**BC EST #D232/99**
**Reconsideration of BC EST #D521/98**

**EMPLOYMENT STANDARDS TRIBUNAL**
In the matter of a reconsideration pursuant to Section 116 of the
*Employment Standards Act* R.S.B.C. 1996, C. 113

- by -

Parduman Singh Kaloti and Kamlesh Devi Kaloti operating as National Courier Service -and- S. Wells, W. Peters, S. Mitrou, J. Hilts, F. Docherty, M. Dixon, T. Davies

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

**ADJUDICATOR:** Alison H. Narod

**FILE NO.:** 1999/119

**DATE OF DECISION:** June 9, 1999
(corrected August 3, 1999)

## DECISION

### OVERVIEW

This is an application by Parduman Singh Kaloti and Kamlesh Devi Kaloti operating as National Courier Service ("National Courier") pursuant to Section 116 of the *Employment Standards Act* for reconsideration of a Decision of this Tribunal issued on November 20, 1998 and numbered BC EST #D521/98 (the "Decision"). The Decision dismissed National Courier's appeal of a Determination made by a Delegate of the Director of Employment Standards which found that drivers engaged by National Courier were employees within the meaning of the *Act* and entitled to unpaid wages in an amount totalling $34,334.47, including interest.

### ISSUE TO BE DECIDED

The issue in this case is whether or not the Employer, National Courier, was denied natural justice in the hearing of its appeal because it did not have a proper opportunity to present its defence by calling its principal, Parduman S. Kaloti, as a witness to testify on its behalf.

### FACTS AND SUBMISSIONS

The Employer appeals on the basis of an alleged denial of natural justice. It alleges that this was due to the fact that one of its principals, Mr. Kaloti, was denied the opportunity to testify because he was not fluent in English and lacked the confidence to testify and because he had a prior business committment that could not be changed. It contends that the Employer ought to have the opportunity to defend its position, including the right to call Mr. Kaloti and present documents in support.

In aid of its appeal, the Employer submits letters from its long-time accountant, Lucy Richardson, stating that the Tribunal's decision was "unfair and wrong" and "a grievous injustice". Ms. Richardson repeats the Employer's assertion that Mr. Kaloti was not available to give direct testimony during the hearing of the appeal and says that as a result much essential evidence never came to light. She says that she was out of the country at the time of the hearings and it was therefore impossible for her to provide testimony in support of the Employer's position. She relates the history of the Employer's business, National Courier. She asserts, without stating the basis of this assertion, that the Employer/Employee relationship was never discussed with the Complainants. Additionally, she submits without supporting documentation that the Tribunal's decision will force National Courier into bankruptcy.

Several of the Complainant Drivers submitted letters opposing the application for reconsideration, as did the Director's Delegate.

The Delegate's Determination was issued on June 30, 1998. On July 22, 1998, an appeal was filed on the Employer's behalf by its lawyer, Gary W. Kinar. By a Notice of Hearing dated August 25, 1998,

the parties were advised that the hearing of the appeal was set for September 28, 1998. By a second Notice of Hearing dated September 16, 1998, they were notified that the hearing was being reset for September 25, 1998. By a third Notice of Hearing dated September 24, 1998, they were notified that the hearing was being reset a further time, for November 10, 1998. All parties were well aware in advance of the date of hearing.

Gary Kinar, counsel for the Employer, advised by letter dated September 14, 1998, that Mr. Kaloti would be a witness at the appeal. He also advised that Mr. Kaloti was functional in English, but as it was his second language, he would be more comfortable if his daughter was permitted to translate. Crispian Starkey, counsel for a number of the Complainant Drivers, objected to Mr. Kaloti's daughter acting as interpreter as it was likely that she would be called as a witness. As a result, the Tribunal arranged for a Punjabi translator to be present at the appeal hearing.

There is no indication on the documentation before me that anyone on behalf of the Employer advised the Tribunal prior to the appeal hearing or at its commencement that the Employer was dissatisfied with the Tribunal providing a translator for Mr. Kaloti or that the Employer objected to the hearing proceeding because Mr. Kaloti was going to be unavailable.

The appeal decision indicates that the Employer was represented at the hearing by its counsel, Mr. Kinar, that the Punjabi interpreter, Manjit S. Dhariwal was present and that Mr. Kaloti's daughter, Sonya Kaloti gave evidence. Neither Mr. Kaloti or his wife testified.

