# 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, Panel Chair
Fern Jeffries
Alison Narod

**FILE No:** 2000/375

**DATE OF DECISION:** December 1, 2000

## DECISION

**APPEARANCES:**

| | |
|---|---|
| Ms. Shirley Kay | on behalf of the Director |
| Mr. H.K. Urschitz | on behalf of Medowvale Holdings Ltd. operating as Video Stop |

**FACTS AND ANALYSIS**

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 December 9, 1999 (#D512/99) (the "Decision"). In the Decision the Adjudicator set aside a $500 penalty imposed on the Employer for failing to produce proper payroll records and cancelled a Determination dated September 15, 1999.

The facts are relatively straightforward. On July 23, 1999, the delegate issued a Demand for Employer Records to be produced by August 9, 1999. However, the Employer did not actually receive the Demand until it received the Determination. While the Demand was served by certified mail, it was not claimed.

In this application for reconsideration, which was filed on May 26, 2000, or almost six months after the date of the Decision, the Director argues that the Adjudicator made errors of law and that the Decision must be reconsidered. In brief, the Director says that the Employer's failure to claim the registered mail does not invalidate service (see Section 122 of the *Act*). The Employer opposes the application.

The only issue to be decided here is whether the application is timely. For the reasons set out below, and in the case referred to, we are of the view that the application is not timely. 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.

The Director argues as follows with respect to the issue of timeliness:

1. Absent a finding of "prejudice" the Tribunal has no jurisdiction to reject an untimely application for reconsideration. The Director relies on submissions made in other applications for reconsideration and attaches photocopies of those submissions.

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 adopt those principles. In a recent reconsideration decision of this Tribunal, *The Director of Employment Standards*, BCEST #D279/00 reconsideration of BCEST #D214/99, the panel stated:

> "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 will 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, and we reaffirm those principles." [emphasis added]

While the Director may not agree with these principles, it is, in our view, neither proper nor particularly persuasive for the Director to keep making substantially the same submissions on the

same issue. If the Director is of the view, as seems to be the case, that the Tribunal is acting outside its jurisdiction, the Director may, like any other party, utilize her legal options, including an application for judicial review. In this case there is no explanation for the delay.

2. The Director also argues that the *Act* is remedial legislation which must be construed in a broad and liberal manner in order to ensure the protection of employees. The Director says that restrictions on the right of a party to apply for reconsideration to the Tribunal, is affecting not the Director, but the employees.

We agree that the legislation is remedial and that it must be construed in a "broad and liberal manner" to ensure the protection of employees in the Province. However, in our view, the Director's argument is not on point. The restrictions with respect to timeliness apply to all parties, including employees, employers and the Director.

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:
>
> (b) to promote *fair* treatment of employees and employers;
>
> (d) to provide *fair and efficient* procedures for resolving disputes over the application and interpretation of this *Act*; [emphasis added]

It is, in our view, not consistent with the purposes of the *Act* to allow a party to apply for reconsideration in a untimely manner unless there is a reasonable explanation for the delay. It is, in our view, not "fair and efficient" to any party--be it an employer, an employee or the Director. As well, it is inconsistent with the purpose to "promote fair treatment of employers and employees."

For the benefit of the Director, we re-state part of the Tribunal's analysis in *Unisource, above*:

> "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 provide for an appeal on much narrower grounds." [emphasis added]

3. The Director also argues that, although the Tribunal has the power to determine its own procedures under Section 107, a "time limitation is substantive in nature rather than

procedural." The Director argues that the Tribunal may not make rules which affect substantive matters.

Again, we disagree with the Director. In our view, the Director's argument is unfounded. The Tribunal has not enacted a rule with respect to the time within which an application must be filed.

The power to reconsider is a discretionary one. In our view, the Tribunal is not required to reconsider a decision of the Tribunal. Rather, the Tribunal has the discretion to reconsider. That follows from the language of the statute. Section 116 of the *Act* provides (in part):

> 116. (1) On application under subsection (2) or on its own motion, the tribunal *may*
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> (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.
> [emphasis added]

While it is correct that there is no time limit in Section 116--as there is in Section 112--the power given to the Tribunal by the legislature is a discretionary. Under Section 112, a "person served with a determination" has the right to an appeal. There is no "automatic right" to a reconsideration. In fact, as noted above, the Tribunal has developed certain principles to assist in its exercise of the power to reconsider (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.

4. The Director also argues that, even if the Tribunal is able to prescribe time limits, it is manifestly unfair and contrary to principles of natural justice to do so without notice to parties who may be adversely affected.

We disagree with the Director. The Tribunal has not prescribed a time limit for reconsideration applications. As stated above, the Tribunal has--over time--developed certain principles guiding it in its exercise of the power to reconsider. One of these principles is that an application for reconsideration ought to be filed in a timely manner unless there is a reasonable explanation for the delay. There is nothing unfair in that.

In brief, in our view, the application for reconsideration must fail.

**ORDER**

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

***Ib Skov Petersen***

**Ib Skov Petersen**
**Adjudicator, Panel Chair**
**Employment Standards Tribunal**

***Fern Jeffries***

**Fern Jeffries**
**Chair**
**Employment Standards Tribunal**

***Alison Narod***

**Alison Narod**
**Adjudicator**
**Employment Standards Tribunal**