BC EST #D120/98
Reconsideration of D538/97

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C. 113

- by -

Gordon Hofer
("Hofer")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Lorna Pawluk

FILE NO.: 97/909

DATE OF DECISION: April 2, 1998

BC EST #D120/98
Reconsideration of D538/97

DECISION

OVERVIEW

This is an application for reconsideration under Section 116 of the *Employment Standards Act* of Decision #D538/97 issued by the Employment Standards Tribunal on October 22**,** 1997. That Decision confirmed a Determination issued by the Director of Employment Standards on July 24, 1997. The adjudicator concluded that the Director's Delegate correctly decided that Vancouver Core Supply Ltd. ("VCSL" or the employer) did not owe Hofer for unpaid overtime.

Hofer applies for reconsideration of the Tribunal's decision on the grounds that the evidence does not support the conclusion of the adjudicator.

ISSUE TO BE DECIDED

The issue is whether the adjudicator committed an error of fact or law which calls for reconsideration of #D538/97.

FACTS

Hofer worked as a truck driver/labourer for VCSL from February 1987 to June 26, 1996. He filed a complaint with the Employment Standards Branch claiming for unpaid overtime. The Director's Delegate concluded that the evidence submitted in support of the claim was unreliable because:

> You acknowledged that the hours of work recorded in the log book were not true and accurate. This false recording of hours of work taints the reliability of the other record of hours recorded by you and submitted for payment. Even if the record of hours maintained by you and submitted for payment of wages is suspect in part, it cannot be used to accurately determine what, if any, overtime pay is owed to you.

Hofer then appealed to the Tribunal and in #D538/97, the adjudicator concluded that the evidence did not show that VCSL owed Hofer for unpaid overtime. The Determination came to the same conclusion but did so on different grounds. The adjudicator found that the Delegate had applied an unreasonable test to determine the reliability and validity of the hours-of-work records. He set out another test for reliability::

> It would be more appropriate, in my opinion, to scrutinize the entire record and to evaluate it for reliability and validity. If some of the records are found to be unreliable then that part should be rejected for purposes of determining entitlement to wages under the *Act* . However, it would be wrong and unfair to reject all records submitted by an employer or an

> employee simply because one part of the records was (sic) found to be unreliable. . . .
>
> In the absence of proper records which comply with the requirements of Section 28 of the *Act*, it is reasonable for the Tribunal (or the Director's Delegate) to consider employees' records or their oral evidence concerning their hours of work. These records or oral evidence must then be evaluated against the employer's (incomplete) records to determine the employees' entitlement (if any) to payment of wages. Where an employer has failed to keep any payroll records, the Director's delegate may accept the employees' records (or oral evidence) unless there are good and sufficient reasons to find that they are not reliable. Under those circumstances, if an employer appeals a determination, it would bear the onus to establish that it was unreasonable for the Director's delegate to rely on the employees' records (or evidence) and to establish that they were unreliable.

This is the Decision from which Hofer seeks reconsideration.

ANALYSIS

Section 116 of the *Act* confers reconsideration powers on the Tribunal:

> 116(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.

This is not an opportunity to revisit the evidence or reconsider the original arguments. Rather, a reconsideration application will succeed in narrow circumstances. *Zoltan Kiss* BCEST #D122/96 outlines the principles used by this Tribunal in the exercise of its reconsideration powers:

- failure to comply with the principles of natural justice
- mistake of fact
- decision inconsistent with prior decisions indistinguishable on their facts
- significant new evidence not available to the first adjudicator
- mistake of law
- misunderstanding of or failure to deal with a serious issue
- clerical error

Hofer makes several points in favour of his application; they will be dealt with in turn. First, he denies any wrongdoing in connection with contacting Kenneth Ransford ('Ransford') at VCSL and says that in any event, this is not relevant to a Determination about overtime. I agree that this statement is of tenuous relevance to a claim for overtime and to this extent sympathize with Mr. Hofer's complaint. Nevertheless, this does not provide grounds for a successful reconsideration application. Second, he argues that the adjudicator failed to include all of the evidence in the Decision. He cites as an example, the answer to a question asked of Ransford about not paying Hofer for overtime as it was due. There is no obligation on an adjudicator to include all of the evidence in the Decision, only that which is relevant to the final conclusion. Third, he points out that a secretary by the name of Nadine did not testify at the Tribunal hearing, but nonetheless the Decision includes information about some of her dealings with Hofer. This, he says, establishes a bias in the Decision. I disagree. If anything, he is complaining about the admission of hearsay evidence. However, the Tribunal is not bound by the formal rules of evidence and may make certain "hearsay" evidentiary findings without compromising its jurisdiction. Thus, this also fails to establish grounds for reconsideration.

Hofer argues that one of the witnesses Moira at the hearing lied under oath, citing the following example

> Moira had said that she had a hard time collecting hours from myself. She said that she had to call me at home and on the road? Well for one thing I was never at home, I was on the road. "Moira would never now where I was on the road so how could she contact me." She agreed this was true. This to me has a role in a decision for me. Also when I questioned Moira I asked Moira what hours she worked for V.C.S. and Ralph's Auto. Her reply was "full time Mon-Fri". This was not true at the time I was employed with V.C. I was the one having a hard time contacting Moira. (reproduced as written)

I disagree with Hofer that this establishes Moira as a liar at the hearing or that this should lead to a different conclusion about the problems in communications between Hofer and VCSL. The question does not make clear what time span was involved and it is not possible to tell what Moira thought was covered; thus, it is too general to draw any negative inferences about the reliability of this testimony. I also note that the adjudicator heard "Moira" and based on his first-hand observations concluded that her evidence was credible and relevant to his decision. I will not interfere.

Hofer also says that VCSL and Moira were not concerned about the his complaint and that Employment Standards had difficulty in obtaining information from the employer, and that these problems somehow compromise the Decision. I do not agree. It is further argued that certain other aspects of Ransford's testimony do not support the conclusion reached by the adjudicator. I am not convinced of this; moreover, it is inappropriate on reconsideration to re-weigh the evidence. Finally, he says "why did Mr. Ransford offer to pay $4000. Because he doesn't owe me anything?" It is unclear to me what context this offer of payment was made, but if it was an offer to settle this matter without going to hearing, I am not prepared to question the employer's motives for wishing to avoid litigation. However, I am prepared to accept that there many reasons why a party would

agree to settle a law suit, separate from the merits of the case against it. Thus, this argument also fails to establish successful grounds for the application.

ORDER

Pursuant to section 116 of the *Act*, I confirm #D538/97.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal