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 -

The Director of Employment Standards
(the " Director ")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Ib S. Petersen
Fern Jeffries
David B. Stevenson

FILE No: 2000/268

DATE OF DECISION: July 17, 2000

DECISION

COUNSEL

Ms. Shirley Kay	on behalf of the Director
Ms. Adele Burchart	on behalf of MacMillan Bloedel Limited ("MacMillan Bloedel"or the "Employer"
Mr. Eamonn Carter	on behalf of himself

OVERVIEW

This is an application by the Director pursuant to Section 116 of the *Employment Standards Act* (the "*Act*"), against a Decision of the Employment Standards Tribunal (the "Tribunal") issued on June 14, 1999 (#D214/99) (the "Decision"). In the Decision, following a hearing on April 26, 1999, the Adjudicator found that MacMillan Bloedel Limited ("MacMillan Bloedel" or the "Employer") had just cause for terminating the employment of Eamonn Carter ("Carter" or the "Complainant"). This finding was based on his view that a conflict of interest existed based on Carter obtaining employment with a competitor of the Employer. The Decision cancelled a Determination dated January 18, 1999 which had held that the Employer did not have just cause for the termination of Carter and that, in the result, he was entitled to compensation for length of service, for a total of $4,352.07. These funds have been held in trust.

In this application for reconsideration, which was filed on April 11, 2000, some nine months after the date of the Decision, the Director argues that the Adjudicator made errors of law and fact and that the Decision must be reconsidered. MacMillan Bloedel argues that the application is not timely.

ISSUES TO BE DECIDED

The first—and in the circumstances, only—issue to be decided in this Reconsideration application is whether the application for reconsideration is timely. In other words, while the statute does not contain a specific time limit, should the Tribunal accept an application filed nine months after the Decision which is sought to be reconsidered? The substantive issues raised in the Director's reconsideration application concerns Carter's fiduciary duties to his Employer; whether or not the Adjudicator erred in law or fact with respect to a distinction between confidential information and proprietary information, Carter's access to such information, and whether such access would provide just cause for termination; and, finally, whether Carter placed himself in a conflict of interest when he accepted the position with MacMillan Bloedel's competitor. We are of the view that we do not need to deal with these substantive issues.

FACTS

For the present purposes the following salient facts provide sufficient background for the application. Carter was an outside sales representative for the Employer. His sales territory included the Greater Vancouver/Lower Mainland region of the province. In that capacity, he had authority to make pricing decisions and had access to proprietary and confidential marketing information. On March 15th, 1998, he resigned, giving one month's notice, to take up a position with a competitor of the Employer. The Employer took the position that Carter's employment would end on the day of his resignation, March 15th, 1998, based on the fact that he would be working for its competitor.

Carter filed a complaint with the Employment Standards Branch. In January 1999, the delegate rendered a Determination concluding that the Employer did not have just cause for termination and that Carter was entitled to four weeks' severance. The Employer appealed that Determination. The issue before the Adjudicator was whether the employer had just cause to terminate Carter's employment. He found that the employer had just cause. The rationale for his Decision is set out as follows, at page 6 of his Decision:

"The fact that Carter had, at the point when he tendered his resignation, already entered into an employment relationship with a MacMillan Bloedel competitor does not, in it self create a conflict of interest. However, given that Carter was taking up employment in a position that was very similar to that which he held with MacMillan Bloedel, a position where he would be selling similar products to the same customer base, I must conclude that if Carter had continued his employment with MacMillan Bloedel throughout the notice period he would have been in the untenable position of having to serve two competing masters both of whom were entitled to demand his undivided loyalty. The fact that Carter disclosed his conflict to MacMillan Bloedel does not make it any less real. Simply put, in the circumstances, MacMillan Bloedel would reasonably have had concerns about Carter's loyalty and faithfulness had he continued to work throughout the proposed 4-week notice period. While Carter did not have any intent to injure MacMillan Bloedel when he accepted a new position with Weyerhauser, the question of intent to injure is not relevant to whether or not there was a conflict of interest ..."

The Adjudicator cancelled the Determination.

ARGUMENTS

The Director notes that Section 116 of the *Act* does not contain a time limit and argues that the Tribunal should adopt an approach similar to that of the courts on judicial review where, under the *Judicial Review Procedure Act*, the courts retain jurisdiction to review a decision regardless of statutory time limits. Timeliness may only bar a review in very limited and specific circumstances. The Director points specifically to Section 11 of that *Act*:

> *11. An application for judicial review is not barred by the passage of time unless*
>
> *(a) an enactment otherwise provides and*
>
> *(b) the court considers that substantial prejudice or hardship will result to any other person affected by reason of delay.*

It is not in dispute that some nine months has passed since the Decision. However, the Director argues that the Tribunal should exercise its discretion to deal with the application unless there is "substantial prejudice" to the respondent. In this case, says the Director, there is no substantial prejudice to the Employer: a successful reconsideration would simply cause the Employer to be liable for a payment of less than $5,000, an amount which the Director describes as "a mere 'pittance' given the substantial size of the Employer". However, "failure to deal with the substantive issues raised on this application ... will have far reaching consequences to many employers and employees."

In response, counsel for the Employer notes that in the circumstances—the hearing was held on April 26, 1999, the Decision was rendered on June 14, 1999, and the application for reconsideration was filed on April 11, 2000--and submits that the delay is unreasonable. Counsel notes that there is no explanation for the delay. Counsel also notes:

> "... I understood from Sharon Cott, the Director's delegate who issued the Determination in this matter that the Director, as well as the Director's legal counsel, was aware of the issues and the significance of a decision cancelling the Determination prior to the issuance of the Determination on January 18, 1999. Notwithstanding this, no submissions were made on behalf of the Director at the hearing on April 26, 1999, and there is no explanation for that decision either."

Counsel for the Employer says that the substantive issues raised in the application were addressed at the hearing. She argues that it would be unfair to allow the Director to fail to participate in the hearing and then "re-argue" the merits on reconsideration. The Employer has suffered substantial prejudice because the Director has held the funds for one year. A party who is denied the right to enjoy its property has been prejudiced. Moreover, the application relies on the "facts" set out in the Determination and that not all of those "facts" were in evidence at the hearing. The Employer says that the Adjudicator's Decision was based on *viva voce* evidence presented at the hearing and that those "facts" should be preferred over those set out in the Determination. Though not stated expressly, it follows from the Employer's submission that an application for reconsideration should be filed within a reasonable time.

The Director responds that the Tribunal in previous cases has misinterpreted the primary authority relied upon by the Director, namely *Carpenter v. Vancouver Police Board* (1986), 9 B.C.L.R. (2d) 99 (C.A.). The Director says that substantial prejudice is the threshold issue before the question of "good cause"—or explanation for the delay—is relevant, as part of the inquiry into whether the delay is unreasonable.

Carter agrees with the Director's submissions.

ANALYSIS

The principles applicable to an application for reconsideration are well established (see for example, *Milan Holdings Inc.*, BCEST D#313/98, reconsideration of BCEST #D559/97). An application for reconsideration should succeed only where there has been a demonstrable breach of the principles of natural justice, where there is compelling new evidence not available at the original appeal, or where the adjudicator has made fundamental error of law. In *Zoltan Kiss* (BCEST #D122/96), and other decisions, the Tribunal has emphasized that it will use the power to reconsider with caution in order to ensure finality of the Tribunal's decisions and efficiency and fairness of the system.

Section 116 of the *Act* provides (in part):

> *116. (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.*
>
> *(2) The director or a person named in a decision or order of the tribunal may make an application under this section.*

We do not agree with the submissions made on behalf of the Director. In our view, the panel in *The Director of Employment Standards*, BCEST #D122/98 reconsideration of BCEST #D172/97 (the "*Unisource decision*") correctly stated the law with respect to the timeliness issue and we adopt those principles. In that decision, the Tribunal stated, at pp. 5-7:

> "There is no time limit provided for in the statute with respect to applications for reconsideration. The argument put forward by the Director suggests that the Tribunal may reconsider a decision at any time. As will become evident, we do not agree. While the *Judicial Review Procedure Act* provides that the courts may review decisions of administrative tribunals regardless of time limits under a specific statutory (Section 11, set out above), it does not necessarily follow that there is no such time limit implied in the *Act*. The Legislature cannot, in our view, have intended that decisions of the Tribunal could be reconsidered without regard for timing. Under Section 107 of the Act, the Tribunal "may conduct an appeal or other proceeding in the manner it considers necessary", subject to any rules made under Section 109(1)(c) of the *Act*. In our view, therefore, the Tribunal has the power to determine its own procedure, including the timeliness of applications for reconsideration, subject to the rules of natural justice.

In *Carpenter v. Vancouver Police Board* (1986), 9 B.C.L.R. (2d) 99 (C.A.), referred to by the Director, the court noted that it may exercise its discretion against an applicant where there was an unreasonable delay. What is an unreasonable delay depends on the circumstances of each particular case. Indeed, after an extensive review of the case law, the court noted that the length of the delay is not determinative. However, the court also noted that if "good cause can be shown for a long delay", the court will exercise its discretion to review. Otherwise, an applicant is required to come forward promptly. At page 115, the court noted:

> In summary, the jurisprudence relating to "unreasonable delay causing prejudice" and the court's jurisdiction to grant certiorari indicates that the court will focus primarily on the conduct of the party applying for certiorari. In determining if the delay was unreasonable in the circumstances of the case, the court examines the conduct of the applicant and any explanation given for the delay....It will also be noted that the courts will not exercise their discretion against a party seeking review unless the delay results in substantial prejudice to the respondent. The fact that the party seeking review acted under a mistake of law may also be taken into account.

In *Principles of Administrative Law* (2nd ed., Carswell, 1994, at 6-7), Jones and de Villar note that judicial review is not the same as an appeal. In general, superior courts do not have the right to substitute their appraisal of the merits for any lawful action taken by the administrative tribunal and, in general, are limited to determining whether it acted strictly within the statutory powers delegated to it. In our view, the process provided under Section 116 is in the nature of an appeal. Moreover, it is a more limited appeal than that afforded under Section 115. Therefore, while we may be guided generally by the principles established by the courts for judicial review, those principles are not necessarily applicable to an application for reconsideration. Moreover, as noted above, the Tribunal has the power to regulate its own procedure, subject to the rules of natural justice.

In our view, the scheme contemplated by the *Act* emphasizes expeditious resolution of disputes based on the principles of natural justice. An appeal of a determination must be made within 8 and 15 days, depending on the method of service, and include the reasons for the appeal (see Section 112). The Tribunal may dismiss an appeal without a hearing of any kind if the appeal has not been made in a timely fashion (Section 114(a)). After considering the appeal, the Tribunal may confirm, vary or cancel the determination or refer the matters back to the Director (Section 115). Similarly, under Section 116, the Tribunal has the power to "cancel or vary" the order or decision under appeal. The Tribunal may also refer the matter back to the original adjudicator. In other words, the Tribunal

> has the statutory authority to consider the matters that should have been considered by the original adjudicator.
>
> The purposes of the *Act* which guide our interpretation are set out in Section 2 which provide (in part):
>
> *2. The purposes of this Act are as follows:*
>
> *(a) to promote* fair *treatment of employees and employers;*
>
> *(b) to provide* fair and efficient *procedures for resolving disputes over the application and interpretation of this* Act*; (emphasis added)*
>
> The purposes of the *Act* require that the Tribunal avoid a multiplicity of proceedings and ensure that appeals are dealt with expeditiously, in a practical manner, and with due consideration of the principles of natural justice. In our view, this includes, generally, an expectation that one hearing will finally and conclusively resolve the dispute. Read in conjunction with Section 115, the power to "vary, confirm or cancel" a determination, imply a degree of finality, *i.e.*, a party should not be deprived of the benefit of a decision without a compelling reason. As noted in *Zoltan Kiss*, above, and other cases, an application for reconsideration does not provide an opportunity to re-argue the merits, but provides for an appeal on much narrower grounds."

