BCEST #D066/99
Reconsideration of BCEST #D374/98

EMPLOYMENT STANDARDS TRIBUNAL

In the matter of a reconsideration request pursuant to Section 116 of the *Employment Standards Act* R.S.B.C. 1996, C. 113

- by -

Anthony Mise

- of a Decision issued by -

The Employment Standards Tribunal

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 99/007

DATE OF DECISION: February 19, 1999

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DECISION

OVERVIEW

Anthony Mise requests that the Tribunal reconsider, under Section 116 of the *Employment Standards Act* ("the *Act*"), a Decision numbered BCEST #D374/98 which was issued by an Adjudicator on September 21, 1998 ("the Original Decision"). One ground for this application appears to be that the delegate of the Director of Employment Standards (the "Director"), during her investigation of his complaint, mistakenly concluded that Mr. Mise was not entitled to "wages" under the *Act* for work performed away from his former employer's place of business. Another ground appears to be that the Adjudicator erred by finding, in the Original Decision, that Mr. Mise's complaint was settled by way of Mise accepting a payment in the amount of $6,784.24 (net) from his former employer. A third ground calls into question the effectiveness with which the Director dealt with Mr. Mise's complaint. Finally, Mr. Mise submits that his former employer was "PG Specialty Wood Products Ltd. and Pacific Precision Wood Products Ltd." rather than Pacific Precision Wood Products Ltd. alone.

This request has been adjudicated following receipt of written submissions.

ISSUES TO BE DECIDED

There are two issues to be decided:

1. Should the Tribunal exercise its discretion, under Section 116 of the *Act*, to reconsider the Original Decision?

   and

2. If so, should it confirm, cancel, vary or refer back to the Adjudicator?

FACTS

The Original Decision set out the following undisputed facts at page 2 and page 3:

- Mise was employed as the Chief Financial Officer of Pacific;
- Mise was employed from November 1, 1995 to May 31, 1996;
- Mise was to be paid $70,000 per annum ($5,833.33 per month);
- Mise performed work for Pacific in Prince George and from his home in Prince Rupert;

- Mise quit his employment;
- Neither Mise nor Pacific kept records of daily hours worked;
- Mise filed a complaint with the *Employment Standards Branch* in regard to wages owing;
- In the course of the investigation of the complaint, Mise and representatives of Pacific met with the delegate of the Director in mid September 1996 and Pacific agreed to pay Mise an amount equal to 3 1/2 months wages;
- The delegate of the Director forwarded a cheque to Mise along with a letter dated September 25, 1996 requesting Mise to sign the enclosed release form and return that form to the delegate;
- Mise cashed the cheque but refused to sign the accompanying release form;
- Mise commenced court action against Pacific however this action was suspended due to Pacific being placed in receivership;
- Mise next contacted the delegate of the Director in April 1998, 1 1/2 years after receiving and cashing the cheque from Pacific, to request that his complaint be reopened;
- the delegate reviewed the request by Mise and concluded that the matter had been resolved, therefore pursuant to Section 76(2)(g) issued the Determination dated June 5, 1998.

I adopt those facts for purposes of this application.

At page 4 of the Original Decision, the Adjudicator begins his analysis by defining the issue before him:

> The issue which is before me is the narrow issue of whether the delegate of the Director erred in concluding that the dispute between Mise and Pacific, which had been the subject of a complaint by Mise in 1996, had been in fact resolved.

In analyzing the issue before him, the Adjudicator considered Section 76 and Section 78 of the *Act* and noted that under Section 76(2), the Director may stop or postpone investigating a complaint under certain circumstances. The Adjudicator made particular note of the following facts in his analysis, at page 5:

- Mise accepted a cheque from Pacific which was intended as a settlement;
- The cheque was enclosed in a letter from the delegate of the Director which stated in part *"This now finalizes the Employment Standards Branch's involvement with your complaint and the file is now closed";*
- Mise did not contact the delegate to dispute the closing of his file;
- Mise cashed the cheque;
- Mise did not contact the delegate for more than 1 1/2 years and only then because his court action had been suspended.

The Adjudicator, based on those findings of fact, went on to express the following view:

> I am of the view that the refusal of Mise to sign the release form as requested by the delegate of the Director is not determinative of the status of the complaint as Mise clearly was made aware in the letter from the delegate of the Director that his complaint was now finalized and his file was closed.

The Adjudicator concluded, on the balance of probabilities, that the dispute between Mr. Mise and his former employer had been resolved, that the Director did not err in making the Determination dated June 5, 1998 and ordered that the Determination be confirmed.

ANALYSIS

The statutory authority to reconsider a decision of the Tribunal is found in section 116 of the *Act*:

> **Reconsideration of orders and decisions**
>
> (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.

