

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an application for reconsideration pursuant to Section 116 of the  
*Employment Standards Act*, R.S.B.C. 1996, C. 113

- By -

Sandy Mayzell  
(the "Employee")

- of a Decision issued by -

The Employment Standards Tribunal  
(the "Tribunal")

**ADJUDICATOR:** Ib Petersen

**FILE No.:** 98/191

**DATE OF DECISION:** July 2, 1998

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## DECISION

### APPEARANCES

Ms. Sandy Mayzell	on behalf of the herself
Mr. David Oliver	on behalf of the Director

### OVERVIEW

This is an application by the Employee pursuant to Section 116 of the *Employment Standards Act* (the “*Act*”), against a Decision of the Employment Standards Tribunal (the “Tribunal”) issued on February 3 (#D059/98). Following a hearing on December 16, 1997, the Adjudicator found that the Employer, Monday Publications Ltd., (the “Employer” or “Monday”) did not pay statutory holiday pay to a number of employees in accordance with the *Act*. The Employer included statutory holiday pay in the commission paid to the employees. The Decision confirmed a Determination dated September 19, 1997 which held that the Complainant employees were entitled to payments on account of statutory holiday pay, of between \$74.10 and \$4,613.79, for a total of \$16,810.83 plus interest. With respect to Ms. Mayzell, the Determination provided that she was entitled to \$1,227.75.

Ms. Mayzell is seeking to reconsider the decision of the Adjudicator which upheld the Determination. She argues that

“in the Determination the amount of statutory pay (sic) was calculated using the incorrect employment dates of January ‘95 - may ‘96. The correct dates, October/94 - July/97 were confirmed both by the Record of Employment ... as well as in <the> adjudication.”

Ms. Mayzell did not appeal the Determination.

## ISSUES TO BE DECIDED

The issue to be decided is whether the Employee is entitled to have the Adjudicator's Decision reconsidered?

## ANALYSIS

Section 116 of the *Act* provides (in part):

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 may make an application under this section.

An application for reconsideration should succeed only where there has been a demonstrable breach of the principles of natural justice, where there is compelling new evidence not available at the original appeal, or where the adjudicator has made fundamental error of law. In *Zoltan Kiss* (BCEST #D122/96), and other decisions, the Tribunal has emphasized that it will use the power to reconsider with caution in order to ensure finality of the Tribunal's decisions and efficiency and fairness of the system.

The purposes of the *Act* which guide our interpretation are set out in Section 2 which provide (in part):

2. The purposes of this *Act* are as follows:
  - (b) to promote *fair* treatment of employees and employers;

(d) to provide *fair and efficient* procedures for resolving disputes over the application and interpretation of this *Act*; (emphasis added)

In my view, the scheme contemplated by the *Act* emphasizes expeditious resolution of disputes based on the principles of natural justice.

As noted by Ms. Mayzell, the Adjudicator set out, what she argues to be, the correct employment dates. However, he also upheld the Determination which, if she is correct about the dates, could lead to the conclusion that the Determination was incorrect as far as amount of compensation is concerned. Nevertheless, I am not satisfied that the Decision should be disturbed. First, the Decision states that the “employees in this case are of the view that the Determination should be upheld”. Second, the dispute is really with the Determination and not with the Adjudicator’s Decision. Section 112 provides, *inter alia*, that any person served with a determination may appeal the determination in writing, including the reasons for the appeal. The request must be made within 8 or 15 days depending on the method of service. Ms. Mayzell does not argue that she did not receive the Determination. It is clear from Ms. Mayzell’s application for reconsideration that she was aware of the Determination and could have appealed it. She received a copy of the Determination. In fact, Ms. Mayzell states that she had pointed out in a letter to the Tribunal dated November 3, 1997, *i.e.*, before the hearing, that the Determination was based on incorrect employment dates. While she argues that she did raise the issue at the hearing, the proper manner in which to appeal a Determination is provided for in the *Act*.

While Section 116 of the *Act* permits a person named in a decision or order of the Tribunal to apply for reconsideration, it follows from the process set up in Part 13 (Appeals) of the *Act* that appeals of determinations are to be made to the tribunal under Section 112. The tribunal may then “confirm, vary or cancel” the determination or refer the matter back to the Director. A party who is dissatisfied with the Tribunal’s decision has further recourse under Section 116. However, the issue must be with the decision of the Tribunal such as a demonstrable breach of the principles of natural justice, compelling new evidence not available at the original appeal, or the adjudicator made fundamental error of law. If a party is permitted to question a determination directly on reconsideration, it is clear that the other party is deprived of at least one appeal opportunity. That, in my view, would be contrary to principles of natural justice.

In short, I am not persuaded that the Decision should be set aside.

**ORDER**

Pursuant to Section 116 of the *Act*, I order that the Decision (D#059/98), dated February 3, 1998 be confirmed.

**Ib Skov Petersen**  
**Adjudicator**  
**Employment Standards Tribunal**