

BC EST #D363/97
Reconsideration of BC EST #D189/97

EMPLOYMENT STANDARDS TRIBUNAL

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

- by -

International Energy Systems Corp.
("I.E.S.")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Niki Buchan

FILE NO.: 97/424

DATE OF DECISION: **AUGUST 5, 1997**

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DECISION

OVERVIEW

This is an application brought by International Energy Systems Corp. (“I.E.S.”) pursuant to Section 116 of the *Employment Standards Act* (the “Act”) for reconsideration of Decision No. D189/97 dated May 6, 1997 issued by the Employment Standards Tribunal (the “Tribunal”).

Ian Plumbley on behalf of I.E.S. alleges that a very serious miscarriage of justice has occurred. He claims that the analysis of this case is in error. He was not allowed to cross examine and was interrupted when attempting to do so. He states that he was only permitted to ask clarifying questions for which he received ambiguous and mostly irrelevant answers. Mr. Plumbley’s other reasons for requesting a reconsideration involve disputes with the findings of facts and the conclusions reached.

ISSUE(s) TO BE DECIDED

1. Whether the adjudicator failed to comply with the principles of natural justice?
2. Whether there was a mistake of facts?

FACTS

1. The Decision confirmed an order issued by a delegate of the Director of Employment Standards in Determination No. 004814 dated November 28, 1996. That Determination required I.E.S. to pay \$ 1,941.25 to a former employee, Elizabeth A. Henriques, on account of unpaid overtime wages and interest
2. A hearing was held at the Tribunal offices on April 30, 1997 at which time sworn testimony was given by Elizabeth Henriques and Ian Plumbley.
3. In the written Decision the adjudicator set out the undisputed facts and reviewed the Determination considering the case made by Mrs. Henriques and by I.E.S. Also, the adjudicator sets out the disputed facts which indicate that Mr. Plumbley had the opportunity to present evidence and challenge the analysis made by the Director’s delegate.
4. The central issue determining the appeal was the credibility of the evidence given by Mrs. Henriques. The adjudicator clearly set out the factors that must be considered in assessing credibility of a witness. He found on balance that it is more probable that events occurred as Mrs. Henriques described them. He states that her evidence was not shaken under cross-examination.
5. Submissions from others attending the hearing, Mrs. Henriques and the delegate for the Director indicate that each party was given opportunity to give evidence, to ask questions of the opposing party and to present closing remarks.

ANALYSIS

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The Tribunal has consistently ruled that it will exercise its power to reconsider with caution in order to ensure finality of decisions and efficiency and fairness of the system. It has set out some of the circumstances in which it will reconsider an order or a decision [*Kiss v. British Columbia (Director of Employment Standards)* (1996) BC EST No. 122/96]. Two circumstances listed there are relevant to the allegations made by Mr. Plumbley: (1) there is a failure to comply with the principles of natural justice and (2) there is a mistake of fact.

If Mr. Plumbley had been denied to opportunity to cross-examine there would be a denial of natural justice and cause to review the appeal Decision. This allegation is unfounded in that the Decision clearly refers to Mrs. Henriques' evidence not being shaken under cross-examination. Submissions by Mrs. Henriques and the delegate for the Director indicate that each party was given opportunity to ask questions of the opposing party. There is nothing in the I.E.S. submission which verifies the allegation that Mr. Plumbley was not allowed to cross-examine or that he was prevented from questioning the witness. I find that there was no failure to comply with the principles of natural justice.

The other allegations involve a dispute over the findings of facts and the conclusions reached. Mr. Plumbley argues that "there is not one shred of substantiated evidence that she worked overtime without pay but there is substantial evidence to suggest that she didn't ie [sic] the company records and testimony of Ian Plumbley, P. Eng." He also alleges that she fabricated the daytimer report.

The adjudicator states that the central issue was one of the credibility of the evidence given by Mrs. Henriques. He assessed her evidence against the factors which must be considered in assessing the credibility of a witness [*Farnya v. Chorny* (1952) 2 DLR 354 (BCCA)]. He found on balance that it is more probable that events occurred as she described. Her evidence is that during most of her employment she reported to Wayne Ryan and Doug Cullen. Mr. Plumbley disagrees with this finding of fact but his evidence did not establish that Mrs. Henriques was told by Wayne Ryan, Doug Cullen or himself not to work overtime prior to December 19, 1995. As a result of this finding, the adjudicator concurs with the Determination finding that Mrs. Henriques is entitled to the overtime claimed.

Mr. Plumbley's submission on these matters is an attempt to challenge the facts found at the oral hearing. I am satisfied that the adjudicator followed the proper legal principles in coming to his findings of fact. The reconsideration powers of the Tribunal should not be used as a second opportunity to challenge the findings of fact made after an oral hearing where sworn evidence was presented. It will not reconsider an appeal of alleged errors unless those facts are entirely unsupported. That is not the case in this instance therefore the appeal Decision is confirmed.

ORDER

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In summary, I order pursuant to Section 116 of the *Act*, that Decision BC EST No. 189/97 be confirmed.

Niki Buchan
Adjudicator
Employment Standards Tribunal