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 -

Restauronics Services Ltd.
("Restauronics")

- of a Decision issued by -

The Employment Standards Tribunal

(the "Tribunal")

ADJUDICATOR:	John McConchie
FILE NO.:	96/159
DATE OF DECISION:	September 27, 1996

DECISION

OVERVIEW

This is an application by Restauronics Services Ltd. under Section 116 of the *Employment Standards Act* (the "*Act*") for a reconsideration of Decision #D131/96 (the "Decision") which was issued by the Tribunal on June 20, 1996.

The Decision addressed an appeal by Restauronics of Determination No. CDET 001342 issued by a delegate of the Director of Employment Standards (the "Director") on February 28, 1996. The Director determined that Restauronics owed the complainant Susan Hjerpe the sum of $2,632.20 for unpaid overtime and vacation pay. The Decision ordered that the determination be confirmed and that Restauronics pay Hjerpe overtime wages in the said amount.

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

In an application for reconsideration dated July 22, 1996, Restauronics provides three bases for seeking to overturn the Decision:

1. The adjudicator did not permit Restauronics to call certain witnesses;

2. The adjudicator was unwilling to reschedule the second day of the hearing to accommodate Restauronics when he had already done so to accommodate himself and the complainant; and

3. The adjudicator did not issue the decision until well past the deadline of 10 working days from date of hearing.

In his decision, the adjudicator noted the following:

> *"Restauronics asked to reschedule the second day of this hearing because one of their witnesses was unavailable. I ruled that we would continue as the witness could have appeared at the first day of hearings but failed to do so and that the witness would, according to Restauronics, give substantially the same evidence as one of their earlier witnesses."* (p. 1)

There were no other observations in the Decision which shed light on Restauronics' allegations that the adjudicator refused to permit witnesses to testify.

In response to the application for reconsideration, the Registrar wrote to Restauronics on August 7, 1996 to secure further information necessary to the processing of the application. The Registrar asked Restauronics to provide the following information which would assist the Tribunal in determining the merits of the application:

1. What are the names of the witnesses?

2. Why were the witnesses unavailable to attend the hearing?

3. What is the precise evidence that they would have provided at the hearing? Is this evidence different from the evidence that was provided to the Adjudicator at the hearing? What difference would this evidence make to the outcome of the decision.

Restauronics did not reply to this request for information.

On its face, the Decision does not disclose a breach of natural justice. Therefore the information sought by the Tribunal in its letter to Restauronics was important to the Tribunal's understanding of its case. As I have said, Restauronics did not respond to the letter. I must therefore proceed on the basis of the information which is available to me. On that information, there is no basis to disturb the Decision.

Restauronics raised the issue of timeliness. It is apparent on the face of the Decision that it was issued more than 10 days from the conclusion of the hearing. The Tribunal seeks to issue its decisions within 15 days (not 10) of the hearing. This is a guide and not a regulation. It is a goal which cannot always be accomplished, but it is always a proper and worthy goal. The failure to issue a decision within 15 days does not provide a basis for reconsideration.

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.

ORDER

Pursuant to Section 116, I decline to vary or cancel the Tribunal Decision BC EST #D131/96.

John McConchie
Adjudicator
Employment Standards Tribunal

JLM:jel