BC EST #D079/99
Reconsideration of BC EST #D369/98

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 -

Canadian Chopstick Manufacturing Co. Ltd.
("CCMC")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

RECONSIDERATION PANEL:	Geoffrey Crampton Carol Roberts Alison Narod
FILE NO.:	1999/036
DATE OF DECISION:	April 27, 1999

DECISION

OVERVIEW

This is a request by Canadian Chopstick Manufacturing Co. Ltd. ("CCMC"), under Section 116 of the *Act*, for reconsideration of a Decision of this Tribunal which was numbered BC EST #D369/98 (the "Original Decision").

The Original Decision confirmed the Determination which was made by a delegate of the Director of Employment Standards (the "Director"). The Determination found that Denise Carter, a former employee of CCMC, was entitled to compensation under Sections 63 and 64 of the *Act*.

CCMC submits that there are three grounds which support its request for reconsideration:

1. The Adjudicator erred in failing to consider the argument that the employee's decision to move from Fort Nelson could, in light of the surrounding circumstances, have constituted a voluntary termination of employment. In failing to consider this issue, the Adjudicator also failed to consider relevant evidence and to make critical findings of fact and credibility.

2. The Adjudicator erred in law by concluding that:

   a) statements evincing the employee's subjective intentions were not relevant on the basis that words of termination are necessary to effect a voluntary termination; and

   b) in the circumstances, the employee could retain a unilateral option to return to her employment as some point in the future.

3. New evidence is now available to establish conclusively that the employee had no intention of returning to her employment at CCMC. That evidence comes in the form of two sworn statements by Gary Verigin (Ms. Carter's former spouse) and Dorothy Verigin (Gary Verigin's Mother).

This reconsideration request proceeded by way of written submissions. The Director elected to make no submission in response to CCMC's application.

ISSUES TO BE DECIDED

The threshold issue we must decide is whether the Tribunal should exercise its discretion, under Section 116 of the *Act*, to reconsider the Original Decision. If we are satisfied there are sufficient grounds to exercise that discretion, then the issues raised by this request are, as set out above:

1. Did the Adjudicator err in failing to consider the argument that the employee's decision to move from Fort Nelson could, in light of the surrounding circumstances, have constituted a voluntary termination of employment. In failing to consider this issue, the Adjudicator also failed to consider relevant evidence and to make critical findings of fact and credibility.

2. Did the Adjudicator err in concluding that:

   a) statements evincing the employee's subjective intentions were not relevant on the basis that words of termination are necessary to effect a voluntary termination; and

   b) in the circumstances, the employee could retain a unilateral option to return to her employment as some point in the future.

3. Is CCMC entitled to rely on the new evidence which it seeks to adduce for the first time in this application?

FACTS

The issue to be decided by the Adjudicator in the Original Decision was whether the Director erred in finding that Denise Carter was an employee of CCMC on April 1, 1997 when it ceased operations and that she was entitled to compensation under Sections 63 and 64 of the *Act*.

Certain undisputed facts were set out at page 3 of the Original Decision:

> CCMC was located in Fort Nelson and manufactured chopsticks. It ceased operation effective April 1, 1997 due to a falling demand for its product in the Pacific Rim resulting from the downturn in the Japanese economy. Two hundred employees were terminated as a result. CCMC's head office was located in Vancouver where accounting and payroll were administered....
>
> Tom Gilgan was employed by CCMC as Manager of Human Resources in Fort Nelson.
>
> Denise Carter was employed by CCMC in its warehouse/stores operation as a purchasing clerk. In August, 1996 she went on short term disability until November 30, 1996 and then commenced long term disability leave. In January, 1997 she attempted a graduated return to her duties but was not able to continue. Her doctor in Fort Nelson had recommended that she attend the Victoria Pain Clinic located in Victoria, BC. Her supervisor throughout this time was Howard Bamford, department manager. Aetna Canada discontinued Ms. Carter's disability coverage after April 30, 1997 having

> determined that their independent medical examination supported her return to her own type of work.
>
> Garry Verigin, Ms. Carter's spouse, was a contractor who operated a log processor that he leased from CCMC.

CCMC's position on appeal was that Ms. Carter "voluntarily severed her employment" prior to April 1, 1997 and, as a result, is not entitled to either compensation for length of service or group termination pay.

A hearing was held on February 17, 1998 in Nelson, B.C. at which time evidence was given under oath by Denise Carter, Gary Verigin, Tom Gilgan, Edward Shoji and Jirina Senko.

