Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Dr. Rudy Wassenaar
("Appellant" or "Employer")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Paul E. Love

FILE No.: 2001/798

DATE OF DECISION: February 4, 2002

DECISION

OVERVIEW

This is an application for reconsideration, made by Dr. Rudy Wassenaar ("Appellant" or "Employer") pursuant to s. 116 of the *Employment Standards Act, R.S.B.C. 1996, c. 113*, of a decision of the Employment Standards Tribunal (the "Tribunal") dated June 12, 2001 (the "original decision"). A Delegate of the Director of Employment Standards ("Delegate") issued a Determination, that Ms. Diane Mason was entitled wages in the amount of $3,540.04 and $225.20 in interest. The amounts relating to minimum daily pay, overtime pay, and vacation pay on bonuses related to productivity. The Employer alleges that the Adjudicator erred in failing to find that the Employee had brought a claim, after resignation, in bad faith and based upon fraudulent time records. I determined that this was not an appropriate case for reconsideration, as the Employer was asking me to "re-weigh" evidence before the Original Adjudicator. Much of the evidence submitted by the Employer to the Tribunal, which the Employer alleges the Adjudicator erred in assessing, was irrelevant and of no weight. While the Employer argued that the Adjudicator wrongly admitted new evidence from the Employee at the hearing, the Employer failed to establish that he objected to this evidence, and that the evidence, if wrongly admitted, had any connection to the conclusions reached by the Adjudicator. I therefore dismissed the application for reconsideration.

ISSUES TO BE DECIDED

Has the appellant raised an issue meeting the threshold for reconsideration?

If this is a proper case for reconsideration, did the Adjudicator err with regard to findings that the Employee was entitled to wages?

FACTS

This reconsideration application is decided upon written submissions of Dr.Wassenaar, Mrs. Mason, and the Delegate, after an original decision based on an oral hearing. The parties were informed by the Tribunal, by letter dated January 7, 2002, that this request for reconsideration would be determined on the basis of written submissions.

Mrs. Mason was employed as a certified dental assistant, in the dental practice of Dr. Wassenaar between November 1987 and July 31, 2000. She was a part time employee at all material times. She resigned her employment on July 31, 2000. After resigning her employment, Ms. Mason filed a complaint with the Employment Standards Branch ("Branch") alleging wages were owing by the Employer.

The Delegate found that Mrs. Mason was entitled to wages in the amount of $3,540.04 and $225.20 in interest. The amounts relating to minimum daily pay, overtime pay, and vacation pay on bonuses related to productivity. Contrary to the *Act*, Dr. Wassenaar did not pay overtime to Ms. Mason. Dr. Wassenaar and Ms. Mason applied for a variance by a letter to the Branch dated November 5, 1997 signed by himself and Mrs. Mason:

> Please be advised that the undersigned mutually agree to compress the work week to 40 hours in less than 5 days. The average working day will be between 8.5 and 9.5 hours.
>
> It is understood that after your approval it will be legal to pay all worked hours at the regularly hourly rate, provided that the total amount of hours does not exceed 40 hours per week. Any hours in excess of 40 hours per week will then be paid the usual overtime compensation requirements as provided by law.
>
> We look forward to your favourable reply at your earliest convenience.

The Branch apparently granted a variance in regard to full time employees, which the Employer failed to post in the workplace as required by the *Act*. The variance did not apply to Mrs. Mason because she was a part time employee. The Employer paid Mrs. Mason as if the variance applied to her, when in fact, the variance did not apply to her. There does not appear to be any evidence that the Employer ever informed the Employee that she was not covered by the variance.

This is the finding of fact with regard to the variance was fundamental to the Determination that wages were owing. Also fundamental to the Determination was the finding that Ms. Mason was not a manager. I note that none of the arguments of the Employer, in this application, cast doubt on the correctness of those findings. The Delegate then went on and determined the amounts owing based on the Employer's records. A critical factual finding by the Delegate was:

> Payroll records submitted by Dr. Rudy Wassenaar show that wages paid to the complainant were not consistent with the Employment Standards Act.

