member invited before she made the Second Decision) and the submissions he made in support of his reconsideration application. While I do not propose to delineate specifically Mr. Eng's submissions here, I feel I can confidently describe them as constituting submissions previously made by Mr. Eng to the delegate before the Determination was made and subsequently in his appeal of the Determination and in his response to the delegate's Report prior to the Second Decision of the Tribunal Member. Some of the written submissions are indeed copies of the same submissions he previously submitted to the delegate or the Tribunal Member. There are also numerous instances in his reconsideration submissions where Mr. Eng is reemphasizing and reasoning why his evidence previously presented to the delegate or the Tribunal Member should be preferred over Anderson's evidence or the evidence of witnesses the delegate spoke with in advance of the Determination or in preparing the Report. In my view, the submissions of Mr. Eng on his reconsideration application may be described as submissions disputing the delegate's findings of facts and resulting conclusions and a simple case of rearguing of the case, which is inappropriate in a reconsideration application, as I will discuss below under the heading Analysis.
20. Mr. Eng also submits in his reconsideration application criticism of the delegate and particularly the manner in which the delegate conducted his investigation of the Complaint in advance of the Determination and subsequently, his investigation of the section 83 complaint leading to the report. Again, I do not propose to delineate those submissions here although I have carefully read them and find them to be without merit frankly based on Mr. Eng's dissatisfaction with the findings of facts made by the delegate and the consequent conclusions.

### *(ii) Director's submissions*

21. The Director submits that the reconsideration application should be dismissed, as Mr. Eng has not shown any serious mistake on the part of the Director in applying the law or raised any compelling issue worthy of reconsideration. According to the Director, Mr. Eng's application is an attempt to reargue the facts before another decision-maker.
22. The Director also responds to Mr. Eng's submission in support of his complaint based on section 83 of the Act that Mr. Anderson's submission to the Tribunal in context of the appeal that Mr. Eng should be flagged (as previously described) is frankly irrelevant and "(n)othing turns on (it)" as Mr. Anderson's comment was made after the Determination was made and therefore cannot be the subject of reconsideration.
23. The Director also makes submissions to dispute Mr. Eng's claim or suggestion in the reconsideration application that he was not afforded a sufficient opportunity to respond in the delegate's investigation of the section 83 complaint after the referral back from the Tribunal Member in the First Decision leading to the delegate's Report. I do not propose to set out those submissions here except to say that, after reviewing all the materials produced to me in this application including the correspondences of the delegate to Mr. Eng dated May 8 and May 28, 2008 affording the latter further opportunities to provide evidence in support of his complaint that he was discriminated against under section 83 of the *Act*, I am in

agreement with the Tribunal Member's conclusion in the Second Decision that Mr. Eng received "adequate opportunity to put forward all the information in support of his case" in response to the Report.

**(iii) Anderson's submissions**

24. Mr. Anderson, in his submissions on behalf of Anderson, states that he stands "firm in his position...that (he) was within the rights of an employer to dismiss Ken Eng". He further indicates that he does not wish to "respond to all of the false accusations and odd interpretations that Ken Eng has made" but is then drawn in to contest various assertions of Mr. Eng on matters previously dealt with in the Determination and in the appeal of the Determination. I do not propose to set out Mr. Anderson's submissions on those matters here, particularly because much of what Mr. Anderson states is a repeat of what he submitted previously to the delegate and the Tribunal Member and of no consequence in this application in light of my decision on the preliminary issue in this reconsideration application.

**ANALYSIS**

25. 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.
26. 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.
27. Having said this, 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.
28. 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.

29. In this case, I find that Mr. Eng has not discharged the burden placed upon him to show an error in the decision appealed from based on any of the grounds delineated in *Zoltan Kiss, supra*, for exercising the Tribunal's reconsideration power exist. More specifically, I find that the delegate afforded Mr. Eng ample opportunity to respond to the Complaint before the Determination was made and he subsequently afforded Mr. Eng an opportunity to respond during the referral back process, which Mr. Eng did. There is, in my view, no evidence of a breach of any principles of natural justice on the part of the delegate. I also note that the Tribunal Member, in the Second Decision, correctly pointed out that Mr. Eng was given adequate opportunity to submit his evidence in context of the delegate's investigation of Mr. Eng's section 83 complaint and the delegate's resulting Report.
30. I also find that the delegate did not make any mistake in stating the facts or interpreting the law (sections 63, 65 and 83 of the Act) in making the Determination and subsequently, in preparing the Report.
31. I also agree with the Tribunal Member's First Decision as well as the Second Decision and do not find any basis to disturb them.
32. As indicated previously, in my view, Mr. Eng's application for reconsideration is nothing short of an attempt by him to have this Tribunal reweigh the evidence that was before the delegate during the investigation of the Complaint and before the Determination was made and subsequently, presented to the Tribunal Member in the appeal of the Determination. As indicated by the Tribunal in *Milan Holdings, supra*, where the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the Tribunal or the delegate, this will weigh against the applicant's application for reconsideration. In my view, Mr. Eng's reconsideration application fails in the first stage of the analysis referred to in *Milan Holdings* and I need not consider the merits of the application.

## ORDER

33. The decisions of the Tribunal dated April 30, 2008 (BC EST # D045/08) and September 11, 2008 (BC EST # D093/08) as well as the Determination dated January 21, 2008 as varied by BC EST # D045/08 are confirmed.

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**Shafik Bhalloo**  
**Member**  
**Employment Standards Tribunal**