

BC EST #D130/98
Reconsideration of BC EST #D586/97

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

James Robert Wilkinson operating as Waterwise Water Company

(“Waterwise”)

- of a Decision issued by -

The Employment Standards Tribunal
(the “Tribunal”)

ADJUDICATOR: Lorna Pawluk

FILE NO.: 98/030

DATE OF DECISION: MARCH 20, 1998

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DECISION

OVERVIEW

This is a reconsideration application under Section 116 of the *Employment Standards Act* (the "Act") of a Decision BCEST #D586/97 issued by the Employment Standards Tribunal on December 16, 1997 (the "Original Decision"). The Original Decision confirmed Determinations issued by the Director of Employment Standards on April 14, 1997 and August 9, 1997. The Adjudicator concluded that the Determinations correctly concluded that Andreas Adamopoulos ("Adamopoulos") was owed \$484.77 for unpaid wages and that James Robert Wilkinson ("Wilkinson") was personally liable for that sum.

These Determinations were made following a Determination dated November 22, 1996 in favour of Adamopoulos against Waterwise Water Company ("Waterwise") for unpaid wages in the amount of \$484.77. Although that Determination was not appealed, the wages were never paid. Thus, the Director issued a further Determination dated April 14, 1997 against Wilkinson in his capacity as a director. On April 23, 1997, Wilkinson wrote to the Director, saying that Waterwise was a shell company set up solely to protect a name. He said it had no assets or bank account and had "never carried on operations". He did not dispute that the wages were owed, but rather argued that Waterwise was not the employer. Following this, the Director issued the August 9, 1997 Determination, finding Wilkinson personally liable for wages.

Wilkinson appealed the Determination dated August 8, 1997 to the Tribunal arguing that the Adjudicator made a number of factual errors and complaining about the process by which the Determination was sent to him. He asked the Tribunal to overturn the Determination or significantly reduce it. This appeal led to the Determination being reconsidered here.

Wilkinson applies for reconsideration on the grounds that the Adjudicator failed to comply with the principles of natural justice and committed mistakes in stating the facts.

ISSUE TO BE DECIDED

The issue is whether there are grounds to reconsider the Original Decision?

FACTS

The Adjudicator dismissed Wilkinson's appeals as "solely designed to delay or attempt to frustrate the Determinations of the Director" He said that Wilkinson did not produce any records or evidence to support his argument that Adamopoulos was a contractor and/or did not work at all. In the absence of such evidence, he dismissed the appeal. He further noted

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that Wilkinson could not dispute the Determination made against Waterwise in the first instance and that it was not open to him to do so through subsequent Determinations.

Wilkinson argues that the Adjudicator committed errors when reciting the facts and failed to comply with the principles of natural justice by incorrectly stating certain facts: "The decision that Mr. Orr sent me clearly stated some facts that were not true. Claims such as Mr. Adamopoulos being hired as a contractor and that I made appeals previous to the one handled by Mr. Orr just didn't happen." In particular he took issue with the hours of work saying they were "significantly overstated and for times that our company was either not open or did not have delivery routes". He does not identify which days are involved in that aspect of his argument. He further claims that there are 4 days where 8 hours are claimed, but that Adamopoulos had been dropped off by one of the delivery drivers after one or two hours of work. He also complains that no oral hearing had been held in proceedings leading up to publication of the Original Decision: "I was told that there would be a physical hearing where these and other issues would be discussed . . .".

Adamopoulos points out a number of contradictions in submissions put forth by Wilkinson. He points out that his hours were outlined in his "daytimer" and that he provided the correct information in the forms which he filled out at the Employment Standards Branch. He insists that he claimed wages for only those hours actually worked.

The Director's Delegate argues that the Tribunal did not breach the rules of natural justice in not holding an oral hearing. It is further argued that Waterwise failed to adequately present its case in the original appeal and cannot now make detailed responses to the findings of fact in the Determination. It is Wilkinson and not the Adjudicator who raised the issue of Adamopoulos' status as a contractor. The Delegate also argues:

With respect to the reference to "appeals previous to the one handled by Mr. Orr", Mr. Wilkinson appears to take issue with the adjudicator's statement that Mr. Wilkinson appealed a Determination of the Director on April 23, 1997. It is true that Mr. Wilkinson did not formally appeal any Determination of the Director prior to the appeal of August 20, 1997. He did write a letter on April 23, 1997, in response to the Determination finding Mr. Wilkinson liable for the complainant's wages in his capacity as an officer/director of Waterwise. However, in enunciating the principle that a party to a Determination that chooses not to appeal is not entitled to appeal in another capacity, it is clear that the adjudicator did not consider the April 23 letter to constitute a valid appeal under the *Employment Standards Act*. Moreover, regardless of the adjudicator's statement concerning an April 23 appeal, it is a fact that Wilkinson did not appeal any Determination prior to August 20, and thus both the principle cited and the decision reached by the adjudicator are correct in law.

ANALYSIS

Section 116 of the *Act* confers reconsideration powers on the Tribunal:

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- 116(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 create an opportunity to revisit the evidence or to reconsider the original arguments. Rather, a reconsideration application will succeed in narrow circumstances. Some examples were outlined in *Zoltan Kiss* (BCEST #D122/96):

- failure to comply with the principles of natural justice
- mistake of fact
- decision inconsistent with prior decisions indistinguishable on their facts
- significant new evidence not available to the first adjudicator
- mistake of law
- misunderstanding of or failure to deal with a serious issue
- clerical error

Wilkinson offered no evidence in support of his arguments about the factual findings which lead to the Original Decision. Thus, even if this was an opportunity to revisit the facts, his application would fail. Moreover, the powers on reconsideration as they pertain to factual findings are narrow and do not include an opportunity to re-argue the weight of the evidence, as is urged by Wilkinson. He also argued that the recitation of facts by the Adjudicator amounted to a breach of natural justice; however he did not elaborate on his argument and one is not obvious to me. He implied that the Adjudicator introduced a question of Adamopoulos's status as an employee, but on this point, I agree with the Delegate that this issue was introduced by Wilkinson himself.

Finally, Wilkinson did not explain how he was prejudiced by the Adjudicator's failure to hold an oral hearing and I am unable to identify a problem with the procedure as followed.

There is no right to an oral hearing: the decision to hold one is made on a preliminary basis by the Registrar of the Tribunal. There is further discretion in the Adjudicator to hold an oral hearing where the circumstances of a case make it necessary. The Adjudicator examined the evidence and apparently concluded that all of the issues could be dealt with without further oral evidence. While it would have been useful for the Adjudicator to explain why he chose to make a decision without an oral hearing, nothing in Wilkinson's submissions convinced me that the failure to hold an oral hearing breached his procedural rights. Moreover, I do not find that the failure to include an explanation in the Decision amounts to a breach of natural justice.

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ORDER

Pursuant to section 116 of the *Act*, I confirm the Original Decision (BC EST #D586/97).

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Lorna Pawluk
Adjudicator
Employment Standards Tribunal