ORIGINAL DECISION:

Dr.Wassenaar appealed on the basis that the employee had committed a fraud on him by obtaining dental services for her spouse in advance of submitting her resignation. Dr.Wassenaar also submitted that Ms. Mason had committed fraud by overstating the time records that she submitted to him for payment of her wages. The Employer alleged that the claim was brought in bad faith by the Employee. The particulars of bad faith included filing a complaint with the Branch after "committing time theft", signing an application for a variance and then making an overtime claim after resignation, resigning after the Employer provided dental service to Mrs. Mason's husband. The Employer also alleged that Mrs. Mason was a manager, and therefore not

entitled to be paid overtime pay in accordance with the *Act*. The Employer alleged that the Delegate acted with bias in that the Delegate issued a Determination in an amount different than that discussed for settlement purposes with the Employer, and by making an arithmetic error in a preliminary decision which was disclosed to the Employer.

In his submission to the Adjudicator, Dr.Wassenaar submitted that the complaint should be dismissed because:

- The complaint is not made in good faith
- There is no evidence to prove the complaint
- The complaint is adjudicated poorly due to many mathematical and judgement errors
- The complaint is currently being investigated by the RCMP and the College of Dental Surgeons of BC

I note that a rather large part of the Appellant's submission to the Original Adjudicator was based on the Employer's "referral of the fraud" to his insurers, to the RCMP, and to the College of Dental Surgeons ("external bodies"). While these "references" show perhaps the serious attitude of the Appellant towards something "he believes was fraud", these references are of course irrelevant to the proceedings before this Tribunal, and are certainly "no evidence" of an alleged fraud, nor should they form any reason for a Delegate to cease an investigation, or an Adjudicator to cease the disposition of the merits of an appeal. Particularly troublesome in this case was the linking by the appellant of his complaints to external bodies to settlement of an employment standards complaint.

The Adjudicator confirmed the Determination after finding that the Employer had not met the burden of proof in demonstrating that the Delegate erred in the finding that Mrs. Mason was not a manager. The Adjudicator also found that the Employer had not established that the Employee mislead the Delegate with regard to the record of hours worked. The Adjudicator found that the Employee had not presented a claim to the Delegate in "bad faith". The Adjudicator also found that the Employer made an unsubstantiated allegation of bias against the Delegate. The Adjudicator also found that the Delegate had correctly calculated the wage entitlement in the Determination, although there had been calculation errors at an earlier stage of the investigative process.

I note that the Delegate appears to have determined the issues against the Employer, on the basis of records of the Employer. The Adjudicator found that there was a substantial basis to believe that the Employee filed the time records accurately at the time the records were made.

RECONSIDERATION APPLICATION:

The Employer filed a request for reconsideration on November 14, 2001. The request for reconsideration is in addition to letters to the Tribunal dated October 26, 2001, November 1, 2001 and November 4, 2001. I have attempted to distill the grounds for the request for reconsideration, because these grounds are not clearly described in the appeal materials.

The Employer has not raised the "manager issue" in this reconsideration and therefore I have not considered the issue of whether the Adjudicator erred in finding that Ms. Mason was not a manager. Further, the Employer has not raised any issue of correctness relating to findings of the Delegate and the Adjudicator, that Ms. Mason was not paid in accordance with the *Act*.

