BC EST #D043/99
Reconsideration of BC EST #D101/98

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 -

Dusty Investments Inc. d.b.a. Honda North
("Honda North")

- of a Determination issued by -

The Director Of Employment Standards
(the "Director")

ADJUDICATORS:	David Stevenson, Chair John Orr Ib Petersen
FILE NO.:	97/873 and 98/190
DATE OF DECISION:	February 15, 1999

DECISION

OVERVIEW OF PROCEEDINGS BEFORE THE TRIBUNAL

On November 28, 1997, Dusty Investments Inc. d.b.a. Honda North ("Honda North") filed an appeal under Section 112 of the *Employment Standards Act* (the *"Act"*) in respect of a Determination of the Director of Employment Standards (the "Director") dated November 24, 1997. The Tribunal received submissions in respect of the appeal and a hearing by the Tribunal was held on January 22, 1998. On March 11, 1998 the Tribunal issued a Decision on the appeal, BC EST #D101/98 (the "original decision"). On March 25, 1998, counsel for Honda North filed an application for reconsideration of the original decision under Section 116 of the *Act.* On March 27, 1998, the Tribunal acknowledged receipt of the application for reconsideration and invited the interested parties to respond. On April 7, 1998, the Director filed a submission on the application for reconsideration. This submission was not provided to either Honda North or its counsel nor was any reply to the submission sought from Honda North or its counsel prior to the Tribunal issuing its decision on the application for reconsideration (the "reconsideration decision") on September 22, 1998. The Tribunal considered the submission of the Director when it reached its decision on the application for reconsideration.

On October 20, 1998, counsel for Honda North corresponded with the Tribunal requesting a copy of the submission of the Director and was provided with that submission by the Tribunal on October 21, 1998. On November 6, 1998, counsel for Honda North corresponded again with the Tribunal asking why no copy of the submission was provided to Honda North or its counsel and why no opportunity was given to Honda North or its counsel to respond. On November 13, 1998, the Tribunal confirmed, without explanation, that the submission had not been disclosed to Honda North or its counsel. On November 20, 1998, counsel for Honda North asked again for an explanation why no copy of the submission was provided to Honda North or its counsel and why no opportunity was given to Honda North or its counsel to respond.

On November 23, 1998, Honda North filed a Petition in the Supreme Court of British Columbia seeking a number of remedies relating to the investigation of the complaint by the Director, the original decision of the Tribunal and the reconsideration decision of the Tribunal. On November 26, 1998, the Tribunal, through its counsel, communicated with counsel for Honda North. The letter states, in part:

> The reconsideration panel of the Tribunal in this matter rendered its decision (BC EST #D204/98) prior to the employer being given an opportunity to consider and speak to a submission from the delegate of the Director of Employment Standards.
>
> The Tribunal will therefore, on its own motion, reconsider its original decision in this matter – Decision BC EST #D101/98 and in so doing will consider the submission of the Employer dated March 25, 1998, the

> submission of the delegate of the Director of Employment Standards dated April 7, 1998 and any response which the Employer wishes to make to the submission of the Director of Employment Standards dated April 7, 1998. Any such submission should be received by the Tribunal on or before December 15, 1998.

On December 14, 1998, counsel for Honda North replied to counsel for the Tribunal indicating that while his client wished to respond to the submission of the Director of Employment Standards, no response would be provided by December 15, 1998. In the same letter, counsel for Honda North reserved his client's right to respond at a later date.

On December 15, 1998, counsel for the Tribunal replied to the December 14, 1998 letter, and noted:

> One of the grounds upon which you seek relief is that the reconsideration panel of the Tribunal which issued the decision BC EST #D204/98 failed to comply with the principles of natural justice by:
>
> > Not providing the Petitioner with a copy of the submission dated April 7, 1998 of Pat Cullinane, Regional Manager, North Region, Ministry of Labour, Employment Standards Branch, and not providing the Petitioner with an opportunity to respond prior to the Employment Standards Tribunal issuing its decision dated September 22, 1998.
>
> The Tribunal agrees that the reconsideration panel failed to comply with the principles of natural justice and thus exceeded its jurisdiction. Therefore, the reconsideration decision is a nullity: *Chandler v. Alberta Association of Architects* (1989) 62 D.L.R. (4th) 577 (S.C.C.)

On January 7, 1999, counsel for Honda North filed a submission in response to the submission of the Director of Employment Standards dated April 7, 1998. In the cover letter to that submission, counsel stated:

> We confirm your advice that the Employment Standards Tribunal will, on its own motion, reconsider its original decision in this matter – Decision BC EST #D101/98 – and in doing so will consider the submission of the Employer dated March 25, 1998, the submission of the Director of Employment Standards dated April 7, 1998 and any response which the Employer wishes to make to the submission of the Director of Employment Standards dated April 7, 1998.

ANALYSIS

Given that the Tribunal accepts the reconsideration decision to be a nullity, the Tribunal has the authority, if not an implied obligation, to remedy the breach of natural justice. In

deciding to reconsider the application for reconsideration brought by Honda North, the Tribunal derives its authority to do so from either of two operating principles. These principles have been summarized in *Nurani v. Alberta (Environmental Appeal Board)* [1997] A.J. No. 1163:

> Therefore, two key principles apply when considering the general rule that an administrative tribunal cannot revisit its decision. The first is that a flexible approach should be adopted in the application of the principle of *functus officio* to the decisions of administrative tribunals that are subject to appeal on questions of law alone, and presumably to those that are subject to review only on grounds of a jurisdictional error. Second, and most importantly in this context, an administrative tribunal can reconsider its own decision where such a review has been expressly provided for under the enabling statute, or where there are indications in the enabling statute that a decision can be re-opened by it. This latter principle was discussed in *Chan v. Canada (Minister of Employment and Immigration)* (1996), 43 Admin. L.R. (2d) 314 (F.C.T.D.), and in *Zutter v. British Columbia (Council of Human Rights)* (1995), 30 Admin. L.R. (2d) 310, where the respective courts reiterated that a decision by an administrative tribunal may be reconsidered by it, in the absence of express statutory authority or a provision to the contrary, where the enabling statute contemplates reconsideration is available.

The Tribunal has been given express statutory authority in section 116 of the *Act* to re-open its decisions and orders. Section 116 of the *Act* reads:

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.

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

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

The Tribunal also has the same general authority as other administrative tribunals, which is described by the Courts as being grounded in logic and public policy, to correct errors that render a decision a nullity. The law in respect of this principle is summarized in the

following passage from *Re Trizec Equities Ltd. and Area Assessor Burnaby-New Westminster*, (1983), 147 D.L.R. (3d) 637, 45 B.C.L.R. 258, 22 M.P.L.R. 318 (S.C.):

> I am satisfied both as a matter of logic and on the authorities that a tribunal which makes a decision in the purported exercise of its power which is a nullity, may thereafter enter upon a proper hearing and render a valid decision: *Lange v. Board of School Trustees of School District No. 42 (Maple Ridge)*, (1978), 9 B.C.L.R. 232 (B.C.S.C.), *Posluns v. Toronto Stock Exchange et al.* (1968), 67 D.L.R. (2d) 165, [1968] S.C.R. 330. In the latter case, the Supreme Court of Canada quoted from Lord Reid's reasons for judgment in *Ridge v. Baldwin*, [1964] A.C. 40 at p. 79, where he stated:
>
> > "I do not doubt that if an officer or body realises that it has acted hastily and reconsiders the whole matter afresh, and after affording to the person affected a proper opportunity to present its case, then its latter decision will be valid.

In the context of the above principles, what the Tribunal should do, and what we intend to do, is to recommence the reconsideration proceeding. We note in that regard that the Tribunal is not limited to a purely appellate role under Section 116 of the *Act*. Speaking in the context of an appeal under Section 112 of the *Act*, the Tribunal made the following point in *World Project Management Inc. et al*, BC EST #D134/97 (Reconsideration of BC EST #D325/96):

> Clearly the Tribunal is not limited to a "true appeal" focusing only on the original decision nor, on the other hand, would it be fair and efficient to ignore the initial work and determination of the Director. In my opinion, the Tribunal should be flexible in its procedure on appeal to ensure that the intent of the *Act* to create a fair and efficient dispute resolution process is fulfilled.
> (page 4)

That comment applies equally to reconsideration applications under Section 116 of the *Act*. We will now address the application for reconsideration of the original decision.