In substance, the Director's argument is the same in this case as in *Unisource*, *above*. Counsel for the Director says that the Tribunal should apply the principles applied by the courts in judicial review applications. In particular, she says that the threshold issue is whether there is substantial prejudice to the respondent. She argues that *Carpenter*, *above*, stands for the proposition that the respondent must show prejudice before dealing with the issue of "good cause". Even if we accept that the assumption that the principles applied by the courts in judicial review applications are applicable with respect to reconsideration applications, and, as is clear from the above, we do not agree, in our view, the *Carpenter* case does not stand for the proposition suggested by counsel for the Director. First, it is clear from the analysis of the Court of Appeal that the applicant must provide a reasonable explanation for the delay in bringing the matter before the courts. As the court noted, at p. 113:

> "A number of cases suggest that if good cause can be shown for a long delay in applying for certiorari, the court will exercise its discretion to grant certiorari. In *R. v. Holyoke; Ex parte McIntyre* (1913), 42 N.B.R. 135, 21 C.C.C. 422, 13 D.L.R. 225, the New Brunswick Court of Appeal refused to interfere with the discretion of a judge in granting certiorari although two terms had intervened between the date of conviction and the date of certiorari. The court stated at p. 227:

> On numerous occasions the rule has been laid down by this court that the applicant is bound to come promptly, and if he allows a term to collapse, he is too late, unless the delay is satisfactorily accounted for: *Robbins v. Watts*, 11 N.B.R.; *Ex parte Price*, 23 N.B.R. 85.

In *Re Palmer* (1977), 17 N.B.R. (2d) 46 (Q.B.), an applicant applied for an order of certiorari respecting the decision of an adjudicator under the Public Service Labour Act on the applicant's grievance six months after the decision was handed down. The New Brunswick Supreme Court had dismissed the application for certiorari and held that the unexplained delay of six months in bringing the application was unreasonable.

This principle of law is reiterated in a 1975 decision of the Supreme Court of Canada, *P.P.G. Indust. Ltd. v. A.G.Can*. (1975), 65 D.L.R. (3d) 354, 7 N.R. 209. In this case, the Attorney General of Canada applied for certiorari to quash a decision of the Anti-Dumping Tribunal two years after the tribunal made its decision. The Supreme Court stated at p. 362:

> The present case is an eminently proper one for the exercise of discretion to refuse the relief sought by the Attorney General. Foremost among the factors which persuade me to this view is the unexplained two year delay in moving against the Anti-Dumping Tribunal's decision. ...

Second, it is clear from the application of the legal principles to the facts of the *Carpenter* case, that the court considered the conduct of the parties (see the quote from *Carpenter* in *Unisource*, *above*). The conduct explained the delay in bringing the application for judicial review in that case. In short, it is our view, while the court did indeed, as noted by counsel for the Director, state that it will not exercise its "discretion against a party seeking review unless the delay results in substantial prejudice to the respondent" that does not mean that, as suggested by the Director, that prejudice is a threshold issue in the manner suggested.

We reaffirm the principles set out in *Unisource*. In our view, an application for reconsideration under the *Act* must be filed within a reasonable time. What constitutes a "reasonable time" depends on the circumstances of each particular case. While we agree that the Tribunal may be guided by the principles applied by the courts, we do not agree that we must follow the approach developed by the courts in judicial review applications. The *Judicial Review Procedure Act* specifically deals with the issue of timeliness and states that applications are not time-barred unless "substantial prejudice or hardship will result to any other person affected by reason of delay." The jurisprudence sought to be relied upon by counsel for the Director is based on that statutory language. While "substantial prejudice or hardship" is one of the factors considered by the Tribunal, in making its decision with respect to timeliness, we are of the view that a party making an application for reconsideration after a long delay must show "good cause", *i.e.*, a reasonable explanation for the delay. We agree that the length of the delay may not be

determinative. If good cause can be shown for a long delay, the Tribunal may exercise its discretion to reconsider. In our view, it would be contrary to the purposes of the *Act* to permit a person to apply for reconsideration where there is no explanation for the delay and, as noted by counsel for the Employer, in this case there is none. A nine month delay is an unreasonable delay, particularly where the is no explanation for that delay. It is inconsistent with the principles of "fair and efficient procedures" contemplated by the *Act* if a party is allowed to file an application for reconsideration months or years—and that would follow from the Director's argument—after the Tribunal had rendered a decision and then place the onus on the party opposing the application to show prejudice without an explanation of why the party did not file the application promptly. In our view, the application for reconsideration must be dismissed.