The Employer's fundamental concerns seem to be outlined in a letter to the Tribunal dated November 5, 2001, where Dr.Wassenaar states that:

> The basis of my appeal was that Mrs. Mason acted in bad faith by falsifying payroll records and taking advantage of the dental benefits I provided to her family (particularly her husband). This helped cover the financial shortfall she felt she was entitled to. After I finished dental treatment on her husband, she resigned immediately. Despite the substantial documentation to support these charges she denied this as you are aware.
>
> When I sat down with her at the time, she stated that she quit because her position was not the " ideal retirement job" she would have hoped it to be. She stated that I had "lied" with regards to the affordability of pay raises, and she could not work for somebody who lied all the time.
>
> During the Tribunal Hearing she stated that the only reason she quit when she did was that she got a better job offer somewhere. Furthermore, she disputed the fact that I claimed she was the highest paid CDA in town. Incidentally, this again implied that I should be considered a liar. I checked with her current employer and it is interesting to note that Mrs. Mason accepted a salary of around $16.00 per hour. This amounts to about 20 % less than what I was paying her Mrs. Mason makes a mockery of the process and essentially this amounts to lying under oath.

The Employer also alleges that the Adjudicator erred:

(a) by wrongly characterizing the conclusions of an RCMP investigation concerning fraud alleged by Dr. Wassenaar;

(b) by ignoring evidence that the Employer's insurers paid out a sum of money on account of employee fraud;

(c) by admitting into evidence a calculation sheet prepared by Mrs. Mason, and not disclosed to the Appellant in advance of the hearing;

and that

(d) that the Employee lied under oath at the Tribunal hearing.

It is clear from the above noted passage that the Employer seeks to revisit the findings of fact related to "fraud". The Employer also seeks to revisit the issue of dental benefits received by the Employee (or her husband) prior to resignation. The Employer's submission also contain the Appellant's other "comments" about the Tribunal process which I have not repeated because they do not form any recognizable ground for reconsideration as set out in the Tribunal's jurisprudence.

Delegate's Argument:

The Delegate submits that there was no fraud with regard to records. The Delegate submits that any information relating to how the Employer's insurers or RCMP dealt with complaints of "fraud" are irrelevant to the issues before the Adjudicator. The Delegate submits that the Employer has established no error in fact or law in the Decision.

Employee's Argument:

The Employee submits that there was no fraud. She prepared her claim based on partial records, which were the only records available to her, and she disclosed this fact to the Delegate and to the Employer**.**

ANALYSIS

In an application for reconsideration, the burden rests with the appellant, in this case the Employer, to show that this is a proper case for reconsideration, and that the adjudicator erred such that I should vary or cancel the Decision. An application for reconsideration of a Tribunal' s decision involves a two stage analysis, as set out in *Milan Holdings Ltd., BCEST #D313/98*:

> ...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), BCEST #D122/98. In deciding this 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: *Re British Columbia (Director of Employment Standards)*, BCEST #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 BCEST # D007/97).
>
> (b) Where the application's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): *Re Image House Inc.,* BCEST #D075/98 (Reconsideration of BCEST #D418/97); *Alexander (c.o.b. Pereguine Consulting)* BCEST #D095/98 (Reconsideration of BCEST #D574/97); *323573 BC Ltd. (c.o.b. Saltair Neighbourhood Pub*), BC EST #D478/97 (Reconsideration of BCEST #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 multiplicity of proceedings, confusion or delay": *World Project Management Inc.*, BCEST #D134/97 (Reconsideration of BCEST #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*. As noted in previous decisions, "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* (BCEST #D199/96, reconsideration of BCEST #D114/96).

After weighing these and other factors relevant to the matter before it, the Panel may determine that the application is not appropriate for reconsideration. If so, it will typically give reasons for its decision not to reconsider the adjudicator's

> decision. Should the Panel determine that one or more of the issues raised in the application is appropriate for reconsideration, the Panel will then review the matter and make a decision. The focus of the reconsideration panel "on the merits" will in general be with the correctness of the decision being reconsidered.
>
> The very point of reconsideration being to provide a forum for sober reflection regarding questions which are considered sufficiently important to warrant such review, we consider it sensible to conclude that questions deemed worthy of reconsideration - particularly questions of law - should be reviewed for correctness.

The reconsideration power is one to be exercised with caution. A non-exhaustive list of grounds for reconsideration include:

a) a failure by the adjudicator to comply with the principles of natural justice;

b) a mistake of fact;

c) inconsistency with other decisions which cannot be distinguished;

d) significant and serious new evidence that has become available and that would have lead the adjudicator to a different decision;

e) misunderstanding or failing to deal with an issue;

f) clerical error.

Reconsideration is meant to be an extraordinary remedy, and not every application filed will meet the tests required. I have reviewed the allegations made by the Employer with a view as to whether this firstly is a proper case to proceed to reconsideration. In turning to an application of these tests to the facts of this case, it is my view that the Employer seeks to have me re-weigh the evidence before the Delegate and the Adjudicator. In this case, the answer to the Employer's allegation of Adjudicator error rests on an assessment of the evidence underlying the errors alleged by the Employer. Essentially the Employer is "unhappy" with the findings of fact made by the Adjudicator, as opposed to demonstrating any error in applying the applicable law. The Employer has raised a ground related to "natural justice" and the admission of new evidence at the hearing. In my view, even if this evidence was wrongly admitted, it could not have affected the outcome of the Decision. I therefore have declined to reconsider the Decision. In this analysis I explain my reasons why this is not an appropriate case for reconsideration.

The Employer's major point at the hearing before the Original Adjudicator was that the complaint was made in bad faith, that there was fraud and that it was adjudicated with bias. I note that after an oral hearing, in which both the Employee and the Employer gave evidence and were cross-examined, the Tribunal found that there was no proof of employee fraud, and no

proof of bias in the investigation. The Tribunal found that there was no variance that applied to exempt Mrs. Mason from the overtime provisions of the *Act*. There was evidence based on the Employer's own records, and admissions by the Employer in correspondence to the Tribunal, that Mrs. Mason had not been paid in accordance with the *Act*. There was a full hearing of the Employer's case.

It is apparent that the Adjudicator did not accept the "bad faith/fraudulent" allegations made by Dr. Wassenaar:

> Turning to the bad faith/fraudulent allegations I find that the appellant has failed to meet the onus required of him to substantiate these claims. It is clear on the evidence, both oral and written (see the Director's reply submission), that there is not, nor has there ever been a criminal investigation into the fraudulent allegations pursued by the Appellant, nor has there been any substantive evidence led by the Appellant to support an allegations that the Respondent was guilty of "stealing time" from the Appellant. Indeed, there is substantive evidence that the respondent filled out her time claims in an appropriate manner. The Appellant, when questioned on where the false claims arose testified that he had not studied the issue in detail and couldn't identify where the falsifications occurred. The evidence led by the Respondent clearly identifies where the two time records, the Respondent's and the Appellant's differed and provided concrete reasoning for the differences. The Appellant was informed from the beginning of the investigation that the Respondent's records were incomplete and this was also identified in the determination. I find that this ground for appeal is frivolous and dismiss it.

Did the Employer prove fraud?

The Employer's theory, communicated to the Delegate and to the Tribunal, was that the Employee, being dissatisfied with her rate of pay, inflated her hours worked in order to get further wages to which she was not entitled. There is of course a substantial difference between a theory and proven facts. The whole basis for the Employer's claim of fraud was that there was a difference between the time records the Employee submitted to him for payment, and the time records submitted to the Delegate during the investigation which documented fewer hours. The Employer says that this is fraud. The Employee's view communicated to Dr. Wassenaar, the Delegate and to the Adjudicator was that she did not have complete records at her home, when she prepared the material for the Delegate. The only support for the Employer's theory is that the Employee submitted different incomplete records to the Delegate at the time of the investigation, in comparison with the time records the Employee submitted to the Employer , and on which the Employer relied upon to pay the Employee during the employment relationship. The Delegate apparently relied on the Employer's records.