OVERVIEW OF THE APPLICATION FOR RECONSIDERATION

Honda North filed an application for reconsideration of original decision on March 25, 1998. Three grounds for reconsideration were raised:

1. There was a failure by the original panel to comply with the principles of natural justice;

2. There was a serious mistake in applying the law; and

3. There was a misunderstanding or failure to deal with a significant issue in the appeal.

We have reviewed the material on file and have decided, pursuant to Section 107 of the *Act*, that an oral hearing is not required in this case.

ISSUES TO BE DECIDED

The three issues raised by this application are framed by the grounds for reconsideration listed above: first, whether the Adjudicator of the original decision failed to comply with principles of natural justice; second, whether the Adjudicator of the original decision committed a serious mistake in applying the law; and third, whether the Adjudicator of the original decision misunderstood and failed to deal with a serious issue before him.

ANALYSIS

As indicated above, Section 116 of the *Act* confers reconsideration powers on the Tribunal.

The circumstances in which an application for reconsideration will be successful are limited. Those circumstances have been identified in several decisions of the Tribunal, commencing with *Zoltan Kiss*, BC EST #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 of or failure to deal with a serious issue; and
- clerical error.

Reconsideration is not used simply to provide another opportunity to seek review of the evidence or to reargue a disagreement with the Determination before another panel of the Tribunal. Counsel for Honda North has framed the application for reconsideration to fit within three of the circumstances in respect of which reconsideration will be available and each of those circumstances will be examined.

1. Denial of Natural Justice

Counsel for Honda North argues the Adjudicator in the original decision demonstrated conduct that gave rise to a reasonable apprehension of bias and failed to give Honda North a fair hearing. We shall address the natural justice arguments separately.

(a) Reasonable Apprehension of Bias

The allegations of fact made by counsel for Honda North to support a reasonable apprehension of bias are set out in the following excerpts from the reconsideration submission:

> At the outset of the hearing, [the Adjudicator] made it clear he was unwilling to hear anything from the applicant.
>
> He stated that he was not going to let the applicant participate in the proceedings whether it be with the introduction of new evidence, the explanation of why all the records requested by the Director were not provided, or providing submissions as to the application of the undisputed facts to the *Employment Standards Act* and *Regulations*. . . .
>
> It was only after counsel queried the purpose of setting down the matter for hearing and of going through the time, effort and expense of preparing for and having a formal hearing did [the Adjudicator] allow the applicant to make some very limited and restricted submissions.
>
> The submissions were limited and restricted in that [the Adjudicator] only wanted to deal with the applicant's failure to provide all the information requested by the Director's delegate. Despite this, [the Adjudicator] would not let the applicant fully explain and call complete evidence as to why only some of the information was provided. He also would not let the applicant fully develop an argument relating to the jurisdiction of the Director's delegate which will be discussed further on in this letter.
>
> . . . and he constantly interrupted and cut off the applicant when making submissions.

We adopt the following comments of Newbury, J.A. in *Finch v. The Association of Professional Engineers & GEO Scientists* (1996), 18 B.C.L.R. (3d) 361 at 376 (B.C.C.A.):

> The test for determining whether a reasonable apprehension of bias arises is well-known and clear: Cory J. for the Court in *Newfoundland Telephone Co. Ltd. v. Board of Commissioners of Public Utilities* (1992), 4 Admin. L.R. (2d) 121 (S.C.C.) formulated it this way:

> It is of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness.
>
> To ensure fairness the conduct of members of administrative tribunals has been measured against a standard of reasonable apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.

Consistent with the above statement, the test is an objective one. Two comments are appropriate in that context. First, because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: see *A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541. Second, the evidence presented should allow for objective findings of fact that demonstrate actual bias or a reasonable apprehension of bias. The rationale for this requirement is anchored in the principle that a party against whom an allegation of bias is made is not permitted to explain away the circumstances in which the allegation arises or to deny the presence of a biased mind. This principle is enunciated by Laskin, C.J.C., in *P.P.G. Industries Canada Ltd. v. A.-G. Can.* (1975), 65 D.L.R. (3d) 354 (S.C.C.), where he stated that "the introduction of evidence to explain away a situation which raised a reasonable apprehension of bias affecting that party's position in respect of a decision which he challenged" would not be permitted (see also *C.D. Lee Trucking Ltd. v. B. C. Labour Relations Board and others*, B.C.J. No. 2776, November 26, 1998, Vancouver Registry No. A981590).

Honda North has not provided any evidence from which a reasonably informed bystander could reasonably perceive bias on the part of the Adjudicator. Counsel for Honda North does not state anywhere in his submissions what was actually said by the Adjudicator. The allegations of bias flow from a superficial overview of the proceedings and consist mainly of subjective impressions made by counsel for Honda North about the proceedings. In this case, as in any case involving allegations of bias, there is an initial presumption that the Adjudicator acted impartially. That presumption is not overcome by presenting subjective impressions, as counsel for the applicant has done here. The following statement by the Court in *A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, *supra* is applicable:

> Further, I agree with respondents' counsel, that . . . Mr. Albright's allegations can be mainly characterized as "impressions" which, according to *Wojcik v. British Columbia (Workers Compensation Board)*, [1997] B.C.J. No. 2704 (November 20, 1997), Vancouver Registry No. CA023349, is insufficient to satisfy the test for bias. In that case, Braidwood, J.A., for the Court, said as follows:

> However, more importantly, is the fact that the evidence upon which bias was based is subjective evidence and does not state what was said. It is an inference that the respondent had as to apparently what was said to him. Such evidence cannot be the basis of making a finding of fact for it is up to the fact finding tribunal to make the inference based on what was said.
>
> The evidence tendered is not real evidence it is subjective and impressionistic evidence which cannot satisfy the test for bias and overcome the presumption that the Panel acted impartially.

On the same reasoning we conclude Honda North has not met its evidentiary burden. Accordingly, Honda North has not established a reasonable apprehension of bias on the part of the Adjudicator and this ground of reconsideration is rejected.

(b) Denial of Fair Hearing

In examining this ground for reconsideration, we note the following outline of facts from the original decision:

> The delegate of the Director submits that:
>
> - August 20, 1997, a demand for Employer Records was sent via Certified Mail to Honda North requiring the records requested be provided on or before September 19, 1997
> - August 26, 1997, an Acknowledgement of Receipt from Canada Post confirmed that the Demand had been received by Honda North on August 22, 1997
> - September 23, 1997, the delegate of the Director telephoned Honda North and spoke to the bookkeeper who advised that she had just returned from holidays and the owner of the business was away until the week of September 29, 1997. The bookkeeper requested and was granted an extension until September 30, 1997
> - October 3, 1997, the delegate of the Director again spoke to the bookkeeper who indicated that she had just finished the year end and that the records would be provided later that morning
> - October 6, 1997, the delegate of the Director again spoke to the bookkeeper to inquire when the records would be dropped off and was advised that the records would be provided in the afternoon of the following day
> - October 15, 1997, the delegate of the Director sent a letter to Honda North again requesting the records and requiring that they be provided by October 24, 1997. This letter advised Honda North in part as follows: *"Under Section 46 of the Employment Standards Act*

> *Regulation I can impose a Penalty of $500.00 for a failure to produce the records requested in the Demand for Records. Further, it may be in the interest of the employer to produce the records requested because without them, I will use the best available evidence – in this case the records provided by the complainant."*
> On October 22, 1997, the delegate of the Director spoke with another employee of Honda North who advised him that the bookkeeper had gone to England because her father was ill. Upon being advised by the delegate of the Director that the records were still required, this employee stated that she "could not produce them because that was not her area of responsibility"
> - November 24, 1997, the delegate of the Director issued the Determination and delivered it by hand to the employer's place of business, the employer's registered and records office, to the residences of both of the directors
> - November 24, 1997, a Penalty Determination was issued in the amount of $500.00 for not producing the requested records as required. . . .

With respect to the failure of Honda North to provide the records requested, counsel for Honda North submits in their appeal that "Honda North was unable to provide the information in the time period requested as the Employer, Honda North's bookkeeper/accountant was:

(a) firstly, was sick;
(b) secondly, had to prepare accounting updates to finalize year end;
(c) thirdly, had to travel to England where her father was severely ill immediately after preparing (b); and
(d) only returned from England November 10, 1997."

