BC EST # D081/98
Reconsideration of BC EST # D395/97

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-

Laguna Woodcraft (CANADA) Ltd.
("Laguna")

-of a Decision issued by-

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 97/854

DATE OF DECISION: April 2, 1998

DECISION

OVERVIEW

This is an application filed by Laguna Woodcraft (CANADA) Ltd. ("Laguna") pursuant to section 116 of the Employment Standards Act (the "Act") for reconsideration of an adjudicator's decision issued, following a two-day hearing, on September 5th, 1997 under file number 96/743. In his decision, the adjudicator confirmed a $500 penalty assessed against Laguna and remitted certain other matters back to the Director for recalculation.

In Determination No. CDET 004598 the Director assessed a $500 penalty for failure to produce payroll records. In a related Determination issued under number CDET 004900 by the Director of Employment Standards (the "Director") on December 5th, 1996, the Director held that Laguna owed its former employee, Palwinder Singh Saprai ("Saprai"), the sum of $8,755.84 on account of unpaid wages (the "Determination"). There were six matters dealt with in the Determination--Saprai's entitlement to overtime, statutory holiday and vacation pay, whether he pad been paid for his last four days of work, compensation for length of service and the base hourly wage rate ($10 or $8).

The Director held in Saprai's favour on all issues save for the wage rate, which was determined to be $8 rather than $10 per hour. Laguna appealed the Determination asserting that it did not "owe [Saprai] anything". Laguna also appealed a $500 penalty determination that was issued on November 8th, 1996.

Following a two-day hearing, the adjudicator confirmed the "penalty determination". The adjudicator found that Saprai had, in fact, quit his employment and, accordingly, was not entitled to compensation for length of service by reason of section 63(3)(c) of the *Act*. Further, the adjudicator also found, relying on a cancelled cheque issued to Saprai by Laguna, that Saprai had, in fact, been paid for his last four days of work--March 23rd, 25th, 26th and 27th, 1996. Saprai's claims for vacation, statutory holiday and overtime pay were substantially upheld. The adjudicator upheld the Director's Determination that the applicable wage rate was $8, not $10, per hour.

Laguna's request for reconsideration is contained in a six-page letter, dated November 21st, 1997, submitted to the Tribunal on behalf of Laguna by Keylock Consulting Ltd. (a firm styled as a "Industrial Relations Services" provider). Laguna's agent advanced a number of grounds in support of its request for reconsideration but primarily argues that the adjudicator misconceived the evidence before him.

ANALYSIS

The Tribunal has issued several decisions regarding the permissible scope of review under section 116 of the Act (the "reconsideration" provision). In essence, the Tribunal has consistently held that applications for reconsideration should succeed only when there has been a demonstrable breach of the rules of natural justice, or where there is compelling new evidence that was not available at the time of the appeal hearing, or where the adjudicator has made a fundamental error of law. The reconsideration provision of the *Act* is not to be used as a second opportunity to challenge findings of fact made by the adjudicator, unless such findings can be characterized as lacking any evidentiary foundation whatsoever.

Much of Laguna's submission is nothing more that an attempt to reargue its case using the reconsideration provision of the *Act* as a springboard. However, it bears repeating that reconsideration is not a trial *de novo*. I have carefully reviewed the adjudicator's decision as well as the documents and submissions that were before him and am entirely satisfied that there was an evidentiary basis for each and every one of his findings.

In its reconsideration request, Laguna also makes the point that the employer submitted payroll records spanning a longer period than is suggested by the adjudicator in his Reasons. However, this particular submission misses the point that the payroll records submitted, regardless of what period they spanned, were nonetheless incomplete and not in compliance with sections 27 and 28 of the *Act.*

I also understand that the employer is now taking the position that it has in its possession payroll records that might undermine the complainant's claim for vacation pay and overtime. However, as noted above, the test for admissibility of new evidence on reconsideration is "unavailability" at the time of the appeal hearing--clearly, the proffered payroll records were available to be produced to the Director in the first instance and also to the adjudicator at the appeal hearing (see *Kaiser Stables Ltd.* (B.C.E.S.T. Decision No. D058/97).

ORDER

The application to vary or cancel the decision of the adjudicator in this matter is refused.

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal