BC EST #D155/00
Reconsideration of BC EST #D430/99 and D431/99

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 -

C-O-E Posscan Systems Inc.
(" Posscan " or the "Employer")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Ib. S. Petersen

FILE No.: 1999/707 and 1999/708

DATE OF DECISION: April 20, 2000

DECISION

SUBMISSIONS

Mr. Blaine Rowlet	on behalf of the Employer
Mr. Ray Lee	
Mr. Doug Stevens	on behalf of the himself
Mr. W.H. Dennis	on behalf of the Director

OVERVIEW

This is an application by the Employer pursuant to Section 116 of the *Employment Standards Act* (the "*Act*"), against two Decisions of the Employment Standards Tribunal (the "Tribunal") issued on October 13 and 21, 1999 (#D430 and #D431/99). The Decisions followed a hearing on September 24, 1999.

BACKGROUND

In #D430, concerning Mr. Doug Stevens ("Stevens"), the Adjudicator upheld the Determination which concluded that he was owed wages, overtime wages, additional vacation pay and interest for a total of $2,311.93 (the "Stevens Decision"). From the Decision, the following background facts may be gleaned. Stevens worked as a "field engineer", doing installation and service, in the Employer's video department from October 13, 1997 and August 24, 1998. He worked considerable overtime and kept a diary of those hours (relied upon in the Determination). Stevens claimed to have submitted his time records to his supervisor, Law, the department manager. Law left the Employer with the entire video department and started a business in competition with the Employer.

In #D431, concerning Mr. Law ("Law"), the Adjudicator confirmed the Determination which found that Law was owed 18,315.06 (the "Law Decision"). Law was employed by Posscan as department manager from January 21, 1998 to August 21, 1998. He was paid by salary and a 2% commission on sales of the video department. This does not appear to have been in dispute. In the appeal of the original Determination, Posscan claimed that Law, in a meeting in Apri, agreed to amend the commission structure due to poor sales. The new commission structure provided for sales of not less than $200,000 per month before commission was payable. Law denied that this meeting took place. The Adjudicator noted:

> "Law denies that meeting took place and Posscan cannot provide any confirmation in the form of notes or a contract to support their claim. Posscan did supply a letter from the office manager, Holly Lenk dated July 6, 1999. In that letter, Lenk stated:

> ....He never reported as to why there were no figures shown for April 1998 and onward. I took this action to show his acceptance of these figures, and that there were no subsequent commissions owed because his total sales were not met."

The Determination found insufficient evidence to support such a major change and relied on Law's position that the commission structure had not been changed. While the Adjudicator had "some difficulty" with the fact that Law took no action with respect to his commissions from April 1998, he concluded that

> "... Posscan has been unable to provide sