An application for Reconsideration

- by -

AMS Consulting Ltd.
("AMS")

- 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: Carol L. Roberts

FILE No.: 2007A/84

DATE OF DECISION: September 19, 2007

DECISION

SUBMISSIONS

George Kos:	On behalf of AMS Consulting
John Dafoe:	On behalf of the Director of Employment Standards
Shannon McKenzie:	On her own behalf

OVERVIEW

1. This is an application by AMS Consulting Ltd. ("AMS") for a reconsideration of Decision #D053/07 issued by the Tribunal on June 14, 2007.

2. Shannon McKenzie filed a complaint with the Employment Standards Branch alleging that AMS contravened the Act by failing to pay banked time and overtime wages. On February 16, 2007, a delegate of the Director of Employment Standards issued a Determination finding that AMS had contravened sections 17 and 40 of the *Act* in failing to pay Ms. McKenzie wages and overtime.

3. AMS appealed the Determination on the grounds that the Director had erred in law in concluding that the alleged overtime hours worked prior to February 9, 2005 constituted a "time bank" pursuant to section 42 of the *Act*, and in concluding that Ms. McKenzie was entitled to be paid overtime wages. AMS argued that Ms. McKenzie was a manager and thus not entitled to overtime pay. AMS also appealed on the grounds that the Director had failed to observe the principles of natural justice in making the Determination. Specifically, AMS contended that because the delegate was predisposed to find a contravention of the *Act* he therefore failed to conduct an impartial investigation.

4. The Tribunal Member found that the Director's delegate concluded that Ms. McKenzie had not been paid in accordance with the Act for the hours she worked for the last six months of her employment and that he had done so without any reference to a "time bank". The Member found no error of law in this respect.

5. The Member considered AMS's argument that Ms. McKenzie was a manager and thus not entitled to overtime wages even though that argument had not been made before the delegate. The Member concluded that because AMS did not have access to "expertise" prior to the determination, he would address that ground of appeal. The Member reviewed the definition of "manager" contained in the *Employment Standards Regulation*s and concluded that AMS had provided insufficient evidence that Ms. McKenzie's principal employment responsibilities consisted of those described in the definition or that she was employed in an executive capacity. The Member dismissed this ground of appeal.

6. The Member found no evidence that the delegate was biased against AMS. The Member said that the fact the delegate considered AMS witness statements "spoke against" AMS's claim that the delegate only pursued avenues of investigation to confirm her position", and dismissed the appeal on this ground.

TIMELINESS

7. The application for Reconsideration was filed July 30, 2007. Although the *Act* does not set out a time limit for the bringing of an application, the Rules provide that reconsideration applications should be brought within 30 days. This application was made approximately 45 days after the decision was issued. The Director took no position on the timeliness of the application. Ms. McKenzie submitted that there was no good reason for the delay as AMS had sufficient opportunity to review all the material it required to file the application, and that, in any event, the application was simply an attempt to have the Tribunal "re-weigh" the evidence.

8. In *Director of Employment Standards*, (BC EST #RD046/01) the Tribunal set out the following principles to be considered relating to timeliness of applications:

- The Tribunal will properly consider delay in deciding whether to exercise the reconsideration discretion
- Where delay is significant, an applicant should offer an explanation for the delay.
- Delay combined with demonstrated prejudice to a party will weigh even stronger against reconsideration. In some cases, the Tribunal may presume prejudice based on a lengthy unexplained delay alone.
- Even in cases of unreasonable delay, the Tribunal ought to consider the merits, and retains the discretion to entertain and grant a reconsideration remedy where a clear and compelling case on the merits is made out.

9. In my view, although there was some delay in filing the application, the delay is not significant. Although I find some prejudice to Ms. McKenzie in that any wages payable to her would be delayed, that delay is not undue. There is no evidence she would experience any hardship as a result of a delay of less than one month.

ARGUMENT

10. AMS says the Member "erred in law and/or contravened the principles of natural justice", and identifies the following errors:

- AMS refers to the Member's quote "what were Buemann's hours of work…" and says that this raises the issue of whether the Member "applied the correct set of facts and information to the appropriate decision". AMS says that the reference to Buemann "indicates that the Member was at best confused or at worst, mixed information from one appeal with information from another which brings into question the correctness of the decision.
- AMS references the Member's comment about Hans Suhr's involvement in the file not commencing until March 22, 2007 as demonstrating the Member's failure to read the file correctly or completely. Mr. Kos says that had the Member reviewed the file he would have noted letters to and from Mr. Suhr well before March 22, 2007.

- AMS refers to the delegate's response to the appeal and says that the issue of whether Ms. McKenzie was a manager was raised well before the appeal documents were filed. Mr. Kos references a number of documents in advancing the argument that Ms. McKenzie was a manager.

- AMS says that the Member's analysis of the delegate's decision to accept Ms. McKenzie's evidence as credible "totally ignores the vast amount of information that was supplied to both the delegates of the Director and the Tribunal for the appeal." He says that the evidence does not support the conclusion that Ms. McKenzie was truthful and for the delegate to accept it as such leads to a bias on the part of the Director to prefer an employee's evidence over that of an employer.

- AMS further contends that there is new evidence that was not available at the time of the investigation. Under this heading, AMS suggests that Ms. McKenzie was involved in "…circumstances intended to destroy the employer and/or the principals of the employer". Although AMS says that it encloses documents to support this allegation, none of those documents were attached to the appeal.

11. In conclusion, AMS says that there are "significant irregularities" in the original decision such that it is appropriate for the Tribunal to suspend collection action in respect of the Determination.

12. The delegate contends that the primary focus of the Applicants' submissions is to try to have the Reconsideration panel re-weigh the evidence and/or reconsider prior submissions on the evidence, including points previously decided. The delegate says that although the Member mistakenly referred to Ms. McKenzie as Ms. Buemann, AMS fails to indicate how the analysis of the facts and law is incorrect. He submits that AMS is attempting to turn a typographical error into an error of law and that cannot be supported upon a reading of the decision. The delegate says that although the Member's statement that Han Suhr was not involved in the appeal until quite late in the process was incorrect, that is not a ground for reconsideration. The delegate submits that had the Member correctly determined the timing of Mr. Suhr's involvement in the file his reasons in the decision suggest that he would have been far more likely to dismiss this ground of appeal on the grounds that the argument had not been raised during the investigation. Further, the delegate says that the Member found, on the evidence, that Ms. McKenzie was not a manager and rather than demonstrate any error of law in this conclusion, AMS is simply re-arguing this finding.

13. Finally, the delegate submits that while AMS contends that the Member erred in upholding the delegate's conclusions about Ms. McKenzie's credibility, it has failed to demonstrate those errors.

14. With respect to the "new evidence" argued by AMS, the delegate says there is no evidence of anything at issue on this matter and has not responded to this ground of appeal.

15. The delegate opposes the suspension request on the basis that the reconsideration application lacks merit.

16. Ms. McKenzie submits that the reconsideration application should be dismissed on the basis that it constitutes an attempt to have the Tribunal re-weigh evidence already submitted and considered by the Tribunal at first instance.

ISSUES

17. There are two issues on reconsideration:

1. Does this request meet the threshold established by the Tribunal for reconsidering a decision?

2. If so, should the decision be cancelled or varied or sent back to the member?

ANALYSIS

18. The *Employment Standards Act,* R.S.B.C. 1996 c. 113 ("Act") confers an express reconsideration power on the Tribunal. Section 116 provides

> (1) On application under subsection (2) or on its own motion, the tribunal may
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> (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.

The Threshold Test

19. The Tribunal reconsiders a Decision only in exceptional circumstances. The Tribunal uses its discretion to reconsider decisions with caution in order to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *Act* detailed in Section 2 "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act."

20. In *Milan Holdings (BCEST # RD313/98)* the Tribunal set out a two-stage analysis in the reconsideration process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. The primary factor weighing in favor 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. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration.

21. The Tribunal may agree to reconsider a Decision for a number of reasons, including:

- The member fails to comply with the principles of natural justice;
- There is some mistake in stating the facts;
- The Decision is not consistent with other Decisions based on similar facts;
- Some significant and serious new evidence has become available that would have led the member to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and

- The Decision contains a serious clerical error.

(*Zoltan Kiss* BC EST#D122/96*)*

22. While this list is not exhaustive, it reflects the practice of the Tribunal to use its power to reconsider only in very exceptional circumstances. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.

23. After weighing these and other factors, the Tribunal may determine that the application is not appropriate for reconsideration. Should the Tribunal determine that one or more of the issues raised in the application is appropriate for reconsideration, the Tribunal will then review the matter and make a decision. The focus of the reconsideration member will in general be with the correctness of the decision being reconsidered.

24. In *Valoroso* (BC EST #RD046/01*),* the Tribunal emphasized that restraint is necessary in the exercise of the reconsideration power:

> .. the Act creates the legislative expectation that, in general, one Tribunal hearing will finally and conclusively resolve an employment standards dispute…

25. There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the "winner" is not deprived of the benefit of an adjudicator's decision without good reason. A third is to avoid the image of a tribunal process skewed in favor of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

26. Having considered the Applicant's submission, I am not persuaded that this is an appropriate case to exercise the reconsideration power for the following reasons:

27. The Applicant makes several assertions of errors without any analysis of the alleged error. AMS has not demonstrated a sound basis for exercising the reconsideration power in the absence of a legal basis to do so. To reiterate, the Tribunal will not "second guess" a decision, or "re-examine" the entire record without a foundation to do so. A disagreement with the result, in itself, is not a basis for re-examining the documents on reconsideration.

