

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 -

KCT Construction Ltd.
("KCT")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: C. L. Roberts

FILE NO.: 99/440

DATE OF DECISION: October 14, 1999

BC EST #D448/99
Reconsideration of BC EST #D322/99
DECISION

This is a decision based on written submissions by Ricardo Kazemi on behalf of KCT Construction Ltd., Jeff Roger, Vice President of the Carpenters Local 1995, United Brotherhood of Carpenters & Joiners of America, on behalf of Ron Blanchette, and Connie Jansen on behalf of the Director of Employment Standards.

OVERVIEW

This is an application by KCT Construction Ltd. ("KCT"), under Section 116(2) of the *Employment Standards Act* (the "Act"), for a reconsideration of BC EST #D322/99 (the "Original Decision") which was issued by the Tribunal on July 28, 1999.

The Original Decision varied a Determination made by a delegate of the Director of Employment Standards on April 12, 1999. The Director's delegate found that KCT has failed to pay Ron Blanchette ("Blanchette") in accordance with the *Skills Development and Fair Wage* ("SDWFA")

ISSUE TO BE DECIDED

Whether the Tribunal failed to comply with the principles of natural justice.

FACTS

The hearing of the appeal of the Director's determination was set for July 7, 1999. On that day, Richard Kazemi ("Kazemi") informed the adjudicator that he had intended to call a number of witnesses, none of whom were present at the hearing. In addition Kazemi advised the adjudicator that a member of his immediate family had passed away the previous day. For both reasons, Kazemi requested an adjournment. The adjudicator allowed the adjournment request, on the condition that, prior to the hearing proceeding on July 13, he was to notify counsel for Blanchette, Jeff Roger ("Roger"), of the names of the witnesses he intended to call by noon July 12.

On July 13, the hearing continued, and Roger advised the adjudicator that he had not been advised of the names of the witnesses as required, by noon July 12. The adjudicator accepted that Kazemi and Roger did have a conversation in the afternoon, but that no communication had been made before noon. Kazemi requested a second adjournment, wanting to call witnesses who were not at the hearing. The adjudicator declined the request. After the commencement of the hearing, Kazemi's brother, Frank Kazemi arrived at the hearing to give evidence. Over Roger's objections, Frank Kazemi was given the opportunity to make arguments.

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The adjudicator found as follows:

KCT had the onus to prove its appeal of the delegate's Determination. This was explained to Kazemi at the outset of the hearing on July 7. He was given the opportunity to call witnesses that worked directly with Blanchette. None of these witnesses was present at the July 13, hearing.

Kazemi and Frank Kazemi raised several allegations. They were not able to establish any of these allegations. Kazemi acknowledged this towards the end of the hearing. Further, Blanchette was able to respond to each of the allegations. I note that the delelgate's findings were supported by other evidence.

Kazemi provided no basis to overturn the delegate's finding that Blanchette worked a 40 hour week throughout his employment with KCT – except for the two days he worked at Steve Kazemi's home. Except for those two days, KCT's appeal is dismissed.

ARGUMENT

KCT seeks a reconsideration of the Decision the grounds that the adjudicator failed to comply with the principles of natural justice. KCT argues that in its appeal document dated May 5, 1999,

KCT clearly outlined various reasons why the delegate's finding does not stand, which includes the lack of evidence, the assumption made and also fragmented information gathered from people who were not aware of the whole situation....The adjudicator didn't seem to have put his judgement on the credibility of the delegate's finding but rather questioned KCT of solid evidence or allegations to defend or overturn something that was primarily based on uncertainty and assumption.

If both the delegate's and KCT's findings or arguments were based on assumptions or could not be proved with solid evidence, then why it's KCT's responsibility to overturn the delegate's finding but not the otherway round. KCT believe that this is a failure to comply with the principles of natural justice and thus request the tribunal to reconsider the decision.(sic)

KCT also outlines a number of reasons why the delegate's findings are questionable. Finally, KCT also raises what it characterizes as ethical or moral aspects of the employment that neither the delegate or the adjudicator investigated or addressed.

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Roger argues that the request for reconsideration be denied, as KCT has had several opportunities to establish the complaint filed by Blanchette was untrue, and has failed to do so.

The Director's delegate also seeks to have the request for reconsideration denied on the grounds that KCT has not provided any arguments in the submission that were not raised at the hearing. She argues that KCT has had several opportunities to present its arguments, and that there has been no denial of natural justice.

ANALYSIS

The Tribunal has established a two stage analysis for an exercise of the reconsideration power (see *Milan Holdings Ltd.* (BC EST #D313//98). At the first stage, the panel decides whether the matters raised in the application in fact warrant reconsideration.

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. (*Milan Holdings Ltd.* page 7)

The Tribunal has held that a reconsideration will only be granted in circumstances demonstrate that there has been a breach of the rules of natural justice, where there is compelling new evidence that was not available at the hearing, or where the adjudicator made a fundamental error of law (*Bicchieri Enterprises Ltd.* BC EST #D335/96).

The scope of review on reconsideration is a narrow one (see *Kiss* BC EST #D122/96): 1. failure by the adjudicator to comply with the principles of natural justice, 2. mistake in stating the facts, 3. failure to be consistent with other decisions which are not distinguishable on the facts, 4. significant and serious new evidence that would have led the adjudicator to a different decision, 5. misunderstanding or a failure to deal with a significant issue in appeal, and 6. a clerical error in the decision.

There is nothing in the record which demonstrates that the adjudicator denied KCT a fair hearing. An adjournment was granted to enable KCT principals to deal with a death in the family and to secure the attendance of witnesses at the hearing. Although the second adjournment request was denied, I find there was no denial of natural justice in doing so. I assume that KCT had agreed to the reconvene date on the understanding that it could secure the attendance of the witnesses by that date. Its failure to do so is not in itself a ground for a further adjournment, and it does not appear from the record that any extenuating circumstances were advanced by KCT to support a further delay in the hearing.

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The adjudicator reviewed the evidence available, and assessed the credibility of the witnesses . He found that KCT was not able to establish any of the allegations made, a fact that Kazemi acknowledged. The adjudicator further noted that Blanchette was able to respond to each of the allegations. The adjudicator also noted that the delegate's findings were supported by other evidence.

I find nothing which supports KCT's argument that there was a denial of natural justice.

The reasons put forth by KCT in support of their argument are, in essence, an attempt to have the Tribunal "re-weigh" the evidence. That is not a basis upon which the reconsideration power will be exercised.

The burden of demonstrating why the Delegate's determination is incorrect rests with KCT, as stated by the adjudicator. The issue of which party bears the onus of proof is not a matter for reconsideration.

KCT also advances moral and ethical positions. A reconsideration application is not the forum for advancing these arguments for the first time, and are not grounds for an appeal in any event.

ORDER

I Order, under Section 116(1) of the *Act*, that the application for reconsideration is dismissed.

Carol Roberts
Adjudicator
Employment Standards Tribunal