The Original Decision contains a comprehensive recitation of the evidence adduced at the hearing, the record in the appeal file and the findings of fact which were made by the Adjudicator (see: pages 3 through 9 of the Original Decision).

As noted by the Adjudicator, at page 9 of the Original Decision, the onus lay with CCMC, as the appellant, to demonstrate on the balance of probabilities that the Director erred in determining that Ms. Carter was entitled to compensation under Sections 63 and 64 of the *Act*.

The Adjudicator reviewed the relevant legal test, as set out in an earlier decision of the Tribunal: *Wilson Place Management Ltd.* (BC EST #D047/96), before making a finding that CCMC had not "...advanced 'clear and unequivocal' evidence to support the conclusion that Ms. Carter voluntarily exercised her right to terminate her employment at CCMC." The Adjudicator found that:

> Ms. Carter's actions were entirely consistent with her genuine pursuit of medical assistance for her disability. Ms. Carter was in regular contact with her supervisor and the Manager of Human Resources regarding her medical difficulties and her plans. While she was in Fort Nelson she attended their offices in person, she left a forwarding address and phone number, she continued to contact them by telephone. She was acting on her doctor's advice to attend the pain clinic despite the great expense and upheaval to herself, her spouse and her daughter. She contacted her insurance company to inform them of her plan. Everyone giving evidence agreed that both Ms. Carter and Mr. Verigin stated they were leaving to be near medical assistance.
>
> CCMC's Vice President felt it was sufficient to conclude that Ms. Carter had terminated her employment based on information from a manager of an entirely separate and unrelated department; information which was acquired outside the work place at a social gathering. Neither Ms. Carter's supervisor nor the Manager of Human Resources were apprised of this information. Mr. Gilgan himself testified that he had to chase down a "rumour" to arrive at the conclusion that Ms. Carter had resigned. I find

from this testimony that whatever he claimed he was told by Ms. Carter at P&J's restaurant on March 18, 1997, he clearly did not consider it to have constituted termination. He also testified that normally the termination would have come through his office and through Mr. Bamford, her supervisor. Mr. Shoji testified that he "assumed" Mr. Gilgan knew of the termination. Mr. Shoji did not confirm with the Manager of Human Resources, Ms. Carter's supervisor or Ms. Carter herself that she had resigned. Given the structure of the Appellant's organization and given the knowledge on the part of everyone concerned that Ms. Carter was acting on her medical condition, it would not have been unreasonable for the Appellant to obtain confirmation from the appropriate individuals that she had terminated her employment. I find on balance that the Appellant's argument that any manager could accept any employee's resignation is not sufficient to substantiate a termination in this particular case where the employee has consistently kept her recognized superiors informed of her actions and has been available for contact.

The Subjective Element:

I find that the Appellant has not shown that Ms. Carter intended to quit. Ms. Carter testified that she did not intend to quit. Even if Ms. Carter did make statements that she was not returning to Fort Nelson I find that these were made outside the workplace, to people with whom she had socialized before, who had no authority over her at work and in circumstances where she could legitimately exercise the option to return or not if she desired at a later time. I find that these statements in and of themselves would not be sufficient to constitute the termination of her employment. There was no evidence that Ms. Carter stated that she quit or that she did not want her job any longer.

The Objective Element:

I find that Ms. Carter's actions were not inconsistent with further employment. She was acting on the then current circumstances in her life. If the Appellant had not ceased operations it would have been open to Ms. Carter to seek a continuation of her employment if her circumstances allowed. That would have been an option for her to exercise later. She clearly could not predict what her circumstances would be at the time she made arrangements to leave town in order to attend a pain clinic after having seen numerous physicians and attempting to return to work. The Appellant does not dispute that it assisted in arranging for Ms. Carter to be on long term disability leave nor that her being on this leave meant that she ceased to be an employee. The Appellant argued that Ms. Carter's job had been filled. I find that if there was no job to offer Ms. Carter when and if she returned to work, then that termination would be at the employer's initiative, not the employee's.

I find on balance that the Appellant has not satisfied its burden of proving that the Director erred in the decision that Ms. Carter was an employee of CCMC on April 1, 1997 when CCMC closed and ceased operations and that she was entitled to compensation for length of service.

After careful consideration of the testimony and lengthy submissions, I find that the Director's Determination is correct and the appeal should be dismissed.

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.

We note that this provision gives the Tribunal a discretion to reconsider its decisions depending on the merits of a particular request. There are limited circumstances under which a request for reconsideration will be successful. A reconsideration should not be simply another opportunity to review the evidence and re-argue before another panel of the Tribunal.

