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 -

Collectrite Services Kelowna Ltd
Re: Carey Meir

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: John M. Orr

FILE No: 2000/192

DATE OF DECISION: June 15, 2000

DECISION

OVERVIEW

This is an application by Collectrite Services Kelowna Ltd.("Collectrite") under Section 116 (2) of the *Employment Standards Act* (the "Act") for a reconsideration of a Decision #D067/00 (the "Original Decision") which was issued by the Tribunal on February 24, 2000.

The Director of Employment Standards ("the Director") issued two determinations on August 13, 1999 one of which found that Carey Meir ("Meir") was dismissed from employment with Collectrite without cause, notice or compensation and that she was owed wages for minimum pay, overtime and statutory holidays. The second determination was a $500.00 penalty against Collectrite for contravention of the *Act.*

Collectrite appealed both Determinations and the appeals were heard on November 19, 1999. However, the decision was not written until February 18, 2000, three months after the hearing.

The original decision confirmed both determinations although a Corrigendum was issued by the adjudicator on February 24, 2000 correcting the amount owing to Meir.

Collectrite now requests that the Tribunal reconsider the original decision for three reasons:

1. (The Adjudicator) was not adequately prepared for the hearing because she was not given all of the evidence provided by both parties to the Employment Standards Office in Kelowna;

2. The Director of Employment Standards refused to allow presentation of key evidence because they prevented or refused to allow a key witness from attending the Tribunal hearing;

3. (The Adjudicator) failed to apply the rules of evidence by letting one party listen to all witnesses; question witnesses and discuss evidence but refused to fairly apply this same grace to all parties even though requested to do so. There is an appearance that (the Adjudicator) did not adequately or correctly apply the rules of evidence.

In a subsequent submission on the request for reconsideration Collectrite makes other allegations against both the Director's delegate and the Adjudicator. The delegate is accused of lying in the determination and the Adjudicator is criticized for being unprepared, disorganized, and for taking three months to write the decision.

ANALYSIS

The current suggested approach to the exercise of the reconsideration discretion under section 116 of the *Act* was set out by the Tribunal in *Milan Holdings Ltd.*, BC EST #D313/98 (applied in decisions BC EST #D497/98, #D498/98, et al). In *Milan* the Tribunal sets 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. In deciding this question the Tribunal should consider and weigh a number of factors such as whether the application is timely, whether it is an interlocutory matter, and whether its primary focus is to have the reconsideration panel effectively "re-weigh" evidence tendered before the adjudicator.

The Tribunal in *Milan* went on to state that the primary factor weighing in favour of reconsideration is whether the applicant has raised significant questions of law, fact, principle or procedure of sufficient merit to warrant the reconsideration. The decision states that "at this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general". Although most decisions would be seen as serious to the parties this latter consideration will not be used to allow for a "re-weighing" of evidence or the seeking of a "second opinion" when a party simply does not agree with the original decision.

It is one of the defined purposes of the *Act* to provide a fair and efficient procedure for resolving disputes and it is consistent with such purposes that Tribunal's decisions should not be open to reconsideration unless there are compelling reasons: *Khalsa Diwan Society*, BC EST #D199/96.

The circumstances in which an application for reconsideration will be successful will be limited. In a Reconsideration decision dated October 23, 1998, *The Director of Employment Standards*, BC EST #D475/98, the Adjudicator sets out those limits as follows:

> Those circumstances have been identified in several decisions of the Tribunal, commencing with Zoltan Kiss, BC EST #D122/96, and include:
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> * failure to comply with the principles of natural justice;
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> * mistake of law or fact;
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> * significant new evidence that was not reasonably available to the original panel;
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> * inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
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> * misunderstanding or failure to deal with a serious issue; and
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> * clerical error

In my opinion this is a case which does warrant the exercise of the reconsideration discretion because the allegations, if established, appear to go to the essence of the fairness of the hearing.

1. (The Adjudicator) was not adequately prepared for the hearing because she was not given all of the evidence provided by both parties to the Employment Standards Office in Kelowna:

Collectrite submits that the Adjudicator had not received all of the file material from the *Employments Standards Branch* ("*the Branch"*) that may have been submitted to the Director's

delegate during the course of the investigation of Ms Meir's complaint. However, Collectrite is not specific about what "evidence" was not available. The submission simply says that she was not in receipt of the evidence and states: "To date I am not sure if all our written materials were ever provided to (the Adjudicator) before or after this Hearing."

Collectrite was the appellant in the hearing that led to the original decision and as such bore the burden of ensuring that all documents or evidence which they wanted to be considered was presented to the Adjudicator. While it is true that in many cases the Director will provide much of the material that has been previously investigated, the ultimate burden of ensuring that all relevant material is presented to the Tribunal rests with the appellant. If the appellant has difficulty in acquiring materials from the Director or other party an application may be made to the Tribunal, pursuant to Section 109(1)(b), for an order for production of any relevant documents.

I am not satisfied that Collectrite has established, on this application, that the lack of documents had any significant effect on the fairness of the hearing or on the outcome of the decision. Therefore, on this ground there is no basis upon which I would vary, cancel or refer this matter back to the original panel.

2. The Director of Employment Standards refused to allow presentation of key evidence because they prevented or refused to allow a key witness from attending the Tribunal hearing:

Collectrite alleges that they had dealt with two different officers of the *Branch* and that the hearing was unfair because neither of the officers appeared at the hearing. Collectrite submits that they would have questioned one of the officers about advice received from the *Branch* and the other officer about "falsehoods" in the determination.

Again, while it is not unusual for a delegate of the Director to appear at a Tribunal hearing, there is no initial "requirement" for them to do so. However a party may apply to the Tribunal for a summons for any witness that they wish called and the Tribunal has the power, pursuant to Section 108 of the *Act* and Section 15 of the *Inquiry Act*, to require their attendance with all relevant documents.

Even if the allegations are true that the Director ordered the officers not to attend, the problem could have been rectified by application to the Tribunal for a summons. There is no indication that Collectrite made any effort to ensure attendance of either officer by way of application to the Tribunal.

While it is almost always helpful when the investigating officer attends the hearing, I can not conclude that the failure of the officers to appear rendered the hearing unfair.

3. (The Adjudicator) failed to apply the rules of evidence by letting one party listen to all witnesses; question witnesses and discuss evidence but refused to fairly apply this same grace to all parties even though requested to do so. There is an appearance that (the Adjudicator) did not adequately or correctly apply the rules of evidence:

This issue arises in relation to the evidence of a witness called on behalf of Collectrite. The reconsideration submission says that the witness, Darryl Sherman ("Sherman"), was the manager of the company at the time Ms Meir's employment ended. Collectrite submits that Sherman was a key witness and the person with the most information about Ms Meir's employment from the employer's point of view.

The original hearing was in Kelowna and apparently Sherman had moved to Vancouver. Collectrite decided that it would be unfair to bring Sherman from Vancouver to Kelowna for the hearing. It was arranged that Sherman could give his evidence by telephone. While Collectrite alleges there were some technical difficulties it appears from the submissions that Sherman did give his evidence in this manner.

Although this ground for reconsideration refers to "the rules of evidence", the essence of the complaint is that Sherman was not permitted to remain on the speakerphone throughout the whole hearing. Collectrite submits that:

> *If Mr Sherwood had been able to personally attend at the Tribunal Hearing he would have listened to all the evidence given by all parties and been able to question or direct me to question any evidence to bring forward all the facts in this matter.*

While Collectrite's submission is probably correct, there appears to be a misunderstanding of the role of a witness at a hearing. It is important to distinguish between witnesses and parties. The parties, including the principal of a corporate party, of course are entitled as of right to be present (except in some exceptional circumstances) throughout the hearing. However the situation is different for a witness who is not one of the parties. It is not the function of a witness to question other witnesses or other parties giving evidence. In fact it is common practice for witnesses to be excluded from the hearing except when giving their evidence. As noted by John Sopinka (now Justice Sopinka of the Supreme Court of Canada) in his leading text on civil evidence:

> The purpose of excluding witnesses is to preserve a witness' testimony in its original state. A witness listening to the evidence given by another may be influenced by the latter's testimony, and accordingly change his evidence to conform with it. Also, by being present in the courtroom and listening to testimony prior to giving his evidence, he may be able to anticipate, and thereby reduce the effectiveness of the cross-examination that he will ultimately face. (Sopinka and Lederman, *The Law of Evidence in Civil Cases;* Butterworths, Toronto)

The decision whether or not to exclude witnesses is a matter of discretion for the adjudicator and there may be occasions where an adjudicator will grant permission for a particular witness to remain in the hearing. It is often the case that the principal of a corporate party may have little knowledge of the matter before the Tribunal and it may be appropriate that a CEO or Manager be allowed to attend to advise and consult with the principal even though he is also going to be a witness during the hearing.

