

BC EST #D385/99
Reconsideration of BC EST #D062/99 and
BC EST #D190/99

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

- by -

Christopher M. Wilson
Operating as Emcee Yard & Garden
("Emcee")

of a Decision issued by

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Cindy J. Lombard

FILE NO.: 1999/380

DATE OF DECISION: September 9, 1999

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DECISION

OVERVIEW

This is an application by Christopher M. Wilson operating as Emcee Yard & Garden (“Emcee”) under Section 116(2) of the *Employment Standards Act* (the “Act”) seeking a reconsideration of Decision #062/99 which was issued by the Tribunal on February 19, 1999 (the “February Tribunal decision”) and Decision #D190/99 which was issued May 11, 1999 (the “May Tribunal decision”).

The Tribunal decision involved a consideration of whether wages for statutory holiday and over-time wages were owed to a former employee of Emcee, namely, Marco Vickers (“Vickers”). The Director of Employment Standards (the “Director”) had rendered a determination dated December 1, 1998, concluding that Emcee owed Vickers \$590.12 being overtime and statutory holiday and vacation pay on those amounts. The February Tribunal decision referred the determination of the amount owed back to the Director for recalculation of wages owed for statutory holidays and overtime wages in an amount to be determined in accordance with an analysis of that decision, namely that errors were made with respect to statutory holiday pay and calculation of hours of work.

The Director issued a further decision dated February 23, 1999, calculating statutory holiday and over-time wages owing in the amount of \$851.06.

Again Vickers appealed this decision. The May Tribunal decision declared that the February determination be confirmed in the amount of \$851.06.

Emcee applied for a reconsideration of the February and May Tribunal decisions on the grounds set out in his letter of March 3, 1999.

ANALYSIS

Section 116 of the *Act* infers reconsideration powers on the Tribunal as follows:

- 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.

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The power granted to the Tribunal to reconsider its decision is discretionary. That discretion will be exercised in favour of reconsideration where the applicant has raised significant questions of law, fact, principal or procedure of sufficient merit to support a reconsideration. This threshold test approach is set out in the Tribunal decision of Milan Holdings Ltd. BC EST #D313/98. Factors to be considered include whether the application is timely and whether the application is merely a request to reweigh the same evidence before the Tribunal.

Factors considered to be of sufficient merit to meet the threshold test include:

1. Failure to comply with the principals of natural justice;
2. Mistake of law or fact;
3. Significant new evidence that was not reasonably available to the original panel;
4. Inconsistency between decisions of the Tribunal that are indistinguishable on the critical facts;
5. Misunderstanding or failure to deal with a serious issue;
6. Clerical error.

The grounds set out in Emcee's letter of March 3, 1999, are as follows:

1. No statutory holiday pay is due because Vickers took a week off in lieu of future statutory holidays, which was an option open to Emcee employees. The applicant cites Section 48 of the *Labour Relations Act*, which should read Section 48 of the *Employment Standards Act* which reads as follows:

- 48 (1) An employer may substitute another day off from a statutory holiday if
- (a) the substitution is agreed to in a collective agreement that binds the employer, or
 - (b) the employer and a majority of the affected employees at a workplace agree to the substitution.
- (2) Any employees affected by the substitution of another day for a statutory holiday have the same rights under this Act and their employer has the same duties under this Act as if the other day were a statutory holiday.
- (3) An employer must retain for 7 years records of agreements made under subsection (1)(b).

This argument was before the adjudicator, weighed and determined by her in the February Tribunal decision.

2. That Vickers' regular weekly hours were 41.25 for which he was remunerated by the \$1,500.00 per month salary paid to him.

Again, this was an argument that was put before the adjudicator in the February Tribunal decision and determined.

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3. Section 46 of the *Act* states that “if an employee is required to work on a statutory holiday” with the key word being “required”. Emcee says that because of the nature of his business, an employee is never required to work on a statutory holiday.

First the word “required” appears in the heading under the *Act*. Secondly, Section 46 (1) itself simply states “an employee who works on a statutory holiday must be paid for that day:

- (1) (a) 1 and ½ times the employee’s regular wage for the time worked up to eleven hours and

The only simple requirement for payment of overtime by virtue of this section is that the employee worked on a statutory holiday.

SUMMARY

The evidence before me does not support a finding that Emcee has met the threshold test. Therefore the application for a reconsideration is dismissed.

Cindy J. Lombard
Adjudicator
Employment Standards Tribunal