We re-iterate that, in our view, an Appellant must first satisfy the Tribunal that there is reasonable explanation for a delay in filing an appeal. In our view, that is a threshold issue. In other words, before the Tribunal will consider other factors, such as prejudice to other parties, it must be satisfied that there is a reasonable explanation. In our opinion the principles set out in Unisource are correct, and in keeping with the approach adopted by the Tribunal on reconsideration applications as expressed in Milan, above, and other cases, we reaffirm those principles.

Moreover, we emphasize that those principles are in keeping with the final and binding nature of the decision of the Tribunal touched upon in *Unisource*:

"The purposes of the *Act* require that the Tribunal avoid a multiplicity of proceedings and ensure that appeals are dealt with expeditiously, in a practical manner, and with due consideration of the principles of natural justice. In our view, this includes, generally, an expectation that one hearing will finally and conclusively resolve the dispute. Read in conjunction with Section 115, the power to "vary, confirm or cancel" a determination, imply a degree of finality, *i.e.*, a party should not be deprived of the benefit of a decision without a compelling reason."

The finality of the Tribunal's decisions is, as well, provided for in the *Act*:

> *110 A decision or order of the tribunal under this Act or the regulations on any matter in which it has jurisdiction is final and conclusive and is not open to question or review in a court on any grounds.*

From the standpoint of the binding nature and finality of the Tribunal's decisions, we are seriously troubled by the fact that the Director did not release the Employer's funds. The Director contends that the amount—around $5,000--is a mere "pittance" given the "substantial size of the Employer". In our view, the size of the Employer is irrelevant. What is important and what concerns us is the fact that the Director held on to the funds after the Tribunal had rendered its decision. The Director, consistent with Section 110, should have returned the money forthwith upon receipt of the original decision. For the Director to continue to hold the Employer's funds following the original decision undermines the role and authority of the Tribunal as the appellate body for determinations of the Director. We order the Director to release the Employer's funds immediately, together with any interest that has accrued under subsection 88(5).

We add that we are also troubled by the Employer's assertion, which is not disputed, that the Director did not make any submissions at the hearing. If, as the Director now says, the issues raised both in the Determination and the Decision were of such fundamental importance and consequence, one would have expected the Director to make that clear at the hearing within the accepted parameters of the Director's participation in hearings before the Tribunal. From the original appeal submissions, and, indeed, the Determination, there was nothing surprising in the factual and legal issues in dispute before the Adjudicator. Moreover, it is troubling that the Director, having failed to make submissions now seeks an opportunity to—in essence—"re-argue" the case on reconsideration. In the circumstances, that is improper. In the instant case, as well, we note that the Director relies on the "facts" as found in the Determination. The Employer argues that not all the "facts" contained in the Determination were in evidence at the hearing and that the *viva voce* evidence tendered at the hearing should be preferred. The Employer takes issue with the Director's submission that there "was no evidence that Carter's employment was other than described in the Position Description". In our view, the Adjudicator rendered a decision well within his jurisdiction and, in the circumstances, we are not prepared to allow the Director the opportunity to re-argue its case.

For all of the foregoing reasons, the application for reconsideration is dismissed.

ORDER

Pursuant to Section 116 of the *Act*, we order that the Decision (#D214/99), dated June 14, 1999 be confirmed and that the funds held in trust be released forthwith to the Employer together with such interest as may have accrued.

Ib S. Petersen, Panel Chair
Adjudicator
Employment Standards Tribunal

Fern Jeffries
Chair
Employment Standards Tribunal

David B. Stevenson
Adjudicator
Employment Standards Tribunal