BC EST #D240/96
(Reconsideration of BC EST # 163/96)

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the

Employment Standards Act, S.B.C. 1995, c. 38

- by -

Linda Lee
("Lee")

- of a Decision issued by -

The Employment Standards Tribunal

(the "Tribunal")

ADJUDICATOR:	John McConchie
FILE NO.:	96/350
DATE OF DECISION:	September 3, 1996

DECISION

OVERVIEW

This is an application by Linda Lee under Section 116 of the *Employment Standards Act* (the "*Act*") for a reconsideration of Decision #D163/96 (the "Decision") which was issued by the Tribunal on July 3, 1996.

The Decision addressed an appeal by Lee of a Determination letter issued by a delegate of the Director of Employment Standards (the "Director") on May 21, 1996. Lee had applied on behalf of a the staff and management of the Protection Department at Northwood Pulp and Timber Ltd. for a variance of the requirement under Section 42 (4) of the *Act* that overtime be paid out or taken within 6 months after the overtime wages were earned. Lee and her group wished to be able to bank overtime for a period of 12 months. The Director's delegate determined that the request was not covered by the *Act* and that the Branch could not accede to Lee's request.

Lee appealed this decision under Section 112 of the *Act*. The Decision dismissed the appeal and ordered that the Determination letter be confirmed. The Adjudicator found that there was no provision under the *Act* which would allow for an extension of the 6 month requirement in Section 42. The Decision observed that Section 73 of the *Act* provides the Director of Employment Standards with the power to grant variances under Section 72 of the *Act*, but that Section 72 did not allow for a variance of Section 42. Regardless of the merits of the application, there was simply no provision under the *Act* which would allow for such a variance. As such, any agreement to bank overtime beyond 6 months would be a violation of the *Act* by virtue of Section 4 of the *Act.*

Lee has applied for reconsideration of the Decision. In her application, she seeks to have the Employment Standards Tribunal:

(1) amend Section 72 to permit the possibility of a variance to Section 42 (banking of overtime); or, in the alternative,

(2) make a recommendation to the Lieutenant Governor in Council under s. 109 to exclude the employees in the Protection Department from Section 42 (4) of the *Act.*

RECONSIDERATION OF ORDERS AND DECISIONS

The grounds on which the Tribunal will reconsider its decisions were set out in **Zoltan T. Kiss**, Decision No. #D122/96. There, the Tribunal described the reconsideration issue in the following terms:

> Some of the more usual or typical grounds why the Tribunal ought to reconsider an order or a decision are:
>
> - a failure by the Adjudicator to comply with the principles of natural justice;
> - there is some mistake in stating the facts;
> - a failure to be consistent with other decisions which are not distinguishable on the facts;
> - some significant and serious new evidence has become available that would have led to the Adjudicator to a different decision;
> - some serious mistake in applying the law;
> - some misunderstandings of or a failure to deal with a significant issue in the appeal; and
> - some clerical error exists in the decision.
>
> This, of course, is not an exhaustive list of the possible grounds for reconsidering a decision or order.
>
> There are also some important reasons why the Tribunal's statutory power to reconsider orders and decisions should be exercised with great caution, such as:
>
> - Section 2(d) of the *Act* establishes one of the purposes of the *Act* as providing fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. Employers and employees should expect that, under normal circumstances, one hearing by the Tribunal will resolve their dispute finally and conclusive. If it were otherwise it would be neither fair nor efficient.

- Section 115 of the *Act* establishes the Tribunal's authority to consider an appeal and limits the Tribunal to confirming, varying or canceling the determination under appeal or referring the matter back to the Director of Employment Standards (presumably, for further investigation or other action). These limited options (confirm vary or cancel a Determination) imply a degree of finality to Tribunal decisions or orders which is desirable. The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reason.

- It would be both unfair and inefficient if the Tribunal were to allow, in effect, two hearings of each appeal where the appeal hearing becomes nothing more than a discovery process for a reconsideration application.

In his report, *Rights & Responsibilities in a Changing Workplace*, Professor Mark Thompson offers the following observation at page 134 as one reason for recommending the establishment of Tribunal:

> *The advice the Commission received from members of the community familiar with appeals system, the staff of the Minister and the Attorney General was almost unanimous. An appeals system should be relatively informal with the minimum possible reliance on lawyers. Cases should be decided quickly at the lowest possible cost to the parties and the Ministry. The process should not only be consistent with principles of natural justice, but be seen to meet those standards.*

Professor Thompson also noted that the appeal process should not be protracted because many claimants (employees) "...need the monies in dispute quickly to meet their basic needs." (at pages 3-4)

ANALYSIS

It is my decision that this application must fail as the appellant has not advanced reasons for reconsideration within any of the grounds on which the Tribunal will reconsider a decision. This is not a comment on the authenticity of or the motivation behind the application. It is clear from the materials that the appellant and her group are well-motivated and believe that they have compelling reasons for seeking relief. However, it is not within the Tribunal's authority in this application to accept their request

With respect to the first ground of the application, the Tribunal cannot amend the *Employment Standards Act*. Only the Legislature of British Columbia can do so. This cannot provide a basis for reconsidering the Decision.

With respect to the second ground of the application, this is a new matter which was not addressed in the Determination or the Decision. In the interests of finality, however, I will address the matter. In **ARC Programs Ltd.**, BCEST #D030/96, the Employment Standards Tribunal had the opportunity to consider the language of Section. 109 and its application.
The Tribunal said:

> *Finally, the Tribunal has the authority under Section 109(1)to make recommendations to the Lieutenant Governor in Council about the exclusion of "classes of persons" from all or part of the Act and regulations. In view of this language, I do not expect that individual employers will normally apply for an exclusion recommendation under Section109. Instead, I expect that groups of employers which employ persons in the "class" for which an exclusion is sought will apply.*

Section 109 contemplates that the Tribunal will only consider making a recommendation to the Lieutenant-Governor where it is is requested to do so in respect of an identifiable *class of persons.* Ms. Lee's application is made with respect to a distinct group of employees within an individual employer. It therefore does not fall within the purview of Section 109 of the *Act.*
The application must be dismissed.

ORDER

Pursuant to Section 116, I decline to vary or cancel the Tribunal Decision BC EST #D163/96.

John McConchie
Adjudicator
Employment Standards Tribunal

JLM:jel