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 -

316465 B.C. Ltd.

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: John M. Orr

FILE No: 1999/752

DATE OF DECISION: January 31, 2000

DECISION

OVERVIEW

This is an application by 316465 B.C. Ltd. ("the company") under Section 116 (2) of *the Employment Standards Act* (the "Act") for a reconsideration of a Decision #D400/99 (the "Original Decision") which was issued by the Tribunal on September 29, 1999.

The company engaged Ernest and Lucy Merry ("the Merrys") as resident caretakers of a 94 unit apartment in Prince George. The Merrys terminated the engagement on November 30, 1997. They made a complaint claiming unpaid wages, overtime, holiday pay, and vacation pay. The company alleged that the Merrys were independent contractors.

The company was originally contacted by the Director's delegate in January 1998 and advised of the Merrys' complaints. The delegate was advised that the principal of the company was travelling but would respond fully in three weeks. A response was not received within the three weeks as promised. The delegate wrote to the principal of the company on February 18, 1998 requesting all payroll records, time sheets, or other supporting documents and requested a response by March 18, 1998. A telephone response maintained that the Merrys were independent contractors but also claimed that all records, which were maintained at the workplace, had been stolen.

On March 09, 1998 the delegate sent a "Demand for Employer Records". The demand required the records to be produced by April 01, 1998. The company did not respond until May 06, 1998. In the May 6th letter the company still maintained that the Merrys were independent contractors but in addition claimed that the Merrys had stolen all the records, abused their position of trust, and had fraudulently misappropriated funds from the company. The letter noted that all accounts and records were being audited.

The delegate telephoned the company and advised them that failure to produce some form of evidence and records may result in a Determination being made solely on the basis of the evidence provided by the Merrys. The delegate gave the company until the end of the year before taking any further action. But in January 1999 the delegate again attempted to get a response from the company.

On January 14, 1999 the delegate sent another letter advising the company of all the details of the Merrys' claims and further reminded the employer that should he fail to produce any information to refute the claims by January 28, 1999 a Determination would be made based on the Merrys' evidence.

The delegate followed-up this letter with phone calls on January 14, 15, 22, and 29, 1999. On February 01, 1999 the principal of the company telephoned the delegate and indicated that the company was going to initiate embezzlement charges against the Merrys. The company also stated that copies of cancelled cheques would be obtained in the next 2-3 weeks to support the company's position. The company apparently made their first request to the bank for these cancelled cheques by letter dated February 11, 1999.

The delegate finally issued the Determination on March 24, 1999. He had still not received any documentation from the company.

The company appealed the Determination and argued in the submission to the Tribunal, as set-out in the original decision, that

> *"I did not have a fair and reasonable opportunity to present our case to the Industrial Relations Officer, because the complainant, Mr Merry, took all bank records/payment account without authority without authorization when he left my employ, and to this day has never returned them to me. I therefore had no documents to submit readily to the Industrial Relations Officer when requested by him to respond to the claims of the Merrys. Once the facts are taken into account they show such claims to be entirely unfounded."*

At the Tribunal hearing the delegate argued that the company had failed to produce or submit any evidence, documented or otherwise, to support its position (that the Merrys were contractors) or to negate and/or refute the Merrys' claims despite all the opportunities given during the 15 months duration of the investigation. The delegate submitted that the company should not be allowed to introduce evidence before the Tribunal that had not been provided during the investigation.

The adjudicator in the original decision dealt with a preliminary issue concerning the admissibility of the company's evidence on the appeal. In his ruling on this preliminary issue ("the preliminary ruling") the adjudicator declined to hear or accept any new evidence which had not been provided to the delegate during the investigation. The adjudicator reviewed the determination and varied the determination somewhat but otherwise confirmed it.

It is the adjudicator's decision in the preliminary ruling regarding new evidence that is the subject of this application for reconsideration.

ANALYSIS

The current suggested approach to the exercise of the reconsideration discretion under section 116 of the *Act* was set out by the Tribunal in *Milan Holdings Ltd.*, BCEST #D313/98 (applied in decisions BCEST #D497/98, #D498/98, et al). In *Milan* the Tribunal sets out a two stage analysis in the reconsideration process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. In deciding this question the Tribunal should consider and weigh a number of factors such as whether the application is timely, whether it is an interlocutory matter, and whether its primary focus is to have the reconsideration panel effectively "re-weigh" evidence tendered before the adjudicator.

