

BC EST #D317/99
Reconsideration of BC EST #D177/99

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 -

Loong Heng Education Ltd. Operating Canadian Berkley College of Computer
Education
("LHE")

- of a Determination issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: David Stevenson

FILE N_{O.}: 1999/342

DATE OF **D**ECISION: July 28, 1999

DECISION

OVERVIEW

Loong Heng Education Ltd. Operating Canadian Berkley College of Computer Education (“LHE”) seeks a reconsideration under Section 116 of the *Employment Standards Act* (the “Act”) of a decision of the Employment Standards Tribunal (the “original decision”), BC EST #D177/99, dated May 3, 1999. The original decision confirmed a Determination made by a delegate of the Director of Employment Standards (the “Director”) on February 3, 1999 in respect of a complaint by John McGrath (“McGrath”) that concluded LHE had contravened Sections 17, 45 and 48 of the *Act* and ordered LHE to cease contravening the *Act*, to comply with the *Act* and to pay an amount of \$3648.50. The Director also imposed a \$0 penalty under Section 98 of the *Act* and Section 29 of the *Employment Standards Regulations*.

ISSUE TO BE DECIDED

In any application for reconsideration 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 we are satisfied the case is appropriate for reconsideration, the application for reconsideration frames the issues as follows:

- (a) the Adjudicator failed to respond to LHE’s calculation of Statutory Holiday and Annual vacation pay;
- (b) the facts and analysis made by Adjudicator in the original decision does not take account of the points made by LHE in their appeal submissions; and
- (c) the Adjudicator erred by ordering interest to be calculated from the date of issuance of the Determination , as opposed to the date of the original decision.

ANALYSIS

I have applied the approach suggested in *Milan Holdings Ltd.*, BC EST #D313/98 and *Zoltan Kiss*, BC EST #D122/96, which, taken together, say the applicant must make out an arguable case of sufficient merit, within those limited circumstances identified in *Zoltan Kiss*, to warrant reconsideration. In *Milan Holdings Ltd.*, the Tribunal stated:

The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases.

A reconsideration is not simply another opportunity to seek a review of the evidence and arguments submitted to the Adjudicator in the appeal hearing. In my opinion, LHE has not made out a case of sufficient merit to warrant reconsideration. At the outset I note the opening comment of the Adjudicator in the original decision:

This appeal borders on the frivolous.

The first two grounds for reconsideration challenge the acceptance by the Adjudicator in the original decision of the Director’s calculation of hours of work and annual and statutory holiday pay entitlement.

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This ground merely asks for a re-examination of the conclusions of the Director in the Determination. LHE was unable to demonstrate any error in their appeal and the Adjudicator did consider whether the calculations were consistent with the requirements of the *Act*:

I have reviewed the delegate's calculations - which were appended to the Determination - with respect to McGrath's entitlement to statutory holiday pay and annual vacation pay and these calculations appear to have been made in accordance with the *Act*.

The second ground for reconsideration also includes an argument that relates to LHE's position that McGrath was an independent contractor doing "project" work. LHE argues that some advertising design work being done by McGrath should be viewed differently from the work he performed as an "employee" and that the number of hours spent on the "project" work is, in any event, uncertain. This argument was raised in the appeal and was not accepted. The Adjudicator found McGrath to be an employee in all respects relative to his term with LHE. As for the argument that the hours worked on this project are still "questionable", the original decision is clear on the point that LHE was provided with every reasonable opportunity to respond to the complaint made by McGrath and was either unwilling or unable to show that the hours of work claimed by McGrath were wrong.

The final ground for reconsideration argues that the original decision, which confirmed the amount ordered to be paid in the Determination, was wrong to include an order that interest accrue on that amount from the date of issuance of the Determination. This ground for reconsideration does not raise any significant issue of law or policy under the *Act* and is completely answered on the clear wording of Section 88 of the *Act*, which says interest on unpaid wages continues to accrue "*to the date of payment*".

For the above reasons, I refuse to exercise my discretion to reconsider the original decision.

ORDER

Pursuant to Section 116 of the *Act*, I reject the application for reconsideration of the Tribunal's decision of May 3, 1999. I also confirm that interest on the unpaid wages continues to accrue pursuant to Section 88 of the *Act*.

David Stevenson
Adjudicator
Employment Standards Tribunal