28. Two of the arguments in support of the reconsideration relate to either a typographical error or a misreading of the file by the Member. Although these errors are unfortunate and perhaps give rise to a concern that the Member did not carefully consider the material before him, they do not, in and of themselves, support reconsideration of the decision. The Applicant must demonstrate how the errors are something more than inadvertent and go to the root of the decision. I have reviewed the documents and am unable to conclude that the errors are substantive. With respect to the first error, the record discloses that two employees filed substantially similar complaints at about the same time, and Determinations were issued concurrently. Both Determinations were appealed and the same Member decided both appeals. It appears the Member wrote one decision for both appeals and omitted changing pertinent details for each appeal. Without any evidence that this omission goes to the substance of the decision, I decline to exercise the reconsideration power.

29. With respect to the second error, that being a misreading of the documents and concluding that Hans Suhr had not been involved with the file until the appeal was filed, the Member's error operated in AMS's favor. The Member considered an issue on appeal that had not been raised before the delegate because of this error and might not have done so otherwise. These errors do not support a re-weighing of the evidence.

30. With respect to the argument that Ms. McKenzie was a manager, the Applicant provides no evidence of an error of law in the Member's analysis. As noted above, this argument was not raised before the delegate at first instance even though AMS had an experienced advocate representing it. Although it was not an appropriate issue to address on appeal, the Member nevertheless did so. The Member found that AMS had not provided sufficient evidence to establish that Ms. McKenzie's principal employment responsibilities consisted of supervising and directing, or both supervising and directing, human or other resources, or employed in an executive capacity. I find no error of law in this conclusion. There is no evidence that Ms. McKenzie had any power of independent action, autonomy and discretion with respect to decisions affecting the conduct of the business, nor is there any evidence she supervised other employees. The evidence is that her job description was, in reality, that of a bookkeeper rather than a "financial administrator". Ms. McKenzie reported to Mr. Kos and there is no evidence she directed other staff or approved their time off as Mr. Kos asserts. I find no basis to exercise the reconsideration power on this issue.

31. With respect to the Member's decision on the issue of Ms. McKenzie's credibility, it is not sufficient for AMS to say that his conclusion was wrong. The Member reviewed the record and concluded that the delegate properly weighed and assessed the evidence before him. The Member noted the delegate's consideration of the claim and the "careful evaluation and recounting of the evidence of the witnesses in that regard". I note that although both Ms. McKenzie and AMS provided written statements from witnesses to support their positions, the delegate made no finding on Ms. McKenzie's credibility. Rather, he found that her claim was supported by the documentary evidence. He determined that Ms. McKenzie's co-workers as well as the employer were aware that Ms. McKenzie was accumulating "flex" time, and of the 12 time sheets for the period in question, Mr. Kos or Andrea McKenzie, AMS's managers, signed off on eight of them. The delegate noted AMS's arguments "that the time sheets should not be accepted as an accurate record of hours worked" but concluded that AMS had "been unable to provide an alternative version of McKenzie's hours of work". The delegate concluded Ms. McKenzie's records were the best evidence of the hours of work. The Member upheld this aspect of the Determination, and I find no basis to exercise the reconsideration power in this respect.

32. The Applicant also says that the delegate demonstrated bias by preferring Ms. McKenzie's evidence over his. Other than restating his arguments on this issue, AMS does not say how the Member erred in concluding that AMS had failed to demonstrate bias. Differences of opinion do not support a finding of bias. As the Tribunal has noted on many occasions:

> an allegation of bias against a decision maker is serious and should not be made speculatively. It ought not be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound bias for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause (*Adams v. British Columbia (Workers' Compensation Board*), [1989] B.C.J. No 2478 (C.A.).
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> To say that someone is unable to give an unbiased decision when he sits, in whatever capacity, deciding things between other people, is an affront of the worst kind, and unless it is well founded

> upon the evidence, it is not something that should ever be said. (*Vancouver Stock Exchange v. British Columbia* (*Securities Commission*) (B.C.C.A.) September 28, 1999)

33. The onus of demonstrating bias lies with the person who is alleging its existence. Mere suspicions, or impressions, are not enough. I find no basis to exercise the reconsideration power on this issue.

34. Finally, although AMS submits that it has new evidence, none was attached to the reconsideration application.

35. After a review of the original decision, the materials in the file and the submissions, it is my view that the Applicant has not shown that it is appropriate to reconsider the conclusions reached by the Member in the original decision.

36. In light of my conclusion on the application for reconsideration, it is unnecessary to consider the application by AMS under Section 113 of the Act for a suspension of the effect of the Determination and decision. That application is moot and, on that basis, is denied.

ORDER

37. Pursuant to Section 116 of the *Act*, I deny the application for reconsideration and confirm the original decision.

Carol L. Roberts
Member
Employment Standards Tribunal