The Tribunal in *Milan* went on to state that the primary factor weighing in favour of reconsideration is whether the applicant has raised significant questions of law, fact, principle or procedure of sufficient merit to warrant the reconsideration. The decision states that "at this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general".

Although most decisions would be seen as serious to the parties this latter consideration will not be used to allow for a "re-weighing" of evidence or the seeking of a "second opinion" when a party simply does not agree with the original decision.

It is one of the defined purposes of the *Act* to provide a fair and efficient procedure for resolving disputes and it is consistent with such purposes that Tribunal's decisions should not be open to reconsideration unless there are compelling reasons: *Khalsa Diwan Society*, BCEST #D199/96.

The circumstances in which an application for reconsideration will be successful will be limited. In a Reconsideration decision dated October 23, 1998, *The Director of Employment Standards*, BCEST #D475/98, the Adjudicator sets out those limits as follows:

> *Those circumstances have been identified in several decisions of the Tribunal, commencing with Zoltan Kiss,BCEST #D122/96, and include:*
>
> * *failure to comply with the principles of natural justice;*
> * *mistake of law or fact;*
> * *significant new evidence that was not reasonably available to the original panel;*
> * *inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;*
> * *misunderstanding or failure to deal with a serious issue; and*
> * *clerical error*

In my opinion this is a case which warrants the exercise of the reconsideration discretion. The request raises a valid point of law which brings into question whether there was a failure to comply with the principles of natural justice. The preliminary ruling by the adjudicator in effect resulted in a situation where there has not been a hearing on the merits of the company's position. The company clearly had significant new evidence which, if accepted, may have resulted in a cancelation or further variation of the Determination. It may be that the company's claim is unsuccessful but it raises sufficient grounds to warrant reconsideration.

The company submitted to the Tribunal at the time of the original decision and on this application for reconsideration that the Merrys had signing authority on the bank trust account for the apartment building and that they had removed the books and records when they terminated their employment. The company put this information in writing to the Bank of Montreal with a copy to the delegate and the R.C.M.P. The company requested the bank "on an urgent basis" to provide copies of all the records and cancelled cheques. The company alleged that Mr Merry had misappropriated thousands of dollars from the account to pay both himself and his wife.

By letter to the delegate dated February 11, 1999 the company confirmed that they had requested all the records from the bank and that they would go to court to recover the rest.
In the notice of appeal the company alleges that the Merrys were contractors with signing authority on the Bank of Montreal trust account from which they paid themselves. The company

alleges that the Merrys not only paid themselves but embezzled extra funds to which they were not entitled. The company complains that the Determination was not fair because the complainants had stolen all the records but yet the delegate was accepting their evidence and not accepting the employer's position because of the missing documents. The company further alleged that the Merrys had given false information about their holiday pay situation and that the Determination on this point was wrong even if they were employees.

The company alleges that the delegate had said that no determination would be made until the records were received from the bank. The bank did not start to produce the copied records until the week of April 16, 1999. The records apparently show, amongst other things, that Mr Merry was making unauthorized payments to his wife through the company trust account. In the notice of appeal the company states that:

> *"After considerable laborious and costly effort, my bank is assembling a complete file of cheques issued over the several years involved. We are expending considerable effort to retrieve everything necessary to refute the unsubstantiated claims, which I expect to be in a position to supply soon."*

At the time of the appeal the company had now received all of the cancelled cheques from the bank and claimed to be in a position to lead evidence to substantiate the position they had taken from the beginning of the investigation. They tendered the documents and wished to call evidence but as stated above the Director's delegate objected and the adjudicator ruled that the information was not admissible.

