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 -

Biport Forest Products Ltd.
(" Biport ")

and by

The Director of Employment Standards
(the " Director ")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: David B. Stevenson

FILE NOS: 1999/742 and 1999/766

DATE OF DECISION: April 26, 2000

DECISION

OVERVIEW

Biport Forest Products Ltd. ("Biport") and the Director of Employment Standards (the "Director") both seek reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision of the Employment Standards Tribunal (the "original decision"), BC EST #D429/99, dated November 17, 1999.

The original decision was made following a hearing on August 17, 1999. It cancelled a Determination made by a delegate of the Director on May 7, 1999, which dismissed a complaint by Tami Parsons ("Parsons"), and concluded that Parsons was owed $4500.00 in overtime wages. The Director did not appear at the hearing.

Biport lists six reasons for seeking reconsideration of the original decision, including whether the Adjudicator erred by relying on anecdotal evidence, whether the Adjudicator erred by arbitrarily selecting an amount as overtime wages owing and whether, as a result of the procedure adopted by the Adjudicator, Biport was denied a fair hearing.

The Director joins Biport in contending the Adjudicator erred by relying on and basing his decision on "anecdotal evidence". The Director also says the original decision failed to consider the legislative requirements in Section 81 of the *Act* or conform with the limitations of the Tribunal's authority under Section 115 of the *Act* and the failure to conform to the requirements of the *Act* is a breach of natural justice and administrative fairness.

These applications for reconsideration have been filed in a timely way.

ISSUES TO BE DECIDED

In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case is appropriate for reconsideration, the issues raised in the reconsideration are framed in the above two paragraphs.

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.*

Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is *"to provide fair and efficient procedures for resolving disputes over the interpretation and application"* of its provisions. Another stated purpose, found in subsection 2(b), is to *"promote the fair treatment of employees and employers"*. In *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97), the Tribunal noted:

> To realize these purposes in the context of its reconsideration power, the Tribunal has attempted to strike a balance between two extremes. On the one hand, failing to exercise the reconsideration power where important questions of fact, law, principle or fairness are at stake, would defeat the purpose of allowing such questions to be fully and correctly decided within the specialized regime created by the *Act* and the Regulations for the final and conclusive resolution of employment standards disputes: *Act*, s. 110. On the other hand, to accept all applications for reconsideration, regardless of the nature of the issue or the arguments made, would undermine the integrity of the appeal process which is intended to be the primary forum for the final resolution of disputes regarding Determinations. An "automatic reconsideration" approach would be contrary to the objectives of finality and efficiency for a Tribunal designed to provide fair and efficient outcomes for large volumes of appeals. It would delay justice for parties waiting to have their disputes heard, and would likely advantage parties with the resources to "litigate".

Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. In *Milan Holdings Ltd., supra*, the Tribunal outlined that analysis:

> At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration: *Re British Columbia (Director of Employment Standards)*, BC EST #D122/98. In deciding the question, the Tribunal will consider and weigh a number of factors. For example, the following factors have been held to weigh against a reconsideration:
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> (a) where the application has not been filed in a timely fashion and there is no valid cause for the delay: see *Re British Columbia (Director of Employment Standards)*, BC EST #D122/98. In this context, the Tribunal

will consider the prejudice to either party in proceeding with or refusing the reconsideration: *Re Rescan Environmental Services Ltd.,* BC EST #D522/97 (Reconsideration of BC EST #D007/97).

(b) where the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the Adjudicator (as distinct from tendering new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): *Re Image House Inc.*, BC EST #D075/98 (Reconsideration of BC EST #D418/97); *Alexander (Perequine Consulting*, BC EST #D095/98 (Reconsideration of BC EST #D574/97); *32353 BC Ltd., (c.o.b. Saltair Neighbourhood Pub)*, BC EST #D478/97 (Reconsideration of BC EST #D186/97).

(c) Where the application arises out of a preliminary ruling made in the course of an appeal. "The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid a multiplicity of proceedings, confusion or delay": *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.

The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in a previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": *Zoltan Kiss, supra*. "The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons": *Khalsa Diwan Society*, BC EST #D199/96 (Reconsideration of BC EST #D114/96). . .

The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the tribunal as including:

- failure to comply with the principles of natural justice;
- mistake of law or fact;
- significant new evidence that was not reasonably available to the original panel;
- inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

Consistent with the approach outlined above, I will first assess whether the applicants have established any matters that warrant reconsideration.

In my view, this is an appropriate case for reconsideration. The application of Biport raises an allegation that the Adjudicator failed to give Biport a fair hearing. Both applications also raise an important issue about the authority of the Tribunal under Section 115.

There are several other matters raised in the application of Biport as reasons supporting their application. Before addressing the two matters that have justified an exercise of my discretion in favour of the applications, I will dispose of those other matters.

