BC EST #D099/99
Reconsideration of BC EST #D585/98

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-

Surjit Singh Sethi doing business as "Prime Time Electric"

("Sethi" or the "employer")

-of a Decision issued by-

The Employment Standards Tribunal

(the "Tribunal")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 99/28

DATE OF DECISION: March 10th, 1999

DECISION

OVERVIEW

This is an application filed by Surjit Singh Sethi, doing business as "Prime Time Electric" ("Sethi" or the "employer"), pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of an adjudicator's decision. The adjudicator ordered that a determination, issued by a delegate of the Director of Employment Standards (the "delegate") on July 10th, 1998 under file number ER 83253-1 (the "Determination"), be varied.

The delegate determined that Sethi owed his former employee, Harjap S. Singh ("Singh" or the "employee"), the sum of $7,738.11 on account of unpaid wages (section 18 of the *Act*) and interest (section 88 of the *Act*). Sethi appealed this Determination to the Tribunal. Following an oral hearing held on December 9th, 1998 the adjudicator issued a written decision, dated January 11th, 1999, reducing the employer's unpaid wage liability to Singh from $7,738.11 to $5,653 plus interest. The adjudicator varied the Determination in order to account for an unpaid 30-minute lunch break taken by Singh on those days when he worked more than 5 hours.

THE REQUEST FOR RECONSIDERATION

At the appeal hearing the employer, who was represented by legal counsel, sought to introduce the *viva voce* testimony of a number of witnesses; the Director's delegate objected, relying on the Tribunal's previous decision in *Tri-West Tractor Ltd.* (B.C.E.S.T. Decision No. 268/96). The adjudicator ruled that he would hear all of the employer's witnesses except Mr. Buta Mann, whom I understand to be the principal of Pacific Developments Ltd. The employer's reconsideration request is predicated, in part, on the adjudicator's refusal to hear Mann's evidence.

The request for reconsideration, set out in the employer's legal counsel's letter to the Tribunal dated January 18th, 1999, also raises one other ground. In a later submission to the Tribunal, dated February 8th, 1999, the employer's legal counsel advanced three additional grounds in support of this application for reconsideration. I will deal with these other grounds later on in these reasons, however, I first wish to address the matter of the adjudicator's exclusion of Mann's evidence.

ANALYSIS

Exclusion of Mann's evidence

During the course of the investigation, the employer asserted, *inter alia*, that the employee's claim for unpaid wages included a claim for hours when, in fact, the employee was working for, and paid by, Mr. Mann's company, Pacific Developments Ltd. The employer produced for the delegate's consideration copies of two cheques, payable to the complainant employee, Harjap Singh, that had been issued by Pacific Developments Ltd. Singh, for his part, did not deny that he worked for Pacific Developments Ltd. but asserted that the hours he claimed to have worked for the employer did not overlap with the hours he worked for Pacific Developments Ltd. The cheques themselves did not identify the particular hours worked. At page 4 of the Determination, the delegate stated:

> "The Investigator attempted to contact Buta Mann at the number provided by Mr. Sethi. When the Investigator told the person who answered the phone that she was calling from the Ministry of Labour the phone was disconnected and when the number was called back, the line was busy. When Mr. Sethi was advised of this he reported that Mr. Mann had said that he did not wish to become involved with this matter.
>
> Mr. Sethi produced no other evidence supporting his contention that Mr. Singh worked for Buta Mann (Pacific Construction)...during the same hours that Mr. Singh claims he was working for Mr. Sethi."

At page 5 of the Determination, the delegate concluded, *inter alia:*

> "Mr. Sethi's records do not show Mr. Singh working until September, 1996 and finishing in December, 1996. The onus is on Mr. Sethi to keep complete records for each person who works for him. The records presented by Mr. Sethi are incomplete. Mr. Singh has produced a more complete record of the work he did for Mr. Sethi including the days and times he started and finished working. He has been able to demonstrate that the record he produced did not overlap with either his time at school or the hours he says he and his brother worked for Mr. Mann. Therefore, Mr. Singh's records of the days and hours worked has [sic] been accepted over Mr. Sethi's records."

The employer appended to his notice of appeal a series of letters including a letter dated July 15th, 1998 from "Pacific Construction Development" signed by Buta Singh Mann. Mr. Mann's letter states that Harjap Singh worked for, and was paid for his labour by, Pacific Construction "during the months of July and August". Tellingly, the letter does not set out the particular hours worked by Harjap Singh during this period--recall, that Singh did not deny working for Pacific Construction; Singh did say, however, that those working hours did not overlap with the hours worked for the employer.

Mr. Mann attended the appeal hearing expecting to testify on behalf of the employer, Sethi, but Mann's testimony was ruled inadmissible by reason of the *Tri-West/Kaiser Stables* exclusionary rule. In *Tri-West* the adjudicator held that certain evidence was inadmissible because:

> "This Tribunal will not allow appellants to 'sit in the weeds', failing or refusing to cooperate with the delegate in providing reasons for the termination of an employee and later filing appeals of the Determination when they disagree with it...The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given to the delegate in the investigative process."

The exclusionary rule suggested in *Tri-West* was applied in *Kaiser Stables Ltd.* (B.C.E.S.T. Decision No. D058/97) where there was a consistent and willful refusal by the employer to participate in the delegate's investigation. Subsequent decisions of the Tribunal have consistently adopted the approach taken in *Kaiser Stables,* namely, that in the face of a concerted refusal to participate in an investigation, the employer will not be permitted to rely on evidence that was available and that could have been presented to the investigating officer. In my view, the principle espoused in *Kaiser Stables* is a sound one and entirely consistent with two of the *Act's* stated purposes--the encouragement of open communication between employers and employees and the fair and efficient resolution of disputes arising under the *Act* [see subsections 2(c) and (d)].

In ruling that Mann's evidence was not admissible, the adjudicator made certain findings of fact (at page 3 of the adjudicator's decision):

> "I find in regard to the witness, Mann, that he could have and should have been heard at the investigative stage but was not because of a lack of effort by Sethi and that is all. The delegate made repeated attempts to contact Mann but failed, in part because, on calling Mann at a telephone number provided by Sethi, the person answering the telephone hung up on the delegate when she explained that she was from the Ministry of Labour. Sethi was advised of that by the delegate, through his accountant, Sam Sharma, and she asked that someone have Mann contact her. Nothing at all was heard from Mann. As I see it, that was only because Sethi did not make any real effort to produce Mann at the investigative stage, the same sort of effort that produces Mann on appeal. I find that is to fail to co-operate with the investigation."

While, as previously noted, I strongly support the *Kaiser Stables* exclusionary rule, in my view, the adjudicator misconceived the burden that ought to be placed on a respondent employer during the course of an investigation. It seems to me that the employer was not "sitting in the weeds" but rather told the delegate about a witness who might have relevant information. That witness, Mann, apparently refused to cooperate with the delegate's investigation, but that was Mann's failure, not that of the employer. Indeed, the delegate had options open to her to ensure that Mann provided

relevant information, options that were not available to the employer--for example, the delegate could have exercised her authority under subsections 85(1)(c), (e) and (f) of the *Act* to require Mann to provide a statement and deliver up relevant employment records. I am not suggesting that a delegate, in the face of a recalcitrant witness, is obliged to demand documents and/or a statement from that witness. However, I do not see how it can be said that the *employer* fails to cooperate in an investigation simply because a material *witness* refuses to respond in any fashion to the delegate's inquiries. While such a conclusion might be appropriate where the witness in question is under the direction and control of the employer, that is apparently not the situation here.

Notwithstanding the foregoing comments, I am of the view that the adjudicator's decision should not be set aside simply because the adjudicator refused to hear Mann's evidence. The employer's position--rejected by both the delegate and the adjudicator--was that Singh did not work for the employer at all in July and August 1996. The employer initially maintained, during the delegate's investigation, that Singh did not commence his employment until September 1st, 1996 but later conceded, at the appeal hearing, that Singh may have commenced as early as August 1996. Both the delegate and the adjudicator found that Singh's employment with Sethi commenced in May 1996 and there is a sufficient evidentiary record to support that conclusion.

Singh's position--accepted by both the delegate and the adjudicator--is that during July and August 1996 he was employed by both Sethi and Mann but, and this is the key point, that the hours he worked for each of those two employers did not overlap. There was evidence before both the delegate and the adjudicator which would support that conclusion.

Sethi did not produce any records at the appeal hearing showing the hours worked by Singh during July and August 1996--and not surprisingly, in light of Sethi's position that Singh was not employed by him during that period. As previously noted, Sethi's records show that Singh did not commence work until September 1996. And yet, the employer now asserts that the hours Singh worked for Sethi "overlap" with the hours Singh worked for Mann. How can Sethi advance this assertion when, all along, he has denied that Singh worked for him at all in July (and initially denied that Singh worked for him in August)? On what footing can a valid comparison be made?

It appears to me that the employer--whose story the adjudicator found to be "rather improbable" and whose records the adjudicator found to be "misleading and inadequate"--is simply adjusting his version of events to suit the evidence as it comes out. Finally, I note the employer has not produced *any* time records from Mann which would show that the hours Singh claimed to have been worked for Sethi overlap with the hours Singh claimed to have worked for Mann. Thus, I cannot conclude, based on the (lack) of evidence before me, that the adjudicator's refusal to hear Mann's testimony materially prejudiced the employer's appeal.

Other grounds for reconsideration

In his letter to the Tribunal dated January 18th, 1999, counsel for the employer asks "why is Mr. Sethi adjudged to be the sole employer and responsible for paying statutory holidays etc. on his

sole account." The short answer to this submission is that the adjudicator only turned his mind, and quite properly so, to Sethi's unpaid wage liability. Any liability that Mann may have to Singh (*e.g.*, for statutory holiday pay etc.) is not presently in issue before the Tribunal. Sethi's obligations to Singh for statutory holiday and vacation pay were determined solely on the basis of the hours worked by Singh for Sethi (as determined by the adjudicator).

In a letter to the Tribunal dated February 8th, 1999, counsel for the employer raised three other grounds for reconsideration:

- "The adjudicator relied too much on the findings and recommendations of the delegate";

- "The adjudicator should have found on the evidence that when Mr. Singh did work for [the employer], it was as a subcontractor rather than employee"; and

- "The adjudicator decided matters of credibility improperly".

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.

With the above comments in mind, I shall first address the "credibility" issue. Given the conflicting evidence before him, the adjudicator was obliged to make a finding regarding the comparative credibility of Singh and Sethi; the adjudicator's adverse credibility finding vis-à-vis Sethi cannot be overturned unless that finding can be characterized as perverse. I cannot so conclude.

As for the first and second above-noted grounds, I similarly find them to be without merit. The adjudicator heard an *appeal* from a determination; he was not conducting a trial *de novo*. The adjudicator, based on the evidence before him, had to determine whether or not the determination was correct. I see no evidence that the adjudicator did anything other than weigh the evidence before him in order to assess the correctness of the Determination. With respect to the second ground--namely, whether or not Singh was a subcontractor rather than an employee--not only was that argument not advanced prior to the application for reconsideration, given the wide definition of "employee" contained in section 1 of the *Act*, it is, in my view, clear that Singh was employed by Sethi during the relevant period.

I should add that counsel's February 8th letter contains a number of other allegations, all of which can be characterized as undisguised attempts to have the adjudicator's findings of fact--all of

which were supported by at least some evidence--overturned. Such an attack lies outside the ambit of the reconsideration provision.

ORDER

The employer's application to cancel the adjudicator's decision, and order a new appeal hearing before another adjudicator, is **refused.**

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Kenneth Wm. Thornicroft, *Adjudicator*
Employment Standards Tribunal