EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the *Employment Standards Act* S.B.C. 1995, C.38

- by -

World Project Management Inc. et al.
("World Project")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: John M. Orr

FILE NO.: 96/222

DATE OF DECISION: March 20, 1997

DECISION

OVERVIEW

This is an application by "World Project" under Section 116 (2) of *the Employment Standards Act* (the "*Act*") for a reconsideration of Decision No. D325/96 (the "Decision") which was issued by the Tribunal on November 18, 1996.

The Decision dealt with two preliminary issues relating to the nature of the appeal process itself under Section 112 of the Act, specifically:

i) the scope of the appeal; and

ii) who bears the burden of proof?

The Tribunal held that the appeal was not a hearing *de novo* nor was it a hearing limited to the record but was in the nature of an appeal by way of re-hearing. The Tribunal also held that at the appeal the burden of proof is on the appellant to show on the balance of probabilities that the Determination under appeal ought to be varied or cancelled. "World Project" has asked for this decision to be reconsidered pursuant to Section 116 of the *Act* and the appeal and the Determination are in abeyance pending this reconsideration.

RECONSIDERATION OF PRELIMINARY RULINGS

Section 116 of the *Act* provides that:

> *(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.*

The Tribunal has set out in a number of decisions the scope of such reconsiderations holding that the power to reconsider orders and decisions should be exercised with great caution (see e.g. BC EST No.D122/96; No.D199/96; No.D217/96; No.D344/96) and should only succeed where there has been a demonstrable breach of the rules of natural justice, a fundamental error in law, or there is compelling new evidence. The reasons why such power should be exercised with great caution are set out fully in the decisions referred to above but include the necessity to provide a fair and efficient process where normally one hearing will resolve the dispute finally and conclusively. Cases should be resolved quickly and inexpensively and it would be contrary to the spirit and intent of the *Act* to allow, in effect, two hearings in each appeal. Reconsideration should be used sparingly and in exceptional cases. These principles apply with even greater force to reconsideration of preliminary rulings in the course of an appeal.

Section 116 allows for reconsideration of "any order or decision" of the Tribunal. However, it would be contrary to the fundamental principles of an efficient and fair process of dispute resolution to allow for reconsideration of every ruling made by an adjudicator in the course of an appeal. The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid multiplicity of proceedings, confusion or delay: *Kuntz v.College of Physicians and Surgeons [1989] 31 Admin L.R. 179.* Such rulings should not normally be considered an "order or decision" of the Tribunal for the purpose of S.116 until the appeal hearing is completed and therefore they are not normally open to reconsideration until the final appeal decision is rendered.

However, in this case the rulings have been issued in the form of and as a decision of the tribunal and are of such fundamental importance to the ongoing conduct of the hearing, and are of general effect to all other hearings, that the Tribunal has agreed to reconsider the rulings as a decision of the tribunal despite the fact that the appeal has not yet been completed.

ANALYSIS

World Project argues that the appeal hearing under Section 112 should be by way of trial *de novo* with the Director, or the employees, bearing the burden of proving on a balance of probabilities the allegations contained in the Determination. World Project argues that the process of the appeal is subject to Section 11(d) of the *Charter of Rights and Freedoms* (the "*Charter*"), the *Act* and nature of the proceedings call for a trial *de novo,* and the rules of natural justice require the burden of proof to be borne by the respondents.

Section 11(d) Canadian Charter of Rights and Freedoms

Section 11(d) of the *Charter* provides as follows:

> *11 Any person charged with an offence has the right*
> *(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal.*

World Project points out that the word "charged" may encompass more than a formal criminal charge and may in fact include proceedings relating to enforcement of other statutes. It refers to *Amway Corp. v. The Queen (1986) 34 D.L.R.(4th) 190 (Fed. C.A.)* and submits that the Court adopted an earlier statement approved by the Supreme Court of Canada that a person may be "charged" when he is required to answer a formal written complaint against him in a legal proceeding. This may well be so but the phrase "charged with an offence" must be read as a whole.

Madame Justice Wilson, for the majority of the Supreme Court of Canada in *Wigglesworth v. The Queen (1987) 45 D.L.R.(4th) 235* reviews the case law and the scholarly literature on the question of whether the language of section 11 of the *Charter* is broad enough to include disciplinary matters. She concludes that the rights guaranteed by section 11 are available "to persons prosecuted

by the State for public offences involving punitive sanctions, i.e., criminal, quasi-criminal and regulatory offences, either federally or provincially enacted". She further reasons that a matter could fall within section 11 "either because by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence". Later, she states that a true penal consequence that would attract the application of section 11 is "imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity".

The Court in *Wigglesworth* makes a clear functional and philosophical distinction between discipline matters and proceedings of an administrative nature instituted by statute for the protection of the public. Madame Justice Wilson states that:

> Proceedings of an administrative nature instituted for the protection of the public in accordance with the policy of a statute are also not the sort of "offence" proceedings to which s.11 is applicable. But all prosecutions for criminal offences under the Criminal Code and for quasi-criminal offences under provincial legislation are automatically subject to s.11. They are the very kind of offences to which s.11 was intended to apply.

The group termination provisions of the *Employment Standards Act* in and of themselves do not create an "offence". They provide an administrative scheme within the framework and policy of the statute for the protection of the public in cases of substantial terminations of employment. In this case the penalty provisions of the *Act* were not invoked, and it is not within the purview of this reconsideration to decide whether or not s.11 would apply to such penalty proceedings but the existence of such penalty provisions contrasts with the administrative scheme
established to protect employees from terminations. I agree with the finding that the group termination provisions do not constitute a penal consequence to invoke the provisions of s.11 of the Charter. The appellant is not "charged with an offence" and therefore the presumption of innocence is not a constitutional requirement in appeals to the tribunal under S.112 of the *Act*.