There can be no hard and fast rules as to when it would be appropriate to exclude witnesses or allow a witness to remain to consult and advise a primary party. The adjudicator will need to turn her, or his, mind to the issues as recognised by Sopinka (above) but also to the fundamental fairness of the hearing and to the purposes of the legislation as set out in Section 2 of the *Act*.

Those purposes include the need to promote the fair treatment of employees and employers and to provide a fair and efficient procedure to resolve the dispute. I also note that Section 107 provides that the Tribunal may conduct an appeal in the manner it considers necessary and is not required to hold an oral hearing. Nevertheless, when an oral hearing is conducted, it is essential that it be conducted in a manner that is fair to both parties and in accordance with rules of fairness associated with administrative tribunals.

In this case, it appears from Collectrite's submission that the adjudicator did exercise her discretion in allowing one witness (the wife of the principal) to remain throughout the hearing and decided not to allow Sherman to remain after he had given his evidence. The employee was alone throughout the hearing.

The question arises about the presence of a witness ***after*** that witness has given his evidence. The factors that give rise to exclusion of witnesses no longer apply as the witness' evidentiary role has been concluded. Of course if the witness were later re-called any subsequent evidence may have little weight if it is in response to evidence given in his presence.

As much as it is common practice for witnesses to be excluded prior to testifying, likewise it is quite normal for witnesses to be able to remain in a courtroom, or hearing, once their evidence has been concluded. If Sherman had attended in person it would have been quite appropriate for him to remain in the hearing once his evidence was concluded. There would be nothing inappropriate in Sherman then consulting with and advising the corporate principal, provided that such consultation and advice given was done in a manner that was discrete and not disruptive of the hearing.

The problem in this case was that Sherman was not present and he would have had to do such consultation and advising over a speakerphone in the hearing room and during the course of evidence or submissions by other parties. It is, perhaps, unfortunate that the adjudicator did not set-out in the original decision her reasons for not allowing Sherman to remain on the telephone during the balance of the hearing but I can only conclude that the adjudicator felt that this procedure was not appropriate and would be disruptive of the hearing.

Although I do not have any record of the adjudicator's reasons for her decision not to allow Sherman to remain on the phone, there is no basis upon which I could find that the adjudicator exercised her discretion unfairly in this case.

The decision not to have Sherman present was made by Collectrite. In their submission they note the inconvenience and cost of Sherman attending from Vancouver. However, that was a decision made by Collectrite. The Tribunal accommodated Collectrite's decision by allowing Sherman's evidence by telephone. If Collectrite needed Sherman in an advisory role then the onus would be upon Collectrite to ensure his attendance for that purpose.

Upon reviewing the original decision and the submissions made by Collectrite I am not persuaded that the adjudicator misdirected herself in exercising her discretion to exclude Sherman from the balance of the hearing. While I may have exercised my discretion differently it is not appropriate for me to substitute my discretion for hers unless I am satisfied that she had not properly considered the matter or had misapplied the law or fundamental principals of fairness.

In conclusion I am not satisfied that the failure to allow the witness to remain on the telephone after his evidence concluded and for the balance of the hearing rendered the hearing unfair or that the adjudicator misdirected herself on this issue.

4. Other Issues:

There are a number of procedural complaints made in Collectrite's submission that were not listed as grounds for the request for reconsideration. These include that the adjudicator was late for the hearing and was not prepared, that she allowed questioning back and forth amongst the parties and a witness, that she did not adequately control the hearing, that she took inadequate notes and that she did not write the decision until three months after the hearing. It is also noted that there was a considerable financial error in the original adjudication which had to be later corrected by way of corrigendum.

I have no response on these issues from the Director or Ms Meir except that Ms Meir states that the disruption in the hearing was caused by the principal for Collectrite.

While the issues raised by Collectrite give rise to some concern about the conduct of this hearing and the delay over the issuing of the adjudication is unusual, there is no substantial reason to conclude that the substance of the decision was affected by these matters.

The application for reconsideration does not address how the merits of the issues would have been decided any differently if the hearing was conducted in any different fashion or if the decision had been rendered more promptly.

Section 116 empowers the Tribunal on reconsideration to cancel or vary the original decision or refer the matter back to the original panel. There is no submission to me on this application which would give me a basis to vary or cancel the decision on its merits or to suggest that, if the matter was referred back to the original panel, that the substance of the decision would be any different.

I conclude that these matters on their own are insufficient to warrant a cancellation, variation, or a referral back to the original panel.

In considering the enumerated grounds for reconsideration and the allegations made in the submissions I am not satisfied that Collectrite has established sufficient grounds to warrant any interference with the original decision.

ORDER

This Tribunal orders that the original decision is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal