BC EST #D095/98
Reconsideration of BC EST #D574/97

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 -

Scott E. Alexander operating as Peregrine Consulting
("Alexander")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: G. Crampton

FILE NO.: 98/037

DATE OF DECISION: March 3, 1998

DECISION

OVERVIEW

Scott E. Alexander operating Peregrine Consulting ("Alexander") filed an application, under Section 116 of the *Employment Standards Act* ("the *Act*"), for a reconsideration of a Decision, issued by this Tribunal on January 5, 1998 and numbered as BCEST #D574/97 ("the Original Decision"). The Original Decision resulted from an appeal by Alexander against a Determination which was issued by a delegate of the Director of Employment Standards on July 15, 1997.

The Determination resulted from a complaint by Todd William Cashin ("Cashin") and concluded that Alexander had contravened the *Act* by failing to pay Cashin at the negotiated wage rate, failing to pay wages for all work performed by Cashin, failing to pay overtime wages, failing to comply with minimum daily pay requirement and making unauthorized deductions from wages payable. The Director's delegate ordered Alexander to pay $654.60. Alexander appealed all aspects of the Determination.

A hearing of Alexander's appeal against the Determination was held over three days (October 27, November 10, and November 24, 1997). The Original Decision dealt with the various issues which Alexander raised in his appeal:

i. Whether all of the work performed by Cashin during the relevant period of time was work for which Alexander was the employer and therefore legally required to pay the wages earned by Cashin;
ii. What was the negotiated wage rate for the work performed by Cashin;
iii. Whether Cashin inflated his hours of work and caused the Director to err in the calculation of regular and overtime wages owed;
iv. Whether Alexander, in the appeal process, can introduce a claim to set-off amounts which Alexander says were paid to, but not earned by, Cashin against any wages which at the end of the day may be owed to Cashin and, if so, whether any claim of set-off has been proved, and;
v. The evidentiary value of three letters from former employer of Alexander concerning Cashin's credibility.

Alexander submitted his written application for a reconsideration on January 16, 1998. The Tribunal provided a copy of Alexander's application to the Director's delegate and to Cashin with a request that they forward a written response no later than February 10, 1998. Neither party has responded to the application and, therefore, this Decision is made solely on the basis of a thorough review and analysis of Alexander's application.

The remedies which Alexander seeks by way of this reconsideration are that:

- the Original Decision be set aside
- the Determination be set aside; and
- "his name be cleared of any wrong-doing."

He goes on to note that:

> Seventy five percent of Cashin's claim has already been determined to be unfounded and frivolous. Please give me the opportunity to be treated fairly and justly, and do not allow this complainant to exploit a system which was never intended for such a purpose. To do so is an insult to the principles and ethics under which this legislation was founded.

ANALYSIS

Before turning to an analysis of this particular reconsideration application, I believe it is helpful to summarize earlier decisions of the Tribunal concerning the grounds on which a reconsideration will be undertaken.

Section 116 of the *Act* does not set out the grounds on which a reconsideration may be granted. Some of the more usual or typical grounds on which the Tribunal will reconsider a decision were set out in *Zoltan T. Kiss (*BCEST #D122/96), as follows:

- a failure by the Adjudicator to comply with the principles of natural justice;
- there is some mistake in stating the facts;
- a failure to be consistent with other decisions which are not distinguishable on the facts;
- some significant and serious new evidence has become available that would have led to the Adjudicator to a different decision;
- some serious mistake in applying the law;
- some misunderstandings of or a failure to deal with a significant issue in the appeal, and
- some clerical error exists in the decision.

This, of course, is not an exhaustive list of the possible grounds for reconsidering a decision or order.

This reasoning has been adopted in several other decisions (see, for example, *Director of Employment Standards* - BCEST# D344/96; BCEST# D47997; and BCEST# D331/97). In short, these decisions stand for the principle that Section 116 of the *Act* was not intended to provide a second opportunity to challenge findings of fact which have been

made by an adjudicator, especially when such findings follow an oral hearing. I agree with and adopt that view of the purpose of Section 116 of the *Act*.