In order to establish fraud, the Employer must show that the Employee made a representation (provided documents), which she knew either were false, or that she was reckless with regard to the truth of the documents, with the intention that the Delegate rely upon the documents. There is nothing fraudulent about keeping partial records, and disclosing those partial records to the Delegate, provided that one does not attempt to pass the records off as a complete record. The Delegate appears to have been aware, as was the Adjudicator, that the records were partial records. The Delegate and the Adjudicator appear to have accepted the Employee's explanation as to why the records submitted were different.

The Employer did not prove fraud before the Adjudicator, and on any cogent application of the test for fraud to the "evidence" adduced by the Employer, the Employer fell far short of proof. I note that generally triers of fact take a "dim view" of persons making allegations of fraud, where fraud is not proven. Civil courts often award costs against the person who makes an unproven allegation of fraud.

The Adjudicator properly characterized the lack of evidence on this point. It is the practice of the Tribunal to accept for filing all documents submitted by a party, without a consideration of whether the documents are evidence. In my experience as a Tribunal Adjudicator, I have noted that, with unrepresented parties, there is often a tendency to blur evidence or proof of the facts with submissions as to what an Adjudicator should find.

I have reviewed the appeal brief supplied by the Employer on the appeal which resulted in the Original Decision. I note that by the ordinary civil rules of evidence much of the Appellant's written material would be inadmissible as evidence. The Tribunal, as stated, accepts for filing all materials provided, but it is up to the Adjudicator to determine the admissibility and weight to be accorded to the documents. An Adjudicator is not bound to apply the ordinary rules of evidence and can accept evidence that is credible and trustworthy. Much of the material filed was simply irrelevant.

I note that the Appellant's attempt to "bootstrap his case" by referring an allegation of fraud to the RCMP, insurers, and College of Dental Surgeons, and then referring to it before the Tribunal is a practice which is to be frowned upon, and is certainly not a substitute for proper proof. Unfortunately the Appellant saw fit to repeat this tactic in his reconsideration submission. As these appear to form part of his reasons for seeking reconsideration, I am going to comment in detail why these references are of no assistance to an Adjudicator:

Findings of Insurance Company:

The Appellant submits that:

> Another issue is that my insurers looked at the same material as Mr. Carkner did. They did the forensic accounting, they consulted with their criminal lawyers and they concluded that I had suffered an economic loss (Exhibit #3). As part of the

> nature of the insurance business, you will agree that typically insurers only pay benefits if they are bound legally to do so.

There is little, if any, factual or evidentiary basis in the material supplied by the Appellant in support of this point. I note that Exhibit #3 consists of a cheque in the amount of $1,094.41 payable by an insurance company to the Employer, and an unsigned proof of loss. While the proof of loss refers to "employee dishonesty", the proof of loss calls for a statutory declaration by Dr. Wassenaar that "the foregoing claim and statements are to the best of my belief true in ever particular ...". The proof of loss tendered as part of the reconsideration submission was not signed or sworn by Dr. Wassenaar. The Employer did not submit a forensic accounting to the Adjudicator to prove an economic loss.

The fact that the Defendant's insurance company paid out some benefits as a result of the Employer's application on account of "employee fraud", is of no assistance to an Adjudicator in determining that there was a fraud by an employee with regard to her wage entitlement. Mrs. Mason apparently was not contacted during the investigation by the insurers. The Adjudicator and the Delegate had the benefit of hearing from Mrs. Mason. At best this payment by the Employer's insurers can be said to be premised on an "opinion" or "conclusion" of an insurance company that there was fraud. The "opinion" or "conclusion" of another person on a set of facts is ordinarily inadmissible, unless it falls within the proper ambit for expert evidence.

