An application for Reconsideration

\- by -

The Taiga Works Wilderness Equipment Ltd.
(“Taiga”)

\- 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 (as amended)

TRIBUNAL MEMBER: David B. Stevenson

FILE No.: 2008A/41

DATE OF DECISION: July 3, 2008

DECISION

SUBMISSIONS

Lindsie M. Thompson	on behalf of The Taiga Works Wilderness Equipment Ltd.
Andres Barker	on behalf of the Director

OVERVIEW

1. The Taiga Works Wilderness Equipment Ltd. ("Taiga") seeks reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of two decisions, BC EST #D016/08, made by the Tribunal on February 6, 2008 (the "original decision") and BC EST #D034/08, dated March 26, 2008 (the "referral back decision"). The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards on September 28, 2007. The Determination was issued following the investigation of complaints filed by eleven individuals alleging entitlement to length of service compensation from Taiga. The referral back decision addressed wage recalculations which had been referred back to the Director in the original decision.

2. The Determination found that each of the individuals were entitled to compensation for length of service and annual vacation pay on that compensation. The Director ordered Taiga to pay wages to the employees in the amount of $41,633.11, including interest, and imposed an administrative penalty on Taiga under Section 29 of the *Employment Standards Regulation* in the amount of $500.00.

3. The appeal was grounded in allegations that the Director erred in law and failed to observe principles of natural justice in making the Determination.

4. Taiga contended the Director had erred in law in applying Section 66 of the *Act* to arrive at a finding that the complainants' employment had been terminated. That ground of appeal was not accepted. The following sentence from the original decision summarizes the disposition of that ground:

> I am not persuaded that the delegate erred in her conclusion that the changes, viewed objectively, constituted constructive dismissal.

5. The natural justice ground of appeal alleged the Director had failed to consider relevant evidence, had failed to disclose relevant materials and allow Taiga an opportunity to respond and had assumed overlapping functions. In support of the assertion that the Director had failed to disclose relevant materials and allow a response, the appeal identified the following matters:

   a. materials provided by the employees to the Director relating to proceedings before the EI Commission and Umpire;

   b. three documents and a letter that were only disclosed under the statutory obligation on the Director, found in Section 112(5), to provide the "record" that was before the Director when the Determination was made; and

   c. a final submission made on behalf of Taiga to the Director on September 27, 2007.

6. The original decision notes the above matters.

7. The original decision did not accept the argument that the Director had failed to comply with principles of natural justice by assuming overlapping functions. That conclusion is not raised or challenged in this application.

8. In respect of the matters raised in this application, the Tribunal Member in the original decision was persuaded that all relevant information to enable Taiga a full response had not been disclosed to Taiga and that Taiga's final response submission to the Director on the alleged breaches of the *Act* had not been considered. The Tribunal Member apparently reviewed and considered that material, the submissions relating to them and the submissions generally in the context of the appeal, and concluded any breaches of natural justice had been addressed, and cured, in the appeal process. That conclusion is stated in the following excerpt:

> . . . as I have reviewed and considered those documents provided on appeal, it is unecessary to remit the matter back to the delegate for reconsideration. The Tribunal has held that any breaches of natural justice may be cured on appeal and having reviwed the submissions, any procedural defects have been addressed.

9. In this application Taiga contends that the Tribunal Member erred in law in the original decision by failing to order a new hearing on the complaints after finding the Director had failed to observe principles of natural justice.

ISSUE

10. 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 substantive issues raised in this application will be considered.

11. In this application, an additional, and preliminary, question has been raised concerning whether the Tribunal should conduct an oral hearing on this application.

THE PRELIMINARY QUESTION

12. Taiga has requested the Tribunal conduct an oral hearing on this application.

13. The Tribunal has a discretion whether to hold a hearing on a reconsideration application and if a hearing is considered necessary, may hold any combination of written, electronic and oral hearings: see Section 36 of the *Administrative Tribunals Act* ("*ATA*"), which is incorporated into the *Employment Standards Act* (s. 103), Rule 26 of the Tribunal's Rules of Practice and Procedure and *D. Hall & Associates v. Director of Employment Standards et al.,* 2001 BCSC 575.

14. The Tribunal has reviewed the material relevant to this application and has decided an oral hearing is not required on this application. As it relates to the original decision, this application raises only a question of whether there was an error of law in the original decision. If the Tribunal concludes this application raises a matter which warrants reconsideration and accepts the original decision was wrong, the appropriate process resulting from those decisions will be addressed.

ANALYSIS OF THE THRESHOLD ISSUE

15. The legislature has conferred a reconsideration power on the Tribunal under Section 116 of the *Act*, which reads as follows:

> 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) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another 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.

16. 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"*. The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. An assessment is also made of the merits of the original decision. The focus of a reconsideration application is the original decision. In the context of this application, the original decision was that the procedural defects which occurred during the complaint process had been cured in the appeal process.

17. Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. 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.

18. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively re-visit the original decision and come to a different conclusion.

19. If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration.

ARGUMENT

20. Taiga says there is an error of law in the original decision, "by failing to correct the breach of natural justice in the Determination". Taiga does not dispute that the Tribunal may cure breaches of natural justice on appeal, but contends that in order to do so, must provide the party affected by the breach with an opportunity to be heard "in circumstances where the principles of natural justice are complied with".