Counsel for Honda North further submits in their appeal that "The Employer, Honda North, realizes it should have responded in writing setting out its problems, however, the key person to provide that information was just not available"

Counsel for Honda North concedes that the records which were provided to the delegate of the Director *prior* to the issuance of the Determination "were limited and not what were requested".

The bookkeeper/accountant for Honda North, Ms. Ross, advised the Tribunal that she chose not to deliver any records to the delegate of the Director until she had an opportunity to ensure that she had collected all the records necessary.

It is apparent from the submissions made by counsel for Honda North that the basis for his denial of fair hearing argument is that the Adjudicator limited evidence and submissions

from Honda North on the preliminary objection raised by the Director and on the jurisdictional issue raised by Honda North. In the reconsideration application, counsel says:

> . . . [the Adjudicator] would not let the applicant fully explain and call complete evidence as to why only some of the information was provided. He also would not let the applicant fully develop an argument relating to the jurisdiction of the Director's delegate . . .

We will address the argument as it relates to the jurisdiction of the delegate later, but in respect of the preliminary objection, there is nothing in the submissions from counsel for Honda North indicating what additional facts or factors would have been introduced to add support to the argument that Honda North should be relieved from its failure to provide the documents requested by the Director. In most cases it would be inappropriate for an applicant to simply assert that they were not allowed to "fully explain or call complete evidence". Such an assertion is purely subjective. It may reflect nothing more than a disagreement with a conclusion by the Adjudicator that certain evidence sought to be led or certain arguments sought to be made were either unnecessary or irrelevant to the issues being addressed.

As such, the assertion made by counsel for Honda North is not helpful in determining whether the applicant was denied a fair hearing. There is no denial of fair hearing if the evidence that Honda North sought to introduce was unnecessary or irrelevant to the issues being addressed. the Adjudicator was entitled to control his own process. Similarly, the bare assertion by counsel for Honda North that the Adjudicator refused to allow the applicant to make full argument is not evidence of a denial of fair hearing. On the other hand, an administrative tribunal should not refuse to hear the representations that a party wishes to make to it unless such representations are late or clearly frivolous, see *Montreal (City) v. National Transport Agency (sub nom Montreal (Ville) c. Office National des Transports)*, (1991). 139 N.R. 176. If the representations which Honda North says it was not able to make were clearly frivolous, then there is no denial of fair hearing. There is, however, nothing in the original decision to assist us in determining whether the evidence was unrelated or irrelevant or that the argument was frivolous. The submission of the Director in response the application does not reply or comment on this aspect of the application for reconsideration.

The Tribunal must be cognizant of the need to ensure that parties to a proceeding are given a fair hearing. We cannot be certain that Honda North received a fair hearing before the original panel. We conclude that this part of the application for reconsideration succeeds. We will address the remedy following consideration of the balance of the application.

2. Serious Mistake in Applying the Law and Failure to Deal With a Significant Issue on Appeal

The second and third arguments on the reconsideration can be considered together. In the application for reconsideration, counsel for Honda North says:

> As [the Adjudicator] did not allow the applicant to make complete and uninterrupted submissions on the jurisdictional issue, it is respectfully submitted that [the Adjudicator] did not understand the applicant's submission on this issue and consequently erred in his application of the *Act* and *Regulations* when he reviewed the Director's Determination. . . .
>
> It is the respectful submission of the applicant that [the Adjudicator] misunderstood or failed to deal with the jurisdictional issue as described above.

The applicant has now been able to provide full argument and submission on the jurisdictional issue. Counsel has filed two submissions on that issue, the first in the application for reconsideration and the second in a letter dated January 7, 1999 in reply to a submission filed on the application by the Director. In the latter submission, counsel took the opportunity to restate many of the arguments from the application for reconsideration. We agree with counsel for Honda North that the jurisdictional issue is a matter of law. The submissions contain all the facts necessary to determine the jurisdictional issue. They are as follows:

- The employee, Christopher Downey ("Downey"), was Parts Manager for Honda North from June 1, 1993 until his resignation, May 15, 1997;
- From May 1, 1995 to September 1, 1996, Downey's salary was $3200.00 a month;
- From September 1, 1996 to the date of his resignation his salary was $3286.66 a month;
- Downey was an "employee" for the purposes of the *Act*;
- Downey's employment duties brought him within the definition of "manager" in the *Regulations*;
- Downey was expected to work 40 hours a week and not more than 40 hours a week without authorization;
- Between November 1995 and February 1997, Downey worked approximately 550 hours more than he was expected to work.