The decision maker is the one charged with the responsibility of making a decision. The Adjudicator must make the decision based on facts presented to the Adjudicator and not base that decision upon speculation about "how or why" another decision maker concluded the matter differently. I note that the "opinion of an insurance company that there was fraud" cannot be a substitute for the Employer's obligation, if it disputes the basis of the Determination, to show that the material submitted by the Employee to the Delegate was fraudulent and the Delegate was mislead by "fraudulent material" submitted by the Employee. In this case it was apparent that the Delegate was well aware that the Employee had not provided full and complete documentary evidence, and assessed the Employee's evidence and the Employer's evidence. The Delegate made the Determination on the basis of the records submitted by the Employer. There is no Adjudicator error with regard to the weight to be granted to an insurer's decision to pay out monies to its insured. There is no weight to this evidence, and it should not have been submitted to the Tribunal.

The Employer has not satisfied me that the conclusions of an insurance company are of any assistance to an Adjudicator in determining whether an Employer has proven fraud. The insurance company's conclusions are simply irrelevant.

RCMP Declining to Investigate the Case:

The Employer alleges that the Adjudicator did not "deal properly with the RCMP investigation in the Decision". The fact that the Employer's complaint to the RCMP did not result in charges

is of no assistance to an Adjudicator in determining an appeal of a wage entitlement. The Adjudicator did not err in his assessment of the RCMP investigation. The Employer filed a letter from the RCMP indicated that they declined to investigate a "time fraud" as a criminal matter.

The fact that the RCMP declined to investigate, or even that the RCMP believed there was a "good civil case for fraud", is simply irrelevant. The fact that the RCMP declined to lay a criminal charge does not assist an Adjudicator. Any "evidence" that the RCMP suggested that the Employer consider a civil action is likewise inadmissible and of no weight in determining a fraud allegation. This information should not have been introduced by the Employer as evidence, as it was not relevant to an issue before the Adjudicator, nor did the "evidence" have any probative or persuasive value on any issue before the Adjudicator.

The evidence tendered by the Employer to the Original Adjudicator fell short of establishing a fraud by the Employee with regard to time sheets. The Appellant's argument with respect to fraud amounts to a request that I re-weigh the evidence that was tendered before the Adjudicator. The "evidence" which the Employer suggested the Adjudicator ignored, or misconstrued, was irrelevant material which should not have been placed before an Adjudicator. In order to find a fraud I would have to find that the Adjudicator erred in the assessment of the Employee's explanation for the records supplied to the Delegate. The Adjudicator was in the best position to determine whether the Employee's explanation for the documents was cogent. I decline to re-consider the decision on the basis of employee fraud.

Dental Benefits and Bad Faith

The Employer alleges that the Employee, in bad faith, used a benefit of dental work performed by the Employer. The Employer alleged that the Employee wrongly used this benefit to obtain dental work for her husband when she was going to resign her job. The finding of fact made by the Adjudicator was that the Employer had not proven bad faith.

A Delegate does have a discretion to cease to investigate a complaint because of bad faith:

> *76(2) The director may refuse to investigate a complaint if*
>
> > *(c) the complaint is frivolous, vexatious or trivial or is not made in good faith*

This is not a proper case to refine the parameters of Tribunal review of a Delegate's investigatory discretion. It is a discretion, however, for the Delegate, and the discretion must be exercised judicially or with regard to the facts of the case. Here there were clear violations of the *Act* by the Employer, and the allegations of bad faith were found by the Adjudicator to be frivolous. This Tribunal will rarely, if ever, interfere with the investigatory discretion of the Delegate, where the Delegate has uncovered a violation of the *Act*. The proper function set out in the *Act*, is that the Delegate investigates, and makes a Determination, and the Tribunal will review that Determination, upon appeal, to determine if the Delegate erred. This Tribunal

performs an error correction function, and the function to decide which cases to investigate or not investigate, is clearly an administrative decision for the Director.

