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 -

Qualified Contractors Ltd.
(" Qualified ")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: David B. Stevenson

FILE No: 1999/653

DATE OF DECISION: March 15, 2000

DECISION

OVERVIEW

Qualified Contractors Ltd. ("Qualified") seeks a reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision of the Employment Standards Tribunal (the "original decision"), BC EST #D420/998, dated October 22, 1999. The original decision confirmed a Penalty Determination made by a delegate of the Director of Employment Standards (the "Director") dated June 28, 1999 and varied a Wage Determination made by the Director, also dated June 28, 1999. The variance to the Wage Determination resulted from the Director correcting a clerical error in calculating the amount of wages owed to the individual. The original decision following an oral hearing. Qualified says they were denied a fair hearing because of the procedure adopted by the Adjudicator at that hearing. That procedure is described in the following passage:

> The employer's appeal was heard at the Tribunal's offices in Vancouver on September 21, 1999. The employer called five witnesses. After first verifying that the employer did not wish to call any other evidence, I advised both the employee, Mr. Kals, and the Director's delegate that since I was not satisfied, having considered the both the previously filed written submissions and the *viva voce* evidence presented, that the employer had raised even a *prime facie* case in support of its appeal, I did not need to hear their evidence or submissions. Other than varying the Wage Determination to correct the aforementioned clerical error, I dismissed the employer's appeal and indicated that more complete written reasons would follow.
>
> I might add that given my view that the employer's appeal was manifestly without merit, and the fact that the appeal hearing would have been required to be adjourned to some future date, perhaps several months away, in order to complete the employee's and the delegate's evidence, I chose to bring the proceedings to an end. Section 2(d) indicates that one of the purposes of the *Act* is to provide fair and efficient dispute resolution procedures – requiring the respondent employee and Director to appear and respond, at some future date, to a wholly unmeritorious appeal is, in my view, neither fair nor efficient.

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 reconsider the original decision. If satisfied the case is appropriate for reconsideration, the sole issue raised in the reconsideration is whether Qualified was denied a fair hearing.

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. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is *"to provide fair and efficient procedures for resolving disputes over the interpretation and application"* of its provisions. Another stated purpose, found in subsection 2(b), is to *"promote the fair treatment of employees and employers"*. In *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97), the Tribunal noted:

> To realize these purposes in the context of its reconsideration power, the Tribunal has attempted to strike a balance between two extremes. On the one hand, failing to exercise the reconsideration power where important questions of fact, law, principle or fairness are at stake, would defeat the purpose of allowing such questions to be fully and correctly decided within the specialized regime created by the *Act* and the Regulations for the final and conclusive resolution of employment standards disputes: *Act*, s. 110. On the other hand, to accept all applications for reconsideration, regardless of the nature of the issue or the arguments made, would undermine the integrity of the appeal process which is intended to be the primary forum for the final resolution of disputes regarding Determinations. An "automatic reconsideration" approach would be contrary to the objectives of finality and efficiency for a Tribunal designed to provide fair and efficient outcomes for large volumes of appeals. It would delay justice for parties waiting to have their disputes heard, and would likely advantage parties with the resources to "litigate".

Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. In *Milan Holdings Ltd., supra*, the Tribunal outlined 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:

(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).

(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 a 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). . .

The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the tribunal as including:

- 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.

Consistent with the approach outlined above, I will first assess whether the applicant has established any matters that warrant reconsideration.

ANALYSIS

Qualified says the Tribunal should exercise its discretion in favour of reconsideration based on what it alleged to be a denial of natural justice. The following passage from Qualified's reconsideration submission fairly summarizes the main basis for the reconsideration application:

> . . . the adjudicator refused to allow [legal counsel] to make submissions regarding the appeal after he heard the employer's witnesses on appeal. The right to make submissions is a fundamental part of the right to be heard and to present one's case. To deny this right is wrong and not the proper approach for a fair-minded adjudicator.

In addition to what I have identified as the main basis for this application, the submission of counsel for Qualified seems to suggest that the Adjudicator of the original decision did not properly address the factual elements of the appeal and I will deal with this argument first.

In the reconsideration submission, following a review of elements of the evidence that had been adduced by the employer's witnesses and asserting that there were elements of the material and information provided the employee, Mr. Kals, that required greater scrutiny, legal counsel for Qualified says, in summary:

> The proper way to proceed would have been to hear Mr. Kals (and the delegate, if need be) and render a decision after submissions. Now the case is flawed and a new hearing is necessary before a different adjudicator.