Counsel for Honda North says the Director has no jurisdiction under the *Act* to:

1) determine the maximum number of hours per day for managers is 8 hours per day or 40 hours per week;
2) determine that a manager is entitled to straight time hours for hours worked over 8 hours per day or 40 hours per week when Part 4 of the *Act* does not apply to give them overtime wages; and

3) determine that a salaried employee's bi-monthly salary can be converted into an hourly rate.

We find no merit in this aspect of the application for reconsideration. The jurisdictional argument proceeds on two fundamental misconceptions about the operation and application of the *Act*. The first misconception is that the Director has no jurisdiction to enforce more than minimum standards of employment. As counsel for Honda North says in his submission of January 7, 1999:

> The Act does not provide an exhaustive code of employment law for British Columbia, only certain minimum requirements of employment.
>
> The Act provides for a complaint, investigation and settlement mechanism by the Director of Employment Standards for circumstances where these minimum requirements of employment as set out in the Act have not been complied with.

That statement is not correct. The Director has authority under the *Act* to regulate and enforce the employment relationship, including elements of the employment relationship that exceed minimum standards. There is no doubt that a primary purpose of the *Act* is to ensure employees receive *"at least basic standards of compensation and conditions of employment"*, but the application of the *Act* is not limited to enforcing only minimum standards. A brief examination of the statutory requirements relating to wages and payment of wages easily demonstrates this point. Section 1of the *Act* defines wages:

"wages" *includes*

a) salaries, commissions and money, paid or payable by an employer to an employee for work,

b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency,

c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee under this Act,

d) money required to be paid in accordance with a determination or an order of the tribunal, and

e) in Parts 10 and 11, money required under a contract of employment to be paid, for an employee's benefits, to a fund, insurer or other person,

but does not include

f) gratuities,

g) money that is paid at the discretion of the employer and is not related to hours of work, production or efficiency,

h) allowances or expenses, and

i) penalties.

There is nothing in that provision that defines wages in the context of the 'minimum wage' provisions of the *Act.* Section 16 of the *Act* says:

> *16. An employer must pay an employee at least the minimum wage as prescribed in the regulations*

If the *Act* was limited in its application to ensuring compliance with only "certain minimum requirements", as suggested by counsel for Honda North, reference to a requirement to pay *"at least"* minimum wage would be unnecessary. Section 17(1) of the *Act* says:

> *17. (1) At least semi monthly and within 8 days after the end of the pay period, an employer must pay to an employee all wages earned by the employee in a pay period.*

That subsection makes no reference to payment of only the minimum wage obligations of the employer, but of a requirement to pay *"all wages"*. Section 18 of the *Act* says:

> *18. (1) An employer must pay all wages owing to an employee within 48 hours after the employer terminates the employment.*
>
> *(2) An employer must pay all wages owing to an employee within 6 days after the employee terminates employment.*

Again, there is no reference in that section to a requirement to pay only minimum wage. It is noteworthy that the Director concluded in the Determination that Honda North had contravened Sections 17 and 18 of the *Act.* In other words, the Director found Honda North had not paid Downey *"all wages owing"*. In that context, the Director had the jurisdiction to decide whether and what wages had not been paid and was not limited in that task to determining only whether minimum wage had not been paid.

The second misconception by counsel for Honda North is that the Director concluded there was some provision in the *Act* that set the maximum number of hours of work in a day or a week for managers and that managers were entitled under the *Act* to be paid for hours worked in excess of 8 in a day or 40 in a week. In fact, all the Director concluded was that the basic terms of the employment agreement between Honda North and Downey was that Downey would be paid $3200.00 a month (later increased to $3286.66 a month) to work eight hours a day, 40 hours a week. That was a conclusion that was specific to the employment relationship between Honda North and Downey. It was not intended to, and does not, have general application to the employment relationship of other managers with

their employers. That is simply a question of fact about the terms of the employment relationship and is conceded by Honda North. In the January 7, 1999 submission, counsel for Honda North states:

> The Employer agrees that it was expected that the employee would work 40 hours per week. However, it was also a term of employment that he not work over 40 hours per week without pre-authorization.