It is important to note that the Original Decision which is subject of this application was made following a hearing in which evidence was given over three days.

These are six grounds or reasons that Alexander gives in support of his application, which can be summarized as follows:

1. Alexander's documentary evidence should have been preferred by the Adjudicator wherever it differed from Cashin's oral testimony because, in Alexander's view, Cashin was not a credible witness.

2. Cashin should have been chastised by the Adjudicator for his untruths in giving evidence.

3. Three letters from former employees should have been given more weight by the Adjudicator.

4. The Adjudicator's findings of fact concerning Cashin's wage rate were erroneous.

5. The Adjudicator's findings concerning Cashin's entitlement to payment of wages for three days training were erroneous.

6. Alexander's payroll records should have been preferred by the Adjudicator over Cashin's oral testimony.

I will now deal with each ground or reason for this reconsideration application.

Alexander's documents vs. Cashin's testimony

Alexander submits that Cashin did not offer any documents to the Adjudicator which would verify his claims:

> He (Cashin) offered only his word that the facts in this case were as he claimed them to be. I, on the other hand, produced 75 pages of documentation, including payroll records, cancelled cheques, program schedules, and even letters of support and testimony from the complainant's co-workers.
> ...
> The simple fact that this young man had eventually been awarded only 25% of the monies he claimed were owed him should be proof enough that he had been from the very outset of this affair untruthful and devious in

> his dealings with both the Labor Standards Branch here in Kelowna, as well as the Appeal Tribunal (sic).

In my view, this is not an appropriate ground in which to reconsider the Original Decision as it would be contrary to the purposes of Section 116 of the *Act* and, equally, contrary to the principles of natural justice if I were to attempt to overturn the Adjudicator's finding of fact. The Adjudicator has heard the oral testimony (including cross examination), has heard the parties arguments and has reviewed the various documents which were submitted in evidence prior to making his decision. It is clear on the face of the Original Decision that the Adjudicator discharged his responsibilities in a manner which ensured that the parties were given a fair hearing.

Cashin's alleged untruths

Alexander submits that despite giving his testimony under oath, Cashin "...was caught time and time again, in lie after lie, and was not even chastised by (the Adjudicator), let alone charged with perjury." He then submits that the Adjudicator "did nothing" when Cashin "was proven to have lied" and that he "allowed (Cashin) to alter his statements time and time again, in direct conflict with..." statements made when he made his complaint originally.

In my opinion, this aspect of Alexander's submission misconstrues the Adjudicator's role and responsibilities. An adjudicator is neither counsel nor an advocate for any one of the parties to an appeal. As the appellant appearing before the Adjudicator, Alexander bore the onus of establishing through evidence and argument that the Adjudicator should cancel or vary the Determination. The Adjudicator's role and responsibilities required him to hear and consider that evidence and argument and to decide, on the balance of probabilities, if the Director's delegate had erred in making his Determination.

The views of the late Mr. Justice O'Halloran of the Court of Appeal of British Columbia in *Faryna V. Chorny*, (1952) 2 DLR 354 (BCCA) have been widely accepted on how the issue of credibility ought to be assessed by a decision - maker.

> The credibility of interested witnesses, particularly in cases of conflict of evidence, cannot be gauged solely by the test of whether the personal demeanor of the particular witness carried conviction of the truth. The test must reasonably subject his story to an examination of its consistency with the probabilities that surround the currently existing conditions. In short, the real test of the truth of the story of a witness in such a case must be its harmony with preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions. ...(pp.356-57)
>
> ...

> A Court of Appeal must be satisfied that the trial Judge's finding of credibility is based not on one element only to the exclusion of others, but is based on all elements by which it can be tested in the particular case.
>
> (at p.356-57)

While the Original Decision does not contain a specific reference to *Faryna v. Chorny*, it is clear to me that the Adjudicator subjected the evidence before him to the proper test, namely, "...its harmony with a preponderance of the probabilities..." I am, therefore, unable and unwilling to find that this ground of Alexander's application is sufficient to warrant a reconsideration of the Original Decision.