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; or some *serious mistake* in applying the law .

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* (BC EST #D313/98; Reconsideration of BC EST #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* (BC EST #D199/96, reconsideration of BC EST #D114/96)... (emphasis added.)

CCMC acknowledges and does not dispute that the appropriate test for determining whether an employee has voluntarily terminated her employment has two elements to it: there is both a subjective and an objective element to a quit. This is the test which the Adjudicator adopted, at page 10 of the Original Decision, and which she used to analyze the facts at pages 11 and 12. However, CCMC submits, the Adjudicator failed to properly address both the subjective and the objective elements of the evidence which was before her in the appeal.

With respect to the subjective element, CCMC submits, the Adjudicator failed to properly consider Ms. Carter's intentions by focusing on whether Ms. Carter's statements to friends or co-workers "were sufficient to effect a termination of the employment relationship" and then went on to conclude incorrectly that her statements were not relevant under this branch of the test. CCMC also submits that:

> It cannot be the case that an employee retains an option to return [to work] after the employment relationship is severed. Therefore, before reaching this conclusion, the Adjudicator was required first to make a finding concerning Ms. Carter's intention on leaving Fort Nelson, which she did not do.

CCMC submits, further, that it was denied a fair hearing because the Adjudicator failed to properly weigh the evidence and the credibility of the witnesses.

On the objective element of the two-part test, CCMC submits that evidence adduced in the appeal was sufficient to establish that Ms. Carter acted in a manner which was inconsistent with continued employment and demonstrated "extreme indifference to her employer".

In Summary, CCMC submits;

> The Adjudicator failed to consider CCMC's primary argument on appeal.
>
> The Adjudicator made errors of law, specifically:
>
> a) in failing to consider evidence of the employee's statements concerning her employment on the basis that it was not relevant unless it constituted express notice of termination; and
> b) in concluding that the employee retained a unilateral option to return to her employment.
>
> Additional evidence is now available which, if adduced at the hearing, would have led to a different result.

We find this to be an appropriate case for reconsideration. It involves an important question of law under the *Act* and it meets the criteria, as set out above, which have been adopted consistently by the Tribunal. Also, in the particular circumstances of this application, the application should not be rejected on the ground that it was untimely.

In exercising its discretionary reconsideration powers, the Tribunal is not required to reconsider a decision or order simply because a new fact, however insignificant, has been brought forward. Rather, there must be "significant and serious evidence...that would have led the Adjudicator to a different decision". (*Zoltan Kiss*, supra). If it were otherwise, it would undermine the final and conclusive nature of the appeal process as well as the 'fair and efficient' purposes set out in Section 2 of the *Act*. However, we must not set too high a standard for the possible significance of the new evidence which is offered in support of the request for reconsideration: *Castro v. Canada (Minister of Employment and Immigration*),[1988] 86 N.R. 356 (Federal Court of Appeal).

There has been a long-standing practice in British Columbia labour relations of being reluctant to review decisions because of new evidence: see, for example, *Brinco Coal Mining Corporation*, (BCLRB No. B74/93, February 26, 1993) in which the BC Labour Relations Board enunciated its reasons for being reluctant to review the inferences which might be drawn from facts found by an original panel.

The BC Court of Appeal in *Bradbury v. I.C.B.C.* [1984] 42 B.C.L.R. (2d) 397, dealt with the issue in this way (at p. 399):

> ...the foundation of the reluctance of appellate courts to permit fresh evidence is founded in the maxim *interest reipublicae ut sit finis litium*.
>
> From that concept comes the requirement in all the fresh evidence cases that the person who seeks to adduce it must use all reasonable diligence to find all the evidence before the trial.
>
> But is also a purpose of Rules of Court that justice should be done. By justice I mean that the law should be applied to the true facts of the case. Some of the cases speak of the evidence being conclusive. But evidence must be weighted in two respects: First, its significance if true, and then the question of its truth.

In our view, the Tribunal should be reluctant to rely on new evidence as a ground for reconsidering one of its decisions or orders. We must be satisfied that the new evidence offered at reconsideration was not available at the time of the appeal hearing and could not have been obtained earlier through the exercise of reasonable diligence by the party seeking to rely on it at reconsideration. Also, there must be a strong probability that the new evidence will have a material and determinative effect on the Original Decision. That is, the evidence, if accepted by the Adjudicator, would have been practically conclusive in deciding the issues in the Original Decision.

