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 -

The Director of Employment Standards
(the "Director")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATORS	Ib S. Petersen Lorna Pawluk Geoffrey Crampton
FILE NO.:	97/775
DATE OF DECISION:	March 24, 1998

DECISION

COUNSEL

Mr. Tim Charon on behalf of Unisource Canada Inc. ("Unisource" or the "Employer")

Ms. Adele Adamic on behalf of the Director

OVERVIEW

This is an application by the Director pursuant to Section 116 of the *Employment Standards Act* (the "*Act*"), against a Decision of the Employment Standards Tribunal (the "Tribunal") issued on May 2, 1997 (BC EST #D172/97). In the Decision, the Adjudicator found that Unisource had just cause for terminating the employment of Kari Lumme, Lee Gulbrandson, Kim Howes and Kelly A. Gulbrandson (the "Complainants"). This finding was based on his view that a conflict of interest existed based on the individuals obtaining employment with a competitor of Unisource. The Decision cancelled a Determination dated November 27, 1996 which had held that the Employer did not have just cause and that, in the result, each Complainant was entitled to compensation for length of service, for a total of $6,820.80 plus interest. These funds have been held in trust.

In this application for reconsideration, which was filed on October 22, 1997, or almost six months after the date of the Decision, the Director argues that the Decision is wrong as a matter of law as only a "potential" conflict existed. The Director filed an application for a stay of proceedings on November 6, 1997.

In view of the circumstances of this case, particularly the lengthy the delay in filing the application for reconsideration, the Tribunal on its own motion decided to request submissions with respect to the issue of timeliness of the application for reconsideration. The Tribunal did not receive any submissions from the complainants concerning the timeliness issue.

ISSUES TO BE DECIDED

The issue to be decided in this Reconsideration application are:

(1) whether the application for a stay of proceedings is filed in a timely manner;

(2) whether the application for reconsideration is timely. In other words, while the statute does not contain an express time limit, should the Tribunal accept an application filed almost six months after the Decision which is sought to be reconsidered?

(3) if the answer is yes, did the Adjudicator make a fundamental error of law when he decided that the employees were terminated for cause?

(4) similarly, if the answer is yes, did the Adjudicator make a fundamental error of law when he decided that one of the employees, Lee Gulbrandson, even if not terminated for cause, had resigned and, in the result, not entitled to compensation based on length of service?

FACTS

The is no dispute with respect to the salient facts in this matter. They are set out in the original Decision, at page 2-3:

> ".... Each of the four employees submitted a letter of resignation in order to take up employment with a direct competitor of Unisource. Three of the former employees--Kelly Gulbrandson, Kim Howes and Keri Lumme--purported to give two weeks' written notice of their resignation. The fourth employee, Lee Gulbrandson, did not give two weeks' written notice; rather this employee tendered his resignation effective immediately (January 18th, 1996) with the proviso that he would "continue to work for Unisource until February 1st, if required.
>
> The Director, in the Reason Schedule appended to the determination, found that "In each case the complainant had access to confidential information and was leaving to work for a competitor."

The issue before the Adjudicator was whether the employer had just cause to terminate the four employees. He found that the employer had just cause. The rationale for his Decision is set out as follows, at page 3:

> "... the fact that an employee stands in a conflict of interest relationship is, of course, just cause for termination. I do not find the phrase, "potential conflict of interest"... to be helpful. One is either in a conflict of interest vis-a-vis some other party (i.e., a relationship) or one is not. In order for the employer to have just cause, the employer need not show that the employee has, in some fashion, exploited the conflict of interest to their own, or to some third party's, pecuniary advantage (i.e., behaviour)."

In the case at hand, the complainants all had access to "confidential proprietary information" and, therefore, the employer had cause for concern. The Adjudicator continued, at page 4:

> "Once the conflict of interest arose (i.e., when these employees entered into employment contracts with the competitor firm), the employer was, by reason of that fact alone, entitled to terminate these employees without termination pay or notice..."

With respect to Lee Gulbrandson, in any event, the Adjudicator found that the Employer need not have concerned itself with the issue of just cause as this employee resigned. As mentioned above, Lee Gulbrandsen wrote to the employer (on January 18, 1996), at page 4:

> "I am writing this letter to tender my resignation effective Thursday January 18, 1996. I will continue to work for Unisource until February 1, 1996, *if required*." (emphasis added)

The Adjudicator found that this employee had resigned.