Former employee's letters

Alexander submits that the Adjudicator "...acted very unfairly" in deciding not to "...accept the contents and statements made in these letters" and, as a result, was "highly prejudicial in favor of (Cashin)."

In the Original Decision, the Adjudicator gives the following reasons at page 3 for deciding not to attach weight to the three letters:

> In reaching factual conclusions in this appeal, I have not placed much significance on the contents of the letters and, apart from a few instances where I have found them to be corroborative, I have not accepted them. I have a number of reasons for my approach to these letters. First, the letters, for the most part, addressed very contentious matters, including the issue of the credibility of Cashin. It would have been unfair to Cashin to allow them to be given weight absent his ability to cross examine on their contents. Second, Alexander acknowledged that he provided each of the individuals with an outline of what he wished them to include in their letters. As such, I am concerned I may not be getting the individuals' recollections of the matters addressed in the letters, but rather the information Alexander provided to them. Third, at the end of the first day's hearing, I recommended to Alexander that he give some consideration to having the individuals give evidence directly. He indicated that one of the individuals was in Ontario and could not be available. No explanation was given for why neither of the other individuals attended to confirm the contents of their letters under oath.

When I review the Adjudicator's reasons on this issue I find that they are consistent with and supportive of the principles of natural justice which seek to ensure that the parties to a dispute are given a fair hearing. In short, the Adjudicator's reasons for not placing "much significance" on the contents of the letters do no create a ground for granting the reconsideration sought by Alexander.

Findings of fact concerning Cashin's wage rate

The essence of Alexander's application concerning this topic is captured in the following submission concerning what, he submits, was a reviewable error by the Adjudicator:

> For (the Adjudicator) to state: " There is no indication the increase was being paid as a bonus" is patently absurd. There was in fact every indication that was exactly what the increase was - an advance of his hourly bonus, which would not become a part of his wages until he had seen the season out as he had promised to do. (The Adjudicator) makes this statement in the same paragraph that he states "I am certain that no increase would have been given if the complainant had told Mr. Alexander that he had found other employment and would be resigning his position." These statements are in direct conflict with one another.

When I review the entirety of the Adjudicator's reasons and analysis I find that I cannot agree with Alexander's submission on this point. While the two statements quoted by Alexander may appear at first reading to be contradictory, the Adjudicator's analysis can be seen to be considerably broader in scope than the single paragraph to which Alexander refers in his application.

At page 5 of the Decision, the Adjudicator makes the following findings of fact:

> Cashin was not happy with Alexander or with the terms of his employment. He felt Alexander had not lived up to promises he had made to him about the amount and type of work he would be given. On or about July 3 he received his first pay statement from Alexander. It showed his rate of pay as $8.50 an hour. Up to this time Cashin was not aware the base rate for his employment with Alexander would be $8.50 an hour and that rate of pay was viewed by him as another failure on the part of Alexander to live up to his promises. He decided to look for other employment. By July 15 he had found other employment.
>
> What occurred between July 14 and July 17 was the subject of much argument, animosity and conflict in evidence between the parties. The following represents my conclusions about what happened during that time. July 15 was the cutoff day for the pay period. Normally, pay statements and cheques are prepared at the end of the period and given to employees on the first working day after the cutoff day, which in this case would have been July 17. **On July 16, the day before he would have received his second pay cheque, Cashin discussed his wage rate with Alexander. His intention in doing so was to try to get money he felt was owed to him before he told Alexander he was leaving. From**

> **Alexander's perspective, the increase simply represented prepayment of a bonus which Cashin would normally have received only if he stayed with Alexander for the season. In any event, Cashin's wage rate was adjusted to $10.50 an hour and two new pay statements and a cheque were prepared by Alexander. The adjustment was retroactive to Cashin's first day of employment. The adjusted pay statements for the two pay periods and a single cheque containing all of the adjustments were given to Cashin the following day.** Shortly after, Cashin told Alexander he was quitting and followed verbal notice with a letter of resignation, prepared on July 19 and backdated to July 17.
>
> (emphasis added)

When I read the impugned paragraph on page 9 of the Decision in the context of these two paragraphs from page 5 of the Decision, I am not drawn to the conclusion that the impugned paragraph is "patently absurd", as Alexander submits. I note, in particular, that the Adjudicator also states, at page 9, that:

> "The wages were paid by Alexander with full knowledge that he had agreed to grant the increase and to pay it immediately. In the circumstances, there is no other conclusion available to me except that the increase was given and paid as wages..."

Payment of wages for training days

On this aspect of his application, Alexander makes the following submission:

> I proved through our payroll records, and those of the complainant's co-workers, that all staff, including the complainant, had been paid for three full days for training in late June, training which admittedly had taken place earlier in May. The three days in question were given as time off, with full pay, to all staff members, including the complainant. I proved through cross-examination of the complainant, that he had been given no instructions to do anything on behalf of our company during the tree days in question, and that he had performed no visible form of work for our company whatsoever.

At page 8 of the Decision, the Adjudicator deals with the training issue by distinguishing it from the question of who Cashin's employer was (Rocky Mountain or Alexander) for the "training days" in question. He found that Cashin was being trained for Alexander's business on May 23 and 26, 1995.

Alexander's submission on this point seeks, in my opinion, simply to re-argue the evidence and arguments which were put to the Adjudicator at the Hearing. As I stated earlier, (at page 3) Section 116 of the *Act* is not intended to provide a second opportunity

to challenge findings of fact which were made by the Adjudicator following an oral hearing. Therefore, I reject this aspect of Alexander's application for reconsideration.

Alexander's payroll records

Alexander submits that he does not contest in any way, that an employer is required to keep accurate employment records in accordance with Section 28 of the *Act*. However, he submits, neither he nor any employer is required to keep records of when an employee is not at work. I agree with this aspect of Alexander's submission.

At the centre of Alexander's application on this issue is his firm belief that ".. (a)ll the complainant (Cashin) in this case has apparently had to do in many instances, is simply state that he worked on an occasion and

it becomes a fact." Alexander makes the same point, using different words, when he submits that the Adjudicator "...simply accepted the complainant's word that he did the...work, despite (his) record of deceit and lies during these proceedings, and the overwhelming evidence that he did not."

As I noted at the beginning of this Decision, a hearing of Alexander's appeal was held over three days. It is clear form the Decision and from Alexander's application that Cashin's evidence was subject to considerable cross examination by Alexander. It is also clear to me that the Adjudicator subjected all of the evidence (both oral and written) to a thorough review and analysis before making the Original Decision. A significant part of that analysis entailed several findings of fact based on the Adjudicator's evaluation of the witnesses credibility after subjecting their testimony to the appropriate tests. For example, at page 6 of the Decision, the Adjudicator refers to "...Cashin's demonstrated inability to accurately record the details of his claim at the time it was made to the Director...". On that ground, the Adjudicator preferred the evidence of Alexander over Cashin *vis - a - vis* Cashin's daily hours of work as a camp counselor/leader. Similarly, at page 7 of the Decision, sets out an analysis of why he preferred Cashin's testimony over that of Alexander *vis - a - vis* "training days" in June, 1995.

In short, my review and analysis of the Decision does not lead me to conclude, as Alexander submits, that the Adjudicator was persuaded solely by Cashin's statement that he did certain things "...with no proof of that fact other than his word." I reiterate the observation made above, at page 3, that Section 116 of the *Act* is not intended to provide an opportunity to reargue the facts which were put before the Adjudicator at the hearing.

ORDER

I find, for all of the reasons given above, that Alexander's application has not demonstrated that there are sufficient grounds on which I should exercise the powers given to the Tribunal under Section 116 of the *Act* to reconsider Decision #BCEST 574/97.

Geoffrey Crampton
Chair
Employment Standards Tribunal

GC/kan