Crispian Starkey, counsel for one of the Complainant Drivers, Frank Docherty, attended at the appeal hearing and made submissions in this application for reconsideration. He writes that at the opening of the hearing the Adjudicator, Mr. Orr, explained to all in attendance the process of the hearing, the purpose of the hearing, as well as the rights of all the parties to lead evidence, documentary or otherwise, to give evidence themselves and to be cross-examined and questioned on that evidence by all of the other parties.

Mr. Starkey says that the Punjabi translator was present from the outset of the hearing. When the hearing commenced, counsel for the Employer proceeded first. The first witness for the Appellant was Mr. Kaloti's daughter. During direct examination of Ms. Kaloti, Mr. Kaloti interjected in English. Ms. Kaloti was cross-examined. Prior to redirect examination of Ms. Kaloti by Mr. Kinar, Mr. Kinar announced to the hearing that Mr. Kaloti would then be leaving the hearing and Mr. Kaloti did so. After Ms. Kaloti's evidence was concluded, Mr. Kinar advised the hearing that Mr. Kaloti had withdrawn from the hearing and that Ms. Kaloti's evidence concluded the evidence for the Employer. Mr. Kinar also advised the hearing that Mr. Kaloti would not be called to give rebuttal evidence. The Employer's case was closed and the Complainants' cases were heard.

Mr. Starkey points out that Mr. Kaloti had the benefit of the interpreter provided by the Tribunal as well as his own lawyer throughout the hearing. Mr. Kaloti chose to withdraw himself from the hearing thereby electing not to give evidence and preventing others from calling him as a witness. Although Mr. Kaloti had stated that he had records in support of his case, none were produced, nor was an adjournment sought to present them and the matter was not addressed in reply.

Mr. Starkey observes that Mr. Kaloti did not appear to have any problem understanding the questioning of his daughter and interjected in English, indicating his understanding of the proceedings. He was provided with the full opportunity to present his documents and present his case in person in his native language, but declined to do so. Mr. Starkey further submits that the application for reconsideration sets out no error of fact or law and consequently is unsupportable.

One of the Complainants, Susan Mitrou, made a written submission in which she confirms that Mr. Kaloti attended the hearing but left after his daughter's testimony and that Mr. Dhariwal, the interpreter, was present. Ms. Mitrou adds that Mr. Kaloti successfully conducted National Courier's business in English. She says that this business demands the use of English and that Mr. Kaloti continually conversed with customers and drivers throughout the day in English. Ms. Mitrou also points out that the Notice of Hearing advised parties of the date of hearing well in advance and that all records and documents were to be provided in advance of the hearing. Mr. Kaloti had ample time to arrange to attend the appeal. There is no reason why Lucy Richardson could not have provided information prior to her letter of December 31, 1998.

Two other Complainants, John Hilts and Wayne Peters made written submissions making similar points.

Graeme Moore, Program Advisor, made written submissions on behalf of the Director of the Employment Standards Branch that the application for reconsideration ought to be dismissed. Mr. Moore submits that a reconsideration is not an opportunity to revisit the evidence or reiterate the original arguments. He relies on *Zoltan Kiss*, BC EST #D122/96 in which, he says, the Tribunal took the position that its power to reconsider ought to be exercised with caution and noted that,

> Employers and employees should expect that, under normal circumstances, one hearing by the Tribunal will resolve their dispute finally and conclusive (sic). 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.

The Tribunal held that a reconsideration application should only succeed in special circumstances, some of which are as follows:

- failure to comply with the principles of natural justice
- mistake of fact
- decision inconsistent with prior decisions indistinguishable on their facts
- significant new evidence which could not have been presented to the original adjudicator
- mistake of law

- misunderstanding of or failure to deal with a serious issue
- clerical error.

Mr. Moore cites the Tribunal's decision in *The Director of Employment Standards*, BC EST #D131/98, which stated:

> This [the reconsideration application] is not an opportunity to rehear the evidence or to re-examine before the original Adjudicator. Rather, it provides a limited opportunity for review, on the grounds identified above [*Zoltan Kiss*].

Mr. Moore submits that the instant reconsideration application does not meet these expectations of the Tribunal and is an attempt to reargue the appeal. Therefore, it ought to be dismissed.

**ANALYSIS**

As noted, the basis of the appeal is that the hearing of the Employer's appeal failed to comply with the principles of natural justice. This is because a principal of the Employer, Mr. Kaloti, is said to have been prevented from testifying in defence of the Employer because he was not comfortable testifying in English and he was unavailable due to prior a business committment that could not be changed. The Employer seeks the right to present and defend its case with its witness, Mr. Kaloti and with all documents.