The Employer's argument essentially is that because the Employee in bad faith wrongfully used a benefit, that the value of the benefit ought to be "taken account" by the Delegate, and by the Tribunal in the assessment of wages. It is apparent from documents filed by the Employer as part of the original appeal submission, that throughout the investigation, the Employer sought to set off the dental benefits received by Ms. Mason (or her family) against any wages owing to Mrs. Mason. This Tribunal has no jurisdiction to deal with set off of claims made by the Employer against the Employee's wages. To a limited extent s. 21 and 22 of the *Act* provide for assignment of wages, but this claim by the Employer does not fit into that limited framework.

The Employee was entitled to have dental work performed by the Employer as part of her benefit package. This is set out in the terms and conditions of the Employer's personnel policy. It is not disputed by the Employer. This was offered as "evidence of bad faith". The Employer seeks to set off the dental work against wages owing to the Employee. The Employer's position was disputed by the Employee. There was evidence before the Adjudicator that the Employer encouraged his patients who were Employees of other Employers to "maximize" their use of their Employer's dental plan prior to leaving employment. If the Employee wrongfully obtained dental benefits, which was denied by the Employee, this is a matter for the Employer to pursue outside of the Tribunal forum. Even if the Employer's allegations on this point are correct, this does not demonstrate any error with regard to a wage entitlement of the Employee for overtime, minimum daily pay, or vacation pay.

Lying Under Oath:

Dr.Wassenaar alleges that Mrs. Mason lied under oath at the Tribunal hearing. This is a very serious allegation. While lying under oath would be a serious matter, warranting a revisiting of the fact finding process, there is no proof tendered by the Employer supporting this allegation. The Employer says that the 'lying conduct" relates to the different reasons advanced by the Employee for resigning. I am not persuaded that there was any lie. Mrs. Mason was obviously dissatisfied with the terms and conditions of her employment with Dr. Wassenaar. The fact that she told Dr. Wassenaar that the job with him was not an ideal retirement job for her, and the fact that she accepted employment with a competitor at a lower wage, is not inconsistent with a statement to the Tribunal that she got a better job somewhere else. A "better job" does not necessarily mean a higher paid job. An employment involves more than the exchange of labour for money. Employment is a relationship. A better job may be one simply that involves working for an employer who the employee likes or trusts.

This serious and unproven allegation, does not warrant a revisiting of the fact finding process before the Adjudicator.

Admitting New Evidence:

The Employer alleges that the Adjudicator should not have admitted a document into evidence which was a summary of the calculation of wage entitlement. There is no ruling recorded in the Decision on this point. There is also no submission from the Employer that he objected to the admissibility of the document at the hearing. An Adjudicator has a discretion with regard to the admission of new evidence. In the absence of any submission before me that the Employer objected to the admission of the document, this ground cannot form a basis for reconsideration.

Even if this evidence was wrongfully admitted by the Adjudicator, it is difficult to determine the effect, if any of the admission of the document, on the Adjudicator's decision. The burden remains on the Employer to establish that the Adjudicator erred such that I should vary or cancel the Decision. The Appellant argues that this new evidence, that he could not answer, had the effect of "sweeping the fraud charge under the carpet". I note that the Adjudicator found that based on the records of the Employer alone, there were many occasions when the Employer did not pay overtime, minimum daily pay or vacation pay on bonuses. If the Adjudicator used the document admitted on the issue of "fraud", I cannot say that such an admission is an error that should result in the setting aside of the Decision. The Employer's argument for fraud lacks an appropriate basis in the evidence, and lacks an appropriate legal foundation. In my view, the Adjudicator would have dismissed the Employer's allegation of fraud, with or without the admission of document, because the argument was not properly grounded in fact or law.

For all the above reasons, I therefore decline to re-consider the Decision and dismiss the application as one not falling within the proper scope for reconsideration.

ORDER

Pursuant to section 116 of the *Act*, I confirm the Decision dated August 21, 2001. Mrs. Mason is entitled to further interest calculated in accordance with s. 88 of the *Act*.

Paul E. Love
Adjudicator
Employment Standards Tribunal