21. Taiga disagrees that the appeal process in this case cured the breach. In its reconsideration application submission, Taiga says:

> The Employer only received a copy of the information and materials which were before the Delegate after it had filed its request for an appeal and after it had provided its submission to the Tribunal concerning the grounds for appeal. At no time has the Employer had the opportunity to address arguments being made by the Employees concerning the merits of the issues before the Delegate.

22. In response to the application, the Director submits that Taiga was provided with the material on November 27, 2007, when the Section 112 record was delivered to the Tribunal, and had made reference to some of that material in their December 20, 2007 final reply submission in the appeal. As a consequence, the Director says that Taiga "was provided with the opportunity to respond to these documents".

23. In reply, Taiga disagrees with that view and makes the following submission:

> Contrary to what the Delegate now argues, this course of events did not provide the Employer with an opportunity to make submissions to the Delegate in response to the information and arguments made by Employees in the Undisclosed Documents. This is, of course, because the documents were not disclosed to the Employer until after the Determination was made.
>
> Furthermore, at no time has the Employer had the opportunity to make submissions in response to the information and arguments made by the Employees in the Undisclosed Documents to a member of the Tribunal making a decision on the merits of the Employee's complaints.

ANALYSIS

24. In at least one respect, the position of Taiga in this application is ingenuous, as I am not entirely convinced there was no opportunity to make submissions relating to the material which was made available to Taiga for the first time during the appeal process. Taiga had the opportunity to make submissions on all of the materials in the Section 112 record in the context of other arguments raised in the appeal. Taiga did, in fact, make specific submissions on some of that material. The failure of Taiga to make more comprehensive submissions on that material cannot be totally laid at the feet of the either the Director or the Tribunal Member of the original decision.

25. There are, as well, other elements of the position taken by Taiga in this application that would normally mitigate against allowing reconsideration.

26. It is unclear in the December 20, 2007 submission made by Taiga what documents, among those that were not disclosed during the complaint process, were considered by Taiga to be relevant to the sole legal issue in the Determination and the original decision, which is whether, the complainants employment with Taiga was terminated and, as a result of that termination, they entitled to length of service compensation under the *Act*.

27. It is equally unclear in this reconsideration application what relevance any of the undisclosed material can possibly have on the entitlement of the complainants under the *Act*.

28. From another perspective, however, while the Tribunal Member in the original decision was satisfied Taiga had not been given all relevant information during the complaint process to enable a full response, it is not apparent from original decision that the failure to provide a full response was addressed in the appeal process.

29. The original decision refers to having considered "the documents", but the original decision does not say whether that reference encompasses the "volumes of materials considered by the Delegate which were not provided to the Employer" (December 20, 2007 submission, page 1) or just the documents that were included in the appendices to the December 20, 2007 submission.

30. If the original decision only looked at the documents included in the appendices, two concerns arise. First, Taiga has not been heard on a sizeable amount of other material that was only disclosed during the appeal process. Second, it is arguable whether in any event the December 20, 2007 submission can be fairly characterized as a full response in respect of those documents included in the appendices, as opposed to what Taiga says was just identifying some of the documents from the Section 112 record that were not disclosed during the complaint process.

31. The point of this brief analysis is simply to indicate that it is not entirely clear Taiga has been given the opportunity to reply in respect of the documents first provided during the appeal process.

32. It is this lack of clarity that has persuaded me to accept this application and, applying the considerations identified in *Dusty Investments Ltd., c.o.b. Honda North*, BC EST #RD043/99, refer the decision back to the original panel.

33. As we said in *Dusty Investments Ltd., c.o.b. Honda North*, *supra*:

> The Tribunal must be cognizant of the need to ensure that parties to a proceeding are given a fair hearing.

34. If there is a question or an ambiguity about whether the process is fair, it should be resolved in favour of ensuring a fair process.

35. There is no disagreement that the Tribunal is capable of curing a breach of procedural fairness in the complaint process by ensuring the party adversely affected by the breach is provided with a fair hearing.

36. Taiga says the breach of procedural fairness in this case can only be cured by a full oral hearing into the merits of the complaints. I disagree. Taiga is entitled to procedural fairness, but procedural fairness in the context of proceedings under the *Act* does not require a full oral hearing at any stage: see *Kyle Freney*, BC EST #D130/04.

37. As has been noted many times, the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case. As stated in the original decision, in the context of a proceeding under the *Act*, procedural fairness requires that the parties know the case being made against them, have the opportunity to reply and the right to have their position heard.

38. In my view, procedural fairness can be ensured in this case by referring the matter back to the Tribunal Member in the original decision and providing Taiga with an opportunity to make a complete submission in respect of the previously undisclosed documents.

39. The submission must clearly identify which documents were not in the possession of Taiga prior to their receipt as part of the Section 112 record, of those documents, which parts are disputed, on what basis they are being disputed and the relevance of those disputed areas to the question decided by the Director in the Determination.

40. I do not perceive, initially at least, there will be any need for the Director to make any submission. That will be a matter for the Tribunal Member of the original decision to decide.

41. Neither the Determination nor the original decision are being cancelled by this decision. Ultimately, what effect this decision might have on the Determination will be for the Tribunal Member of the original decision to decide.

ORDER

42. Pursuant to Section 116(1) of the *Act*, the matter is referred back to original panel.

David B. Stevenson
Member
Employment Standards Tribunal