On October 22, 1997, the Director applied for reconsideration of the decision. On November 6, 1997, the Director applied for a stay of proceedings. This occurred after counsel for the Employer requested that the Director pay out the funds held in trust.

ARGUMENTS

(1) Timeliness

The Director's explanation for the delay of almost six months in filing this application for reconsideration is that she required an opportunity to re-canvas the law in the area to prepare a detailed legal opinion concerning the relationship between confidential information and dismissal. The fact that Section 116 does not contain a time limit, means that the Tribunal may reconsider a decision at any time. As the Director or a person affected by a decision may also apply for reconsideration, the same considerations apply. The Director argues that the Tribunal should adopt an approach similar to that of the courts on judicial review where, under the *Judicial Review Procedure Act*, the courts retain jurisdiction to review a decision regardless of statutory time limits. In those circumstances, timeliness may only bar a review in very limited and specific circumstances. The Director points specifically to Section 11 of that *Act* which provides:

> 11. An application for judicial review is not barred by the passage of time unless
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> (a) an enactment otherwise provides, and
>
> (b) the court considers that substantial prejudice or hardship will result to any other person affected by reason of delay.

In this case, there is no substantial prejudice or hardship to the parties. The only prejudice is to the complainants if the Tribunal did not deal with an error in law which negatively impacted on their statutory rights.

In response, counsel for the Employer submits that in the absence of a fixed time limit, a reasonable time limit should apply. Counsel for the Employer notes the lengthy delay in filing the application for reconsideration. The Employer has suffered substantial prejudice because the Director has held the funds for one year. A party who is denied the right to enjoy its property has been prejudiced. On the Director's argument, funds paid into trust could be held forever. The Director applied for a stay of proceedings to continue to hold onto the funds six months after the funds ought to have been returned. The Director's explanation, that she wished to undertake a further review of the law, is irrelevant. The Director reviewed the law before the adjudicator at great length and the submissions in the reconsideration application are not materially different from those submitted at the original hearing. In the result, the application should be dismissed.

ANALYSIS

(1) Stay of Proceedings

Under Section 116 of the *Act*, the Director is entitled to apply for reconsideration of a decision of the Tribunal. In this case the application for a stay of proceedings was made after the application for reconsideration, which was made some six months after the date of the Decision. In the ordinary course, the Employer would have been entitled to have the funds which had been paid into trust released when the original Determination was cancelled. In view of the fact that the Tribunal is issuing this Decision and Order now, it is unnecessary for the Tribunal to adjudicate the application for a stay of proceedings. Nevertheless, we hasten to add that an application for a stay of proceedings normally should be made expeditiously and without unnecessary delay.

(2) Timeliness of the Application for Reconsideration

An application for reconsideration should succeed only where there has been a demonstrable breach of the principles of natural justice, where there is compelling new evidence not available at the original appeal, or where the adjudicator has made fundamental error of law. In *Zoltan Kiss* (BC EST #D122/96), and other decisions, the Tribunal has emphasized that it will use the power to reconsider with caution in order to ensure finality of the Tribunal's decisions and efficiency and fairness of the appeal system.

Section 116 of the *Act* provides (in part):

> 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
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> (b) cancel or vary the order or decision or refer the matter back to the original panel.
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> (2) The director or a person named in a decision or order of the tribunal may make an application under this section.

There is no time limit in the *Act* with respect to applications for reconsideration. The argument put forward by the Director suggests that this means that the Tribunal may reconsider a decision at any time. As will become evident, we find that timeliness of a reconsideration application is a relevant consideration. While the *Judicial Review Procedure Act* provides that the courts may review decisions of administrative tribunals regardless of time limits under a specific statutory (Section 11, set out above), it does not necessarily follow that there is no such time limit implied in the *Act*. Under Section 107 of the Act, the Tribunal "may conduct an appeal or other proceeding in the manner it considers necessary", subject to any rules made under Section 109(1)(c) of the *Act*. In our view, therefore, the Tribunal has the power to determine its own procedure, including the timeliness of applications for reconsideration, subject to the rules of natural justice.

In *Carpenter v. Vancouver Police Board* (1986), 9 B.C.L.R. (2d) 99 (C.A.), referred to by the Director, the court noted that it may exercise its discretion against an applicant where there was an unreasonable delay. What is an unreasonable delay depends on the circumstances of each particular case. Indeed, after an extensive review of the case law, the court noted that the length of the delay is not determinative. However, the court also noted that if "good cause can be shown for a long delay", the court will exercise its discretion to review. Otherwise, an applicant is required to come forward promptly. At page 115, the court noted:

> In summary, the jurisprudence relating to "unreasonable delay causing prejudice" and the court's jurisdiction to grant certiorari indicates that the court will focus primarily on the conduct of the party applying for certiorari. In determining if the delay was unreasonable in the circumstances of the case, the court examines the conduct of the applicant and any explanation given for the delay....It will also be noted that the courts will not exercise their discretion against a party seeking review unless the delay results in substantial prejudice to the respondent. The fact that the party seeking review acted under a mistake of law may also be taken into account.

In *Principles of Administrative Law* (2nd ed., Carswell, 1994, at 6-7), Jones and de Villar note that judicial review is not the same as an appeal. In general, superior courts do not have the right to substitute their appraisal of the merits for any lawful action taken by the administrative tribunal and, in general, are limited to determining whether it acted strictly within the statutory

powers delegated to it. In our view, the process provided under Section 116 is in the nature of an appeal. Moreover, it is a more limited appeal than that afforded under Section 115. Therefore, while we may be guided generally by the principles established by the courts for judicial review, those principles are not necessarily applicable to an application for reconsideration. Moreover, as noted above, the Tribunal has the power to regulate its own procedure, subject to the rules of natural justice.

In our view, the scheme contemplated by the *Act* emphasizes expeditious resolution of disputes based on the principles of natural justice. An appeal of a determination must be made within 8 and 15 days, depending on the method of service, and include the reasons for the appeal (see Section 112). The Tribunal may dismiss an appeal without a hearing of any kind if the appeal has not been made in a timely fashion (Section 114(a)). After considering the appeal, the Tribunal may confirm, vary or cancel the determination or refer the matters back to the Director (Section 115). Similarly, under Section 116, the Tribunal has the power to "cancel or vary" the order or decision under appeal. The Tribunal may also refer the matter back to the original adjudicator. In other words, the Tribunal has the statutory authority to consider the matters that should have been considered by the original adjudicator.

The purposes of the *Act* which guide our interpretation are set out in Section 2 which provide (in part):

> 2. The purposes of this *Act* are as follows:
>
> (b) to promote *fair* treatment of employees and employers;
>
> (d) to provide *fair and efficient* procedures for resolving disputes over the application and interpretation of this *Act*; (emphasis added)

The purposes of the *Act* require that the Tribunal avoid a multiplicity of proceedings and ensure that appeals are dealt with expeditiously, in a practical manner, and with due consideration of the principles of natural justice. In our view, this includes, generally, an expectation that one hearing will finally and conclusively resolve the dispute. Read in conjunction with Section 115, the power to "vary, confirm or cancel" a determination implies a degree of finality, *(i.e.*, a party should not be deprived of the benefit of a decision without a compelling reason). As noted in *Zoltan Kiss*, above, and other cases, an application for reconsideration does not provide an opportunity to re-argue the merits, but provides for an appeal on much narrower grounds.

In our view, an application for reconsideration must be filed within a reasonable time. What constitutes a "reasonable time" depends on the circumstances of each particular case. The Tribunal may be guided by the principles applied by the courts and the length of the delay may not be determinative. However, as noted by the courts, if good cause can be shown for a long delay, the Tribunal will exercise its discretion to reconsider. In our view, it would be contrary to the purposes of the *Act* to permit a person to apply for reconsideration except in the rare and

exceptional circumstances because that person wanted to obtain a legal opinion. The only explanation provided by the Director for the delay in applying for reconsideration was the wish to canvas the law further. However, it appears to us that in the main, the submissions are similar to those made before the original Adjudicator. In other words, the Director has not shown a good cause why the application for reconsideration should proceed.

(3) Merits

In view of our decision above, there is no need for us to consider the merits of the application for reconsideration.

ORDER

Pursuant to May 2, 199 Section 116 of the *Act*, we order that the Decision (BC EST D#172/97), dated May 2, 1997 be confirmed and that the funds held in trust be released forthwith to the Employer together with such interest as may have accrued.

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Ib Skov Petersen
Adjudicator
Employment Standards Tribunal

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Geoffrey Crampton
Chair
Employment Standards Tribunal

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Lorna Pawluk
Adjudicator
Employment Standards Tribunal