Biport says that the Adjudicator "failed to identify the interest portion out of the $4500.00 amount". The Director makes the same point, which is surprising, since the Director knows full well that interest calculation is a purely administrative task. The Director has a computer program that would provide that breakdown. Alternatively, the breakdown could have easily been acquired by a request to either the Adjudicator or the Tribunal. If the applicants are interested, the interest component of the original decision is $448.52, leaving a wage component of $4051.48. There is no reason to reconsider this aspect of the original decision. Biport also says the original decision notes that Parsons was employed as a "clerk/office manager" and as a such was not entitled to overtime in any event. This is a new argument, raised for the first time in this application and normally would not be considered. Notwithstanding, it is completely without merit. The Determination identifies Parson's duties and notes that she was "the only office employee". The duties as described and the absence of any other employees to supervise militate against any conclusion that she was a "manager" under the *Act*. Finally, Biport says they were held solely responsible for not providing the relevant evidence to the Director in a timely fashion. I do not read the original decision as reaching that conclusion. The original decision only concluded that the investigation was procedurally unfair to Parsons and, as a result, she was given a chance at the hearing to respond to the information provided by Biport. The timeliness of the filing of documents was only relevant to that conclusion and there is no reason to reconsider the original decision on that point.

As outlined above, there are two aspects to the fair hearing issue. Biport says that certain events relating to the hearing and the procedure adopted by the Adjudicator denied them an opportunity to fully present their case and was generally unfair. The second aspect of this issue relates to the Director's argument that issuing an overtime award without a detailed finding regarding hours of work is a breach of natural justice and administrative fairness. The following comments address the first aspect of this issue - procedural fairness. In respect of the allegation that Biport was denied a fair hearing, Biport makes the following assertions of fact:

1. The Adjudicator arrived ½ hour late for the hearing.

2. The Adjudicator stated he had not had an opportunity to study the file and would conduct an investigation, as opposed to a hearing.

3. The Adjudicator rushed the entire hearing and due to time restraints he placed on the hearing, Biport was unable to provide the factual evidence from their records.

4. The Adjudicator did not ask Parsons to provide either documents or witnesses to substantiate her claim for overtime.

The first point has not been shown to be relevant to any part of the applications. There is nothing in the application that would indicate how arriving ½ hour late for a hearing (and I note there is disagreement about whether that happened) would affect Biport's ability to get a fair hearing.

In her reply to the second point, Parsons states:

> The adjudicator . . . stated clearly that he had just received the information relating to the case. This information was complete with all evidence of the previous two years. He did in fact state that he would conduct an investigation rather than a hearing due to the unfairness I had experienced with the case due to the withholding of all evidence from the Labour Standards Branch in Terrace by [the Director].

In reply to the third point, Parsons states:

> We both had an opportunity to present our sides and Mr. Hans had an abundance of evidence and things such as telephone records, which directly supported my claim for overtime hours.

In response to the last point, it is clear that the original decision was based on a careful consideration of the evidence presented and the argument that were made.

When a party alleges a denial of fair haring, that party has the initial burden of establishing some evidentiary basis supporting such an allegation. In most cases it would be inappropriate for an applicant to simply assert, as Biport has done here, that they were not allowed to "provide factual evidence from their records". Such an assertion is purely subjective. It may reflect nothing more than a disagreement with the result and it is not helpful in determining whether that party was in fact denied a fair hearing. There is some suggestion of that in their application, where Biport says the Adjudicator, "has based his decision on anecdotal evidence provided by Miss Parsons, while ignoring the documentary evidence which was made available at the Hearing". Otherwise, there is no indication from Biport as to what "factual evidence" they were not able to provide because of the procedure adopted. It is apparent on the face of the original decision that all of the "factual evidence" delivered by Biport to the Director during the investigation of the complaint was before the Adjudicator. As noted in the Determination (a point also referred to in the original decision):

> Biport produced a substantial body of evidence in support of their position, including payroll records, telephone log books and bills, letters from business colleagues and daily diaries kept by both Parsons and Hans.

Similarly, there is nothing in Biport's application that gives me any basis for concluding that the decision of the Adjudicator to adopt a less formal "investigatory" style of hearing denied Biport an opportunity to fully present its case on the appeal. There is nothing in the application or in the original decision suggesting that the parties objected to proceeding in that way.

Section 107 of the *Act* provides the Tribunal with the authority to procedurally control its hearings:

> *107. Subject to any rules made under Section 109(1)(c), the tribunal may conduct an appeal or other proceeding in the manner it considers necessary and is not required to hold an oral hearing.*

The Adjudicator was entitled to control his own hearing. While the Tribunal must be cognizant of the right of the parties before it to a fair hearing, nothing has been provided that would support Biport's suggestion that the process was unfair. No error in the original decision has been shown as a result of the procedure adopted by the Adjudicator.

The other aspect of the fair hearing argument has been raised by the Director as well as Biport and is included in the issue of whether the Adjudicator was wrong, as a matter of law arising under the *Act*, to rely on non-specific and anecdotal evidence to cancel the determination and order Biport to pay Parsons an amount of $4500.00.

The argument made by Biport on this issue is brief:

> The Adjudicator has not based his award of $4500.00 to Miss Parsons by determining the actual hours of overtime she may or may not have worked. The Adjudicator has erred in law by arbitrarily selecting an amount.

The argument made by the Director is more comprehensive. The submissions of the Director are prefaced with the following acknowledgment:

> The Adjudicator found that Parsons did work overtime without receiving appropriate compensation. The Director does not dispute the Adjudicator's authority to make such a finding. The Director does, however, have concerns with the remedy that was ordered.

The Director argues that the remedy provided by the original decision, which was not based on a specific finding of hours worked by Parsons, was a breach of natural justice because it failed to meet the legislative requirements set out in Section 81 and Section 115. These provisions state:

> *81. (1) On making a determination under this Act, the director must serve any person named in the determination with a copy of the determination that includes the following:*
>
> *(a) the reasons for the determination;*

> *(b) if the employer or other person is required by the determination to pay wages, compensation, interest, a penalty or other amount, the amount to be paid and how it was calculated.*
>
> *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.*
>
> *(2) The tribunal must make a written copy of its order with reasons available to*
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> *(a) the person who requested the appeal, and*
>
> *(b) the persons who under the tribunal's rules were notified of the appeal.*

The Director argues that to make a finding that Biport owed $4500.00 without a specific finding of hours worked is inconsistent with the intent of subsection 81(b), because the original decision does not show how the amount was calculated. This argument ignores the following comments from the original decision:

> Parsons' complaint claims she worked a total of 450 overtime hours between January, 1996 and July, 1997. Neither party kept an adequate record of hours worked or tasks assigned to Parsons outside regular office hours. As noted, I found Parsons to be credible in her claims, but unable to support the amount of time claimed with any detail about the work she performed. The problem now is what remedy should be ordered to correct that difficult situation. The Director has a computer program for calculating wages owing to an employee for overtime, which automatically allows for statutory holidays, watches for the total hours worked in a week, and makes appropriate adjustments to the calculations. . . .
>
> Parson's salary, converted to an hourly rate, would be in the range of $15.00 per hour. Most of the overtime hours she claims would be paid at time and a half, although some would be paid at double-time. In these circumstances, I have decided that fairness between the parties can be accomplished by reducing Parson's claim by a substantial amount, as a contingency to allow for hours that Biport claims she received as time off "in lieu", and also to allow for the vexing problem of Parsons' inability to specify exactly what work was done for any particular overtime claim. The reduction would also address the probability that the parties did have some agreement (which Mr. Hans denied) that Parsons would bank her overtime and simply take time off.

That passage informs any objective reader how the amount owing was calculated and I do not accept the Director' argument that the above passages do not meet the intent or requirements of the *Act*. I see no difference between what was done by the Adjudicator in this case and what is frequently done by the Director when the information acquired during the investigation is incomplete.

In *Mykonos Taverna operating as the Achillion Restaurant*, BC EST #D576/98, the appellant challenged calculations done by the Director in respect of claims by three employees who alleged the employer had improperly deducted amounts from their wages. That decision notes:

> Each individual made the same allegations of improper deduction of shortages, unpaid meals and tips. The findings of fact made by the Director on the allegations was the same for each individual:
>
> > With respect to the allegation that the employee is entitled to the recovery of wages used to pay 5% of the value of tips to the employer when the tip is paid by credit card, the employer acknowledges that he requires his employees to pay this. Further, the employer acknowledges that he required the complainant to pay for till shortages. In addition, the employer acknowledged that he required the complainant to pay for meals and beverages which the customer had not paid for and for any costs arising from a mix-up in a food or beverage order.
> >
> > While the complainant does not have any records or receipts to prove that the employer made deductions from her wages, she could not produce such records because the employer never provided them. The employer admits it is his practice to make these deductions from his employees because to do otherwise would be a cost to him. The complainant does, however, have an estimated amount which she was required to pay for unauthorized deductions.

The Director accepted the employees' estimates to determine amounts owing and the employer appealed. In the course of issuing its decision on the appeal, the Tribunal made the following statement relating to the authority of the Director to estimate amounts owing under the *Act* where the information provided is not capable of specific calculation:

> After the Director has determined that a person has lost wages because of a contravention of the *Act*, the task of establishing what amount of wages are payable can be a difficult one. That task can be made more difficult where the information necessary to determine the amount owed by reason of the contravention is unavailable or incomplete. Consistent with the statutory objective of achieving "efficient" resolution of disputes, the Director has considerable latitude in deciding what information will be received and relied upon when reaching a conclusion about the amount of wages that may be owing.