The implication of the above statement is that the Adjudicator should have required Kals to present himself for cross-examination, notwithstanding Qualified had closed its case and had not even established a *prima facie* case in support of its appeal. It should also be emphasized that before dismissing the appeal, Qualified was asked by the Adjudicator whether they wished to call any further evidence and counsel had indicated that they did not.

The appeal submissions attached to this application do not address the basis for this application, but deal directly with the merits of the appeal and the facts supporting it. In reply to this application, the Director, among other things, argued:

> In the request for reconsideration, Denovan Hill, Counsel for the Appellant, attempts to reargue facts that were put before the Adjudicator. Mr. Hill has also attached correspondence in support of the Appellant's position which have

> already been considered by the Adjudicator. The Director submits that the Appellant is simply trying to reargue the appeal.

In response, Mr. Hill says:

> I am not attempting to reargue the facts put before the adjudicator. I attach the correspondence previously filed to show the weaknesses and problems in Mr. Kal's case.

It is not appropriate on reconsideration to seek a review of evidentiary conclusions made in the original decision unless it is clear on the face of the record that there is either no rational basis for the conclusion of fact or that an error has been made. In this case, the conclusions reached by the Adjudicator in the original decision were made after hearing the witnesses' evidence directly and observing their demeanour under oath. Simply put (if it is not already apparent from the parts of the original decision set out above), the Adjudicator of the original decision disbelieved or rejected as inherently contradictory all of the *viva voce* evidence provided by Qualified. The Adjudicator is in the best position to make that judgement and counsel for Qualified has provided no good reason to ignore it. Accordingly, from an evidentiary perspective there is no reason to consider the "weaknesses and problems" with Mr. Kals' case. The burden in the appeal was on Qualified to show some error in the Determination. They failed to do that. Mr. Kals was not required to provide any evidence. If counsel for Qualified felt that the testimony of Mr. Kals was important to the appeal, then he should have been called him as part of the appellant's case as an adverse party and permission sought to have him treated as such. It is not the role of the Tribunal to conduct the case of any of the parties to an appeal. It is pure speculation for counsel for Qualified to suggest their appeal might have been bolstered by any "scrutiny" of what Mr. Kals had submitted either to the Director in support of his complaint or to the Tribunal in reply to the appeal. No basis for reconsideration has been established by reason of the Adjudicator not requiring Mr. Kals to present a case.

Returning to the main basis for this application, I can find no reason to conclude that Qualified was denied a fair hearing. Certainly there is nothing in this application to indicate why it was necessary for counsel for Qualified to make submissions on the evidence presented by his witnesses, such that not being able to make submissions has denied Qualified a fair hearing. On its face, the appeal was dismissed because the Adjudicator concluded that there was no basis for the appeal and the *viva voce* evidence presented in support was contradictory and deceitful. To a large extent, the application reflects nothing more than a disagreement with the conclusion of the Adjudicator. The assertion that Qualified has been denied a fair hearing by the process adopted by the Adjudicator is purely subjective. Certainly there is nothing in this application showing any reason for concluding the appeal would have been any more meritorious if counsel had been allowed to make submissions regarding the appeal than it was following conclusion of the evidence.

The Adjudicator was entitled to control his own process. In this context, I adopt the following comments of the B.C. Supreme Court in *Vanlon v. British Columbia Council of Human Rights*, (1994) B.C.J. No. 497:

> The scope of that opportunity [to present one's case] is not unlimited. While it is sensible to permit generous latitude in the presentation of evidence, as Mr. Powell did here, a tribunal must be able to control its own process, and in so doing may be able to impose reasonable procedural constraints.

In the above case, the Human Rights tribunal, following six hours of cross-examination of the complainant, limited the respondent to one further hour of cross-examination. I see no significant difference in principal between the procedure adopted here and the procedural constraints imposed in that case. The Adjudicator allowed Qualified to call all its evidence and made its decision to end the hearing and issue oral reasons only after ensuring that Qualified had no further evidence to call on its appeal. I cannot perceive how the procedure adopted prevented a Qualified from receiving a full and fair hearing on its appeal. It was not unreasonable, based on the Adjudicator's view of the evidence and the consequent merits of the appeal, to bring the hearing to a close and issue a decision.

While I acknowledge that the Tribunal should not normally refuse to hear or foreclose representations that a party wishes to make, it is abundantly clear in this case that the Adjudicator, after hearing all Qualified's evidence, considered the appeal to be "wholly unmeritorious". In such circumstances there is no denial of fair hearing because a party has been limited in the submissions it is able to make to the Tribunal after the evidence has been presented and that party's case closed.

This is not an appropriate case reconsideration.

ORDER

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

David B. Stevenson
Adjudicator
Employment Standards Tribunal