What is the nature of the Appeal under s.112 of the Act?

Having found that section 11 of the *Charte*r does not govern the proceedings of an appeal under s. 112 of the *Act* the question remains as to the nature of the appeal. The *Act* provides that:

> *112. (1) Any person served with a determination may appeal the determination to the tribunal ...*

and the *Act* further provides

> *115. (1) After considering the appeal, the tribunal may, by order,*
> *(a) confirm, vary or cancel the determination under appeal, or*
> *(b) refer the matter back to the director.*

World Project contends that the *Act* contemplates that the appeal should be by way of trial *de novo* and that it can not be an appeal by way of "re-hearing" because in fact there has not been an initial hearing. Of course this same semantic argument could be applied to the term *de novo.*

The *Act* does not define the nature of the proceeding under s.112, although s.107 says that the Tribunal "may conduct an appeal ... in the manner it considers necessary and is not required to hold an oral hearing". The Tribunal has clearly been given wide latitude to determine how to conduct the appeal. It is master of its own procedure. But the *Act* does refer to this process as an "appeal", it is not a hearing in first instance.

It is helpful to refer to the statement of purpose set out in the *Act* itself. Section 2 of the *Act* sets out the purposes of the *Act*:

> *2. The purposes of this Act are to*
> *(d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act,*

Clearly theTribunal is not limited to a "true appeal" focusing only on the original decision nor, on the other hand, would it be fair and efficient to ignore the initial work and determination of the Director. In my opinion the Tribunal should be flexible in its procedure on appeal to ensure that the intent of the *Act* to create a fair and efficient dispute resolution process is fulfilled.

There may be occasions where an appeal may turn simply on the interpretation or legal analysis of a word, phrase, or provision in the *Act* or *Regulations* where witnesses would not be required at all to resolve the matter. However, there may be other occasions where the appeal turns clearly on evidence and the credibility of witnesses where an oral hearing with sworn testimony would be essential to resolve the point in dispute. Nevertheless, even where such oral hearing is called-for it should focus only on the issue appealed and should not necessarily require the re-establishment of the balance of the findings of the Director. For example, if an appeal turned on whether a person was in law an employee or an independent contractor it would be far from efficient to hear evidence and re-calculate all the payroll, overtime and holiday pay effects of the decision. Likewise, if the dispute were over whether or not, in fact, the employee worked on certain days it would be pointless to have to establish that they were in fact an employee if it was not even in issue.

As the procedure is an appeal from a determination already made and otherwise enforceable in law, the appellant should be expected to clearly set out the aspects of the determination not agreed with and to delineate the issues. The Tribunal may then determine the most fair and efficient method for resolving the matter.

To be a truly effective means of dispute resolution the Tribunal should resist being forced to define the process within a single legal concept such as "trial de novo", "true appeal", or even "appeal by way of re-hearing". Depending on the circumstances of each case it may be any one of these or a hybrid of another sort. The essential ingredient is that, whatever the process is called, it is fundamentally fair and efficient

In light of the above it would seem that it is not necessary to be so focused on the issue of "burden of proof". Rules about the legal burden, called by Wigmore "the risk of non-persuasion", define who is to lose if at the end of the evidence the tribunal is not persuaded. Various tests have been advanced over the years in various situations but as one writer (E.M. Morgan,"How to Approach the Burden of Proof and Presumptions"(1952-53) 25 *Rocky Mountain L.Rev*. 34 puts it " the allocation (of the burden of proof) is determined according to considerations of fairness, convenience and policy". In most cases, convenience suggests that the party with the most ready access to the means of proof should have to produce it. One of the goals of proof is the production of reasonably accurate information and therefore there should be an obligation on the party having most access to such information to provide it or bear the risk of non-persuasion. Considerations of fairness suggest also that the party seeking change should bear the risk of non persuasion in that the status quo would otherwise prevail. Of course concerns of convenience and fairness may be affected by particular circumstance and, for example, may depend upon an assessment of the respective resources of the parties. Ultimately the notion of "burden of proof" is only of significance where the tribunal has not been persuaded.

Although it is my opinion that the notion of "burden of proof" is not a helpful dispute resolution concept I concur completely with the decision that in this case it would be appropriate, fair and efficient to require the appellant to bear the risk of non-persuasion.

Likewise in terms of the sequence of presentation it is my view that the Tribunal should be flexible. Although it would be usual for the appellant to first present to the Tribunal the concerns and issues that arise from the Determination and the reason for the appeal it is important that the Tribunal avoids becoming restricted by unhelpful and overly legalistic concepts and procedural rules. On the facts of this case however it seems most fair and reasonable to require the appellant to delineate the grounds for appeal, narrow and define the issues, and present their case first.

In the circumstances of this appeal, I can not disagree with the decision of the adjudicator that the "the burden of proof lies with the appellant to prove, on a balance of probabilities, that the Determination ought to be varied or cancelled" and that the appellant should be called upon to present its case first.

CONCLUSION

I have read the decision of adjudicator, Kenneth Wm. Thornicroft, in this matter and can find no demonstrable breach of the rules of natural justice and no fundamental error in law. Nor is there any compelling new evidence that was not before the tribunal. The issues raised on this reconsideration were argued at the appeal and Mr Thornicroft set out a fair and reasonable process for the hearing of the appeal based on a well reasoned and careful consideration of the circumstances of the case, the situation of the parties, and the nature of the appeal.

I can find no basis to disagree with the rulings made by adjudicator Thornicroft.

ORDER

Pursuant to Section 116 of the *Act* I decline to vary or cancel the decision BC EST # D325/96

JOHN M. ORR
ADJUDICATOR
EMPLOYMENT STANDARDS TRIBUNAL