In declining to accept any new evidence on the appeal the adjudicator in the original decision cited, as similar situations, the two leading cases: *Tri-West Tractor Ltd. (1996)* BCEST #D268/96 and *Kaiser Stables Ltd.* (1997) BCEST #D058/97. The adjudicator noted these decisions, and noted there were many others, for the principle that *"the Tribunal would not allow an appellant who failed to provide information to the delegate of the Director during the investigation, to file an appeal on the merits of the determination".*

The adjudicator states that "The Employer, for their (sic) own reasons, chose not to provide any evidence to the delegate of the Director." He goes on to say:

> *"The Employer chose not to provide information to the delegate of the Director during the investigation. It now seeks to challenge the delegate of the Director's determination with that information it acknowledges it did not previously provide. The Tribunal will not allow that to occur. As reviewed BWI Business World Incorporated, Tri-West Tractor Ltd. and Kaiser Stables Ltd., the Tribunal will not allow an employer to either completely ignore the determination's investigation or to withhold certain information and then appeal the determination's conclusions."*

The *Tri-West* and *Kaiser Stables* decisions were considered in a 1998 adjudication by adjudicator Thornicroft: *Speciality Motor Cars (1970) Ltd.* (1999) BCEST #D570/98. In *Speciality Motors* Thornicroft noted that the key issue was that in the previous decisions there had been a consistent and wilful refusal by the employer to participate in the delegate's investigation. Thornicroft notes

that subsequent decisions of the Tribunal had adopted the approach that in the face of a concerted refusal to participate in an investigation the employer will not be permitted to rely on evidence that was available and that could have been presented to the investigating officer. He goes on, however, to reject any suggestion that evidence is absolutely inadmissible merely because it was not provided to the investigating officer. He further notes that:

> *"There may be legitimate reasons why particular evidence may not have been provided to the investigating officer and, in my view, an adjudicator ruling on the admissibility of such evidence will have to weigh a number of factors including the importance of the evidence, the reason why it was not initially disclosed and any prejudice to parties resulting from such nondisclosure. I do not intend the foregoing to be an exhaustive listing of all relevant criteria"*

The *Speciality Motors* decision followed a number of other decisions which had indicated that there had to be some degree of latitude in the acceptance of evidence at an appeal even if it had not been submitted previously. See for example: *Codfathers Fish and Chips Ltd.*(1996) BCEST #D323/96; *Freemart Financial Services Inc.* (1997) BCEST #D104/97; *Re: Aristocrat Cleaners* (1998) BCEST #D370/98. In *Aristocrat* the records sought to be entered on the appeal had been in the possession and control of a third party and therefore it had been difficult for the employer to acquire them prior to the determination. They were admitted on appeal.

The primary purposes of the *Act* set out in Section 2 include the need to promote the fair treatment of employers and employees and to provide fair and efficient procedures for resolving disputes. I am persuaded that the approach set-out in *Speciality Motors* meets those requirements. It is open to a party who has not produced records or other evidence to persuade the Tribunal that there are legitimate reasons why they were not initially disclosed. The adjudicator should consider those reasons carefully and fairly, weighing such factors as the importance of the evidence, the difficulty involved in acquiring it, who had the custody or control of the evidence, the diligence of the party in acquiring it, whether there was any deliberate or wilful refusal to cooperate in the investigation, the prompt disclosure of the evidence once acquired, and any prejudice to other parties resulting from the earlier failure to produce it.

In this case the adjudicator states several times that the employer failed to provide, chose not to provide, or chose for his own reasons not to provide the evidence during the investigation. However there is no analysis of the reasons given by the company for the unavailability of the records. The adjudicator gives no reasons for rejecting the company's explanation. In fact, he does not address the company's explanation at all. It may be that the company was not believed but there is no reason set-out to explain why the company's explanation was rejected.

As a dispute resolution body it is important that the Tribunal should endeavour to deal with the merits of the real dispute between the parties and not become too legalistic or restrictive in the application of evidentiary or procedural rules.

In my opinion it is incumbent on the adjudicator to address the issue judicially and to make a reasoned decision as to whether the evidence should be allowed or not. In this case it would appear that the adjudicator was mistaken in thinking that the *Kaiser Stables* principle was an

absolute rule, foreclosing any evidence not previously produced to the Director. That rule would be too restrictive and has not been the general practice of the Tribunal.

This is not an appropriate case for me to vary or cancel the decision because no decision was made on the merits of the appeal. Accordingly under Section 116 I am referring the matter back to the original panel to re-hear the appeal including the issue as to whether all of the new evidence should be allowed.

ORDER

This Tribunal orders that pursuant to Section 116 (1)(b) of the *Act* this matter is referred back to the original panel.

John Orr
Adjudicator
Employment Standards Tribunal