A failure by the Tribunal to comply with the principles of natural justice is a ground for reconsideration under s.116 of the Employment Standards Act (*Zoltan Kiss, supra*.). The principles of natural justice require that parties be given notice of the case, be told the case against them and be afforded a fair opportunity of answering it (*Homex Realty v. Wyoming* [1980] 2 SCR 1011 (S.C.C.), *Martineau v. Matsqui Disciplinary Board* [1980] 1 S.C.R. 602 (S.C.C.)).

The Employer initiated an appeal of a Determination dated July 30, 1998. It retained counsel who made detailed written submissions and responded to submissions made by the Complainant Drivers. The date of the hearing was well known in advance to all parties. Counsel for the Employer advised the Tribunal in advance of the hearing that Mr. Kaloti would be testifying as a witness and did not indicate that his availability was going to be a problem. The Tribunal accommodated Mr. Kaloti's discomfort testifying in English by providing him with the assistance of a Punjabi translator. Mr. Kaloti attended at the hearing with his daughter and his lawyer.

Decisions regarding how a party will conduct its case are to be made by the party. The order in which the Employer would call its witnesses and the scheduling of those witnesses was a matter for the Employer to decide, in this case, through its representatives, Mr. Kaloti and the Employer's lawyer. Accordingly, a decision was made to call Mr. Kaloti's daughter as the Employer's first witness. During the first witness's evidence, Mr. Kaloti left the proceedings. There is no evidence before me

that an adjournment was sought to have Mr. Kaloti testify at another time. The Employer's lawyer continued to participate to the conclusion of the hearing.

It was entirely within the Employer's power to determine how to present its case, including the order in which to call its witnesses. Mr. Kaloti was available and attended for part of the hearing. No explanation is given as to why he could not have been accommodated by being called as the first witness instead of his daughter. With respect to Mr. Kaloti's assertion that he was not available because of a prior business committment, the Employer provides no explanation as to what that committment was, why it could not have been arranged for another time or why it did not seek an adjournment to allow for Mr. Kaloti to testify at another time.

The bare assertion of unavailability, without explanation, is an insufficient basis for concluding there is a denial of natural justice. In this case, the Employer had ample time in advance to organize its affairs so as to attend the hearing and present its case through witnesses and documentary evidence. A party's decision not to call a witness, particularly when that witness is present and available, is not a reason for finding that the Tribunal erred in a manner that constitutes a denial of natural justice. Rather, it is a strategic decision wholly within the control of the party.

With respect to the Employer's assertion that Mr. Kaloti did not testify because of his lack of proficiency in English, I note that the Tribunal was aware of his concern and provided a Punjabi translator. His concerns were accommodated and he elected not to take advantage of the translator's services. In the circumstances, Mr. Kaloti has not provided a compelling reason why he could not continue to participate in the hearing with the assistance of his lawyer and the interpreter.

With respect to documents, the three Notices of Hearing each advised that any records or documents which parties wished to be considered by the Adjudicator were to be provided to the Tribunal in advance of the hearing. The evidence is that no records were provided by National Courier at the hearing. There is no satisfactory explanation for why any documents that Mr. Kaloti seeks to rely on, including those that may have been in Lucy Richardson's possession, could not have been provided in advance of the hearing and in compliance with the Notices of Hearing. There is no explanation of what information or documents Lucy Richardson possesses that would be of assistance in this matter, nor is there any explanation for why that information could not have been provided in documentary form or through other witnesses.

It would be unfair to the other parties to allow an appeal on the grounds alleged in the instant case. It would be a simple matter for a party to manipulate the conduct of its case through scheduling witnesses, withholding documents, refusing to use translators and the like so as to have the decision set aside if the party did not like the result. One of the purposes of giving advance notice is to permit parties ample time to arrange the presentation of their cases so that the whole of the case may be heard and a final result rendered. If a decision could be vacated simply because of the manner in which a party conducted its case, there would be no finality to the result. A party is not entitled to a second "kick at the can" merely because it planned its case poorly.

**ORDER**

In the circumstances, I conclude that there is no basis on which to find that the Employer was denied a hearing consistent with the principles of natural justice as alleged. The Employer had ample notice. It was aware of the case it had to meet. It was provided the opportunity to be heard. Its failure to fully avail itself of the opportunity to be heard by not calling a witness who was present and available and by not adducing documents within its possession or control is not a basis for finding it was denied a fair hearing. I dismiss the application for reconsideration.

**Alison H. Narod**
**Adjudicator**
**Employment Standards Tribunal**