Our review of the statements sworn by Gary Verigin and Dorothy Verigin on January 10, 1999 leads us to conclude that we should not allow CCMC to rely on this evidence in this reconsideration application. We reach that conclusion for two reasons. The evidence could have been available, with due diligence, at the time of the hearing on February 17, 1998. Also, we are not satisfied that the evidence, if made available to the Adjudicator, would have been conclusive in deciding the Original Decision.

However, that is not the end of the matter. Our review of the reasons contained in the Original Decision suggests that the Adjudicator may not have considered the subjective evidence with sufficient care and attention. There is no dispute that Ms. Carter moved from Fort Nelson. Her move, ("objective" evidence) however, is a neutral factor in deciding the reasons ("subjective" evidence) for Ms. Carter's decision to leave Fort Nelson. The Adjudicator found, at page 11, that "....Ms. Carter's actions were entirely consistent with her genuine pursuit of medical assistance for her disability." Also, the Adjudicator found that CCMC "...had not shown that Ms. Carter intended to quit: and that "...Ms. Carter's actions were not inconsistent with further employment." But, in our review of the reasons

contained in the Original Decision, the Adjudicator appears not to have answered a crucial question: did Ms. Carter intend to leave Fort Nelson permanently or temporarily?

In our view, the fact that Ms. Carter left Fort Nelson to seek medical treatment (the objective element) is not, in itself, determinative of her subjective intentions. That is, Ms. Carter's move could be explained by either her intention to seek medical assistance or, in the context of all the surrounding circumstances, she could have been acting in a manner which was incompatible with her continued employment with CCMC.

Thus, we consider the Adjudicator's analysis of the facts to be problematical. The Adjudicator, having set out the correct test (that there is both a subjective and an objective element to the act of quitting), then analyzed the facts under the two branches of that test.

Applying the subjective test, the Adjudicator found that "there was no evidence that Ms. Carter stated that she quit or did not want her job any longer." Reviewing the evidence before the Adjudicator, we find there was evidence that Carter did say she quit. The Adjudicator appears to have rejected that evidence because it was not made to a supervisor or while Ms. Carter was in the workplace. We are unable to find any authority for the proposition that statements of quitting need be made either in the workplace, or to someone in a position of direct authority over the employee, to be a reliable and valid indicator of a person's subjective intentions.

In applying the objective test, the Adjudicator found that "Carter's actions were not inconsistent with further employment." We find that we cannot reconcile the evidence with this finding. The evidence before the Adjudicator was that Carter moved from Fort Nelson, although it is unclear from the evidence whether that was a temporary move or a permanent one. It is also unclear that Ms. Carter had, in fact, been accepted as a suitable candidate for the pain treatment program. She left Fort Nelson knowing only that she would be assessed and, without knowing the results of that assessment, whether she would be admitted to the program. Furthermore, if accepted as a suitable candidate for the program, the date when the pain treatment program would begin was also unknown at the time Ms. Carter decided to move from Fort Nelson. The fact that Carter's common law spouse had sold his company and was moving away would support the Employer's argument that Carter intended to move permanently. There was no evidence regarding the length of the pain clinic program which Ms. Carter intended to take nor any other factors which might impact on a determination of whether the move was permanent or temporary. We note also that Ms. Carter left Fort Nelson approximately six weeks before her assessment was to take place, yet the Adjudicator made no finding about why she decided to leave so far in advance of the assessment dated. We are also troubled by the fact that the Adjudicator did not consider that Ms. Carter removed herself and all her household effects from Fort Nelson solely for the purpose of attending a pain management program which, by itself, would not require her to relocate permanently.

Therefore, we find that the Adjudicator erred in applying the facts as she found them to the correct legal test. In our view, the facts as set out in the Original Decision establish that Ms. Carters's actions were

inconsistent with continued employment with CCMC after March 23,1997 when she moved from Fort Nelson. The Adjudicator did not consider: that Ms. Carter moved from Fort Nelson without knowing if she was a suitable candidate for the pain management program; that her initial participation would be for assessment purposes only; and, that there was no substantive reason for her to move so far in advance of the assessment taking place.

ORDER

We order, under Section 116(1)(b) of the *Act*, that the Original Decision be cancelled for all of the reasons given above. We also order that the Determination be cancelled for the same reasons.

Carol Roberts
Adjudicator
Employment Standards Tribunal

Alison Narod
Adjudicator
Employment Standards Tribunal

Geoffrey Crampton
Chair
Employment Standards Tribunal