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 -

Director of Employment Standards
(the " Director ")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

PANEL: David B. Stevenson
Fern Jeffries
Mark Thompson

FILE NO: 2000/331

DATE OF DECISION: September 15, 2000

DECISION

OVERVIEW

The Director of Employment Standards (the "Director") seeks a reconsideration under Section 116 of the *Employment Standards Act* (the "*Act*") of a decision (the "original decision") of an Adjudicator of the Employment Standards Tribunal (the "Tribunal"), BC EST #D271/99, dated July 21, 1999. The original decision varied a Determination dated January 15, 1999, which had concluded that Hewitt Rand Corporation ("Hewitt Rand") was liable to Thomas Park ("Park"), a former employee of Hewitt Rand, in the amount of $3,970.57 for unauthorized deductions from commissions, for overtime and for annual vacation pay, by reducing the annual vacation pay entitlement by $200.30.

The Director contends that there is a serious error in law in the original decision with respect to the calculation of vacation pay for commissioned salespersons.

ISSUES TO BE DECIDED

In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to accept the application.

If the Tribunal exercises its discretion to accept the application, the substantive issue raised is whether the original decision was inconsistent with previous decisions of the Tribunal and/or wrong in respect of the calculation of annual vacation pay for commissioned salespersons.

ANALYSIS

Section 116 of the *Act* confers reconsideration powers on the Tribunal:

> *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.*
>
> *(3) An application may be made only once with respect to the same order or decision.*

Section 116 is discretionary. As the Tribunal has noted in several reconsideration applications, the accepted approach to such applications resolves into a two stage analysis. In *Milan Holdings*

Ltd., BC EST #D313/98 (Reconsideration of BC EST #D559/97), the Tribunal outlined what is involved in the first stage of that analysis:

> At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration: *Re British Columbia (Director of Employment Standards)*, BC EST #D122/98. In deciding the question, the Tribunal will consider and weigh a number of factors. For example, the following factors have been held to weigh against a reconsideration:
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> (a) where the application has not been filed in a timely fashion and there is no valid cause for the delay: see *Re British Columbia (Director of Employment Standards)*, BC EST #D122/98. In this context, the Tribunal will consider the prejudice to either party in proceeding with or refusing the reconsideration: *Re Rescan Environmental Services Ltd.*, BC EST #D522/97 (Reconsideration of BC EST #D007/97).
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> (b) where the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the Adjudicator (as distinct from tendering new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): *Re Image House Inc.*, BC EST #D075/98 (Reconsideration of BC EST #D418/97); *Alexander (Perequine Consulting*, BC EST #D095/98 (Reconsideration of BC EST #D574/97); *32353 BC Ltd., (c.o.b. Saltair Neighbourhood Pub)*, BC EST #D478/97 (Reconsideration of BC EST #D186/97).
>
> (c) Where the application arises out of a preliminary ruling made in the course of an appeal. "The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid a multiplicity of proceedings, confusion or delay": *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.
>
> 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. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": *Zoltan Kiss, supra*. "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 reasons": *Khalsa Diwan Society*, BC EST #D199/96 (Reconsideration of BC EST #D114/96). . .

If satisfied the case warrants reconsideration, the Tribunal will proceed to the second stage of the analysis, addressing in a substantive way the issues raised.

This application raises at least two concerns about whether a reconsideration is warranted.

The first concern is the lengthy delay in bringing this application. It was filed with the Tribunal on May 8, 2000, more than nine months after the issuance of the original decision. The only explanation provided for the delay of more than nine months from the date of the original decision to the application date suggests that the re-assignment of the delegate involved in the original decision may have prevented that decision coming to the attention of Branch counsel until late November, 1999. No explanation at all is given for the delay of more than five months from the time Branch counsel did become aware of the original decision to the filing of this application.

The Director has anticipated this concern, presenting a complete argument on the relevance of the delay to the application. The Director submits that, absent a finding of prejudice, the Tribunal has no jurisdiction to refuse an application for reconsideration because the application is not timely. The Director says that earlier decisions of the Tribunal, *Re Unisource Canada Ltd.*, BC EST #D122/98 and *Re Director of Employment Standards*, BC EST #D179/00, imposing a requirement to provide a reasonable explanation for the delay, are wrong.