I note that this provision gives the Tribunal a discretion to reconsider its decisions depending on the merits of a particular request.

The Tribunal's seminal decision on its reconsideration powers is *Zoltan Kiss* (BC EST #D122/96; reconsideration of BC EST #D091/96). Some of the typical grounds on which the Tribunal ought to reconsider one of its own orders or decisions, as set out in that Decision, include the following:

- Some *significant and serious evidence* has become available that would have led the Adjudicator to a different decision;
- Some *serious mistake* in applying the law ... (emphasis added).

The Tribunal also noted in *Zoltan Kiss* that it should exercise its reconsideration powers with "great caution", for several reasons:

- Section 2(d) of the *Act* establishes one of the purposes of the *Act* as providing fair and efficient procedures for resolving disputes over the application and interpretation of the *Act.* Employers and employees should expect that, under normal circumstances, one hearing by the Tribunal will resolve their dispute finally and conclusive. If it were otherwise it would be neither fair nor efficient.

- Section 115 of the *Act* establishes the Tribunal's authority to consider an appeal and limits the Tribunal to confirming, varying or canceling the determination under appeal or referring the matter back to the Director of Employment Standards (presumably, for further investigation or other action). These limited options (confirm vary or cancel a determination) imply a degree of finality to Tribunal decisions or orders which is desirable. 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 reason.

- It would be both unfair and inefficient if the Tribunal were to allow, in effect, two hearings of each appeal where the appeal hearing becomes nothing more than a discovery process for a reconsideration application.

- In his report, *Rights & Responsibilities in a Changing Workplace,* Professor Mark Thompson offers the following observation at page 134 as one reason for recommending the establishment of Tribunal:

> *The advice the Commission received from members of the community familiar with appeals system, the staff of the Minister and the Attorney General was almost unanimous. An appeals system should be relatively informal with the minimum possible reliance on lawyers. Cases should be decided quickly at the lowest possible cost to the parties and the Ministry. The process should not only be consistent with principles of natural justice, but be seen to meet those standards.*

Some further comments on the principles which should guide the Tribunal in exercising its discretion under Section 116 of the *Act* were set out in a recent reconsideration decision: *Director of Employment Standards* (BCEST #D313/98; Reconsideration of BCEST # D559/97) at page 6:

> The Tribunal has sought to exercise that discretion in a principled fashion, consistent with the fundamental purposes of the *Act*. One such purpose is to "provide fair and efficient procedures for resolving disputes over the application and interpretation of the Act": s. 2(d). Another is to "promote fair treatment of employees and employers": s. 2(b).
>
> 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 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": see *Re Zoltan T. Kiss* (BC EST #D122/96) ... (emphasis added).

And at page 7, the Tribunal elaborated further:

> 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) ... (emphasis added).

When I apply those principles to the particular circumstances of this request, I find that Mr. Mise has not made out a sufficient case for the Tribunal to exercise its discretion to reconsider the Original Decision. I make that finding for several reasons. Nothing in Mr.

Mise's reconsideration request establishes that the Adjudicator made a serious mistake of fact or law by finding that the Director did not err and by confirming the Determination that a settlement was reached by the parties in September, 1996.

Mr. Mise's submission places considerable emphasis on the issue of "work done at the employers' place of business" compared to "work performed away from the employers' place of business" and the Director's statutory authority to consider work he performed in Prince Rupert. He also disputes that there was a settlement because, in his submission:

> "In common law the fact that a cheque is cashed does not imply that the matter was resolved, there was no document signed by the principals and myself indicating that the matter was resolved..."

By focusing on those narrow points, Mr. Mise fails to give sufficient recognition to the fact that his appeal was decided following an oral hearing on August 26, 1998 and, based on all of the evidence adduced through the appeal, the Adjudicator made his findings of fact and concluded, on the balance of probabilities, that the dispute between Mr. Mise and his former employer had been resolved.

It is clear from the record before me that the Director's delegate, while investigating Mr. Mise's complaint, made considerable effort to determine the amount of work performed by Mr. Mise in Prince Rupert. As noted in the Director's submission of January 26, 1999: "There was never any question that work was performed in Prince Rupert and that no daily records were kept by either party. Reconstructing daily hours (of work) was the problem."

The essence of Mr. Mise's submissions, with respect, is an attempt to re-argue the same issues which were the subject of his appeal and were decided in the Original Decision. The intended purpose of Section 116 of the *Act* is not to provide an opportunity to re-argue an appeal. The intended purpose, as noted earlier, is to allow the Tribunal to deal with questions of fact or law which are "... so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases."

For all of these reasons, I find that the Tribunal should not exercise its discretion to reconsider the Original Decision.

ORDER

I order, that the Original Decision be confirmed.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC/lb