

An Application for Reconsideration

- by -

Lutz Consulting & Contracting Ltd.
("LCCL")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

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

ADJUDICATOR: Carol L. Roberts

FILE No.: 2002/501

DATE OF DECISION: December 2, 2002

DECISION

OVERVIEW

This is an application by Lutz Consulting & Contracting Ltd. (“LCCL”) under Section 116 (2) of the *Employment Standards Act* (the “Act”) for a reconsideration of Decision #D410/02 (the “Original Decision”), issued by the Tribunal on September 9, 2002.

Section 116 of the *Act* provides:

- (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.

A delegate of the Director of Employment Standards issued a Determination on December 11, 2001 concluding that LCCL had contravened the *Act* and ordered LCCL to pay certain wages to Kurt Giddings. LCCL appealed the Determination to the Tribunal alleging that the Director’s delegate erred in concluding that Mr. Giddings was an employee, rather than a self-employed contractor.

The adjudicator in the original decision concluded that the delegate had not erred, and upheld the Determination.

LCCL now contends that there is an arithmetical error in the wage calculation as originally decided by the delegate. This “arithmetical error” relates to a deduction LCCL made from Mr. Giddings’ wages for room and board.

ISSUE

There are two issues on reconsideration: Does this request meet the threshold established by the Tribunal for reconsidering a decision. If so, should the decision be cancelled or varied or sent back to the Adjudicator?

ANALYSIS

1. The Threshold Test

The Tribunal reconsiders a Decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *Act* detailed in Section 2 “to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act.”

In *Milan Holdings (BCEST # D313/98)* the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration 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.

The Tribunal may agree to reconsider a Decision for a number of reasons, including:

- The adjudicator fails to comply with the principles of natural justice;
- There is some mistake in stating the facts;
- The Decision is not consistent with other Decisions based on similar facts;
- Some significant and serious new evidence has become available that would have led the Adjudicator to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The Decision contains a serious clerical error.

(Zoltan Kiss BC EST#D122/96)

While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.

Having considered LLCL's submissions, I am not satisfied that they satisfy the first stage for the exercise of the reconsideration power.

The issues before the delegate were whether Mr. Giddings was an employee, and if so, whether he was owed wages as claimed. The delegate concluded that Mr. Giddings was an employee, and entitled to wages in excess of \$3000. It does not appear that LCCL raised the issue of deductions for room and board before the delegate, although Mr. Lutz did allege that Mr. Giddings lived at his house without charge for rent or groceries.

On appeal to the Tribunal, LCCL raises the issue of a deduction from wages in the amount of \$800 for the first time, suggesting, in a written submission, that Mr. Giddings agreed to a \$600 month "room and board" deduction. This was presumably not advanced in the appeal hearing, since it is not addressed by the Tribunal in the decision. On September 23, LCCL sought reconsideration of the decision on the grounds that an \$800 advance had been deducted from amounts owed to Mr. Giddings, contending that the deduction was for room and board for the months of July and August.

I am not persuaded that this is an arithmetical error that gives rise to the exercise of the reconsideration power.

I find no merit in LCCL's submissions. LCCL's initial documents identify an \$800 deduction from wages as an "advance", without any reference to room and board. Subsequently, LCCL claimed that there was an agreement between the parties whereby Mr. Giddings agreed pay LCCL \$600 per month for room and board. LCCL provides no explanation as to why the deduction was \$800, rather than \$1200, as it should have been if it was for a two month period. Finally, LCCL submitted an invoice with the reconsideration application that was altered from the one submitted to the delegate, as support for its contention that there

had been an agreement in respect of the room and board deduction. The original invoice showed a deduction for an “advance”, the words “room and board” had been added to the invoice submitted on reconsideration. An employer is not entitled to make deductions from an employee’s wages, or withhold wages, without the written agreement of an employee. This altered invoice does not support LCCL’s submission that Mr. Giddings agreed to any deductions, or that there was an arithmetical error in the Tribunal’s decision.

ORDER

Pursuant to Section 116 of the Act I deny the application for reconsideration.

Carol L. Roberts
Adjudicator
Employment Standards Tribunal