What the argument of the Director fails to appreciate is that the Tribunal's authority under Section 116 is discretionary. While the Tribunal has approached an exercise of this discretion in a principled manner, the Tribunal has determined, based on an assessment of the objectives and the purposes of the *Act*, that the failure to file an application for reconsideration in a timely way without a reasonable explanation for the delay will be a key factor in deciding whether or not that discretion will be exercised in favour of the application. In *The Director of Employment Standards (Re MacMillan Bloedel Limited)*, BC EST #D279/00 (Reconsideration of BC EST #D214/99), the Tribunal stated:

> We reaffirm the principles set out in *Unisource*. In our view, an application for reconsideration must be filed within a reasonable time. What constitutes a "reasonable time" depends on the circumstances of each 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. . . . We agree that the length of 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 opinion, the principles set out in *Unisource* are correct, and in keeping with the approach developed 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 on in *Unisource*:
>
> > "The purposes of the *Act* requires that the Tribunal avoid a multiplicity of proceeding 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.

It may also be worthwhile to reiterate that the approach taken by the Tribunal is supported in Section 2, paragraphs (b) and (d), of the *Act*, which state:

> *2. The purposes of this Act are to*
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> . . .
>
> *(b) to promote the fair treatment of employees and employers,*
>
> . . .
>
> *(d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,*

The delay in filing this application is unreasonable. No adequate explanation has been given for the delay. The application is refused on that basis.

We wish to make a final comment on a matter arising from the submission of the Director. The Director suggests that the Tribunal has established a "rule" that, "it will not decide the merits of a reconsideration application where there is a delay of 6 months between the decision and the reconsideration application". There is no such "rule". As the above analysis indicates, a lengthy and unexplained delay in filing an application for reconsideration weighs significantly against that application. But, as indicated in *The Director of Employment Standards (Re MacMillan Bloedel Limited), supra*, it is only one factor that is considered and whether the length of the delay results in a refusal to grant the application depends on a consideration of all the relevant circumstances, including the reason given for the delay and the prejudice to any party in proceeding with or refusing the reconsideration.

Additionally, even if we were to ignore the lengthy delay, we are also concerned that the application has mis-stated a key factual consideration in the original decision. The application contains the following statement:

> The Employer's obligation to pay the commission paid while the employee was on vacation *arose from the Employee's earlier work.*
> (emphasis added)

That is inconsistent with the factual conclusions reached in the original decision.

The original decision notes that Park worked for Hewitt Rand as a salesperson at one of their retail outlets. His wages were comprised of a base salary and commissions. The original decision

indicates that the commission pay was based on the performance of the branch in which Park worked (the "branch commission"). In other words, the commission pay at issue was not earned exclusively by Park. In its appeal, Hewitt Rand put the circumstances in the following way:

> The terms of Park's compensation for 1997 were; $1700 / month base salary plus .5% of the total division's sales over the monthly quota. This commission structure was based on the total sales of the Richmond branch. Each salesman received the same commission regardless of their individual contribution. Therefore if a salesman is on vacation for 50% of the month, he receives 100% of their share of the group's commission.

This assertion of fact was never challenged in any reply to the appeal and the Director chose not to attend the appeal hearing.

Based on the particular circumstances, the original decision says nothing more than the commission payable for the 10 days Park was on vacation should have been credited to Hewitt Rand's vacation pay obligation to Park. It should be noted that the Determination credited the base salary paid to Park for those 10 days to Hewitt Rand's annual vacation pay obligation and deducted that amount from the annual vacation pay owed to Park. While we make no final decision about it, in the circumstances, it is difficult to see any difference between what the Determination accepted as appropriate and what the Director says in this application is wrong.

There is nothing in the application for reconsideration that suggests the findings of fact made in the original decision were incorrect. The Tribunal has been asked to consider a question that is factually different from the one addressed in the original decision. In effect, this application for reconsideration has no basis in any previous decision of the Tribunal and we would also be justified in refusing it on that basis.

ORDER

Pursuant to Section 116 of the *Act*, the application for reconsideration is denied.

David B. Stevenson
Adjudicator, Panel Chair
Employment Standards Tribunal

Fern Jeffries
Chair
Employment Standards Tribunal

Mark Thompson
Adjudicator
Employment Standards Tribunal