> If that decision is sought to be challenged *on its facts*, the burden on the appellant is to show either that the decision was manifestly unfair or that there was no rational basis upon which the conclusions of fact relevant to the decision could be made. This is consistent with the statutory and legal obligation of the Director to adhere to the principles of fairness and reasonableness when exercising her authority under the *Act* (see *Shelley Fitzpatrick operating as Docker's Pub and Grill*, BC EST #D511/98). In this case, the question is whether the appellant has shown the decision is unfair or unreasonable.

There is no difference in principle between what the Adjudicator has done in this case and the above statement. In this case, the Adjudicator found that the Determination was arrived at in a procedurally unfair manner and that in the circumstances, which included a delay of almost two years between the filing of the complaint and the issuance of the Determination, was appropriate for the Tribunal to consider the claim. The original decision is completely consistent with the objects and purposes of the *Act*, achieving the primary legislative objective to *"ensure that employees . . . receive at least basic standards of compensation"* and also achieves the objectives of fair treatment and fair and efficient procedures for resolving disputes. If the conclusion and calculation of the Adjudicator are to be successfully challenged, and consistent with principle established in the *Mykonos Taverna* case, the Director and Biport would have to establish that the conclusion was manifestly unfair or that there was no rational basis for it.

It is obvious that the main objection raised by the Director and Biport is how the Adjudicator arrived at his conclusion that Biport owed Parsons overtime wages. The Director characterizes the conclusion in the original decision as an "arbitrary award without evidentiary foundation" and without a specific finding of hours worked. Biport says:

> We submit there exists an abundance of evidence, which can be the basis for arriving at a fair and just decision. One does not have to resort to either anecdotal evidence or mere hearsay.

For clarification, the term "anecdotal evidence" is a term used by the Adjudicator and is found in the original decision at page 5:

> Although Parsons cannot prove exactly what she did during the many overtime hours claimed, she was able to provide anecdotal evidence which satisfies me beyond a reasonable doubt that she performed work for Biport on a regular basis outside office hours.

It is clear that the "anecdotal evidence" referred to by the Adjudicator was not the only evidence he had nor the only evidence he relied on. What neither the Director nor Biport have addressed is the reason for arguing that this evidence, or any of the other evidence received and relied on, should not have been accepted and utilized in the original decision.

The Adjudicator had a substantial body of evidence provided to him. He chose to give greater weight to some of that evidence. His reasons for doing so are in the decision. The Director and Biport must do more than merely disagree with the Adjudicator's view of the evidence.

The Director also says that the original decision was inconsistent with the requirements of Section 115 of the *Act* and that:

> Section 115 specifies the remedy available once an appeal is considered to be valid, but there is insufficient evidence before the Adjudicator to determine quantum. If the Adjudicator believes the delegate has erred, the Determination ought to be either cancelled or referred back to the Director for further consideration. Alternatively, the Adjudicator ought to make a specific finding of hours worked, adequately consider the implication pursuant to the *Act* and vary the Determination.

Section 115 is not so narrow as suggested by the Director. The *Act* gives the Tribunal a broad authority in respect of appeals filed under Section 112. As the Tribunal noted in *Takarabe and others*, BC EST #D160/98:

> The appeal and inquiry powers of the Tribunal are set out in Section 108 of the Act. In particular, Section 108(2) gives the Tribunal the power to "...decide all questions of fact or law arising in the course of an appeal or review". Section 112(1) of the Act allows a person served with a Determination to appeal it to the Tribunal. Section 115(1) of the Act gives the Tribunal the power to "...confirm, vary or cancel the determination under appeal, or refer the matter back to the Director". We agree with the Appellants that Section 115 of the Act confers on the Tribunal a "...wide ambit of appellate authority" (see, for example, British Columbia (Minister of Health) v. British Columbia (Environmental Appeal Board), (1996) 26 B.C.L.R.).

Similarly, in this case, the Tribunal has the authority to decide all questions of fact and law relating to this appeal. I don't disagree with the Director's suggestion that one of the options available to the Adjudicator in this case was to refer the matter back to the Director. However, there is no indication, either in the applications or in the decision, that the Director would have been in any better position to decide the appropriate remedy than the Adjudicator was. As well, the reasons for the Adjudicator choosing to provide the remedy rather than referring the matter back to the Director are stated in the original decision are consistent with the objects of the *Act*.

The applicants have not shown any error in fact or in law in the original decision.

ORDER

Pursuant to Section 116 of the *Act*, this application is denied.

DAVID B. STEVENSON

David B. Stevenson
Adjudicator
Employment Standards Tribunal