Notwithstanding the assertion found in the second sentence, it was found that Downey did work more than 40 hours a week and that such work was authorized, either expressly or by implicitly, by Honda North. The conclusion that Downey was entitled to be paid for the extra hours worked and the amount he was to be paid is a simple matter of applying the findings of fact to the requirements of the *Act*. We can find no error of law by the original panel in deciding the Director had the necessary jurisdiction under the *Act* to make the Determination.

It is a simple enough analysis. First, an employee is entitled to be paid for work performed for his or her employer. Second, if an employee is paid a weekly, monthly or yearly wage to do a finite amount of work, then any work in excess of that amount is work for which the employee is entitled to be paid. Counsel for Honda North has not directly said it, but the effect of his submission is that Downey should not be paid for the extra work he has performed for the benefit of his employer. Third, in order to determine the wage at which the work should be paid, the *Act* requires the director to find the hourly wage using the formula found in Section 1 of the *Act*, definition of *"regular wages"*. In this case subsection (d) was applicable:

"regular wages" *means . . .*

> *(d) if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work, . . .*

There is no magic in the use of the word "regular" in the definition. That term exists primarily for the purpose of avoiding confusion between the formula for reaching an hourly wage and the definition of *"wages"* that appears later in Section 1 (and which is set out above). A *"regular wage"* is simply a *"wage"* that has been converted to an hourly rate.

The applicant has not demonstrated any ground for reconsideration on this aspect of the case.

ORDER

Honda North asks that the original decision and the Determination be canceled. No reason has been established by the applicant for canceling the Determination. The original panel was correct in deciding the Director had jurisdiction to make the Determination and that aspect of the original decision is confirmed.

Also, Honda North has not demonstrated that there was any reasonable apprehension of bias on the part of the Adjudicator of the original decision and that aspect of the application for reconsideration is denied.

On the issue of denial of fair hearing, while we have some concerns about whether the applicant was able to introduce evidence relevant to the preliminary objection and to make complete submissions on that issue, neither are we certain that the applicant was not able to do so. Our authority under Section 116 is not restricted to a purely appellate role. In appropriate circumstances, a panel of the Tribunal acting under Section 116 will adopt a broader role in order to ensure the proceedings before the Tribunal generally achieve an acceptable level of fairness. We will rehear the parties on the preliminary objection. The rehearing will proceed by way of written submissions and, if necessary, Statutory Declaration. We do not foreclose the possibility that an oral hearing may be ordered to resolve critical factual differences that might arise in the rehearing, but without seeing the factual assertions of the parties on the preliminary issue it would be premature to proceed directly to an oral hearing.

Pursuant to our authority under Section 107 of the *Act*, we make the following orders on this aspect of the application for reconsideration:

1. Honda North will be given an opportunity to make full submission on the preliminary issue, including an opportunity to explain why only some of the information was provided to the investigating delegate;
2. Any evidence that Honda North wishes to introduce in support of that submission must be provided by way of Statutory Declaration and be attached to the submission;
3. Any submission and evidence that Honda North wishes to provide to the Tribunal must be delivered to the Tribunal and to the other parties no later than 5 working days following the date of receipt of this decision;
4. The other parties will then be given an opportunity to reply to the submission of Honda North and to any Statutory Declaration received from Honda North;
5. Any reply evidence must be provided by way of Statutory Declaration and be attached to the reply submission;
6. Any reply submission and reply evidence that any other party wishes to provide to the Tribunal must be delivered to the Tribunal and to Honda North no later than 5 working days following the date of receipt of the submission of Honda North.

The parties should keep in mind that the submissions and evidence being provided to this panel are supplementary to the material already before us and the parties may rely on findings of fact and submissions already made. This panel will retain jurisdiction over the application for reconsideration for the purpose of exercising our authority under Section 116 of the *Act*.

_____

David Stevenson
Adjudicator

_____

John Orr
Adjudicator

_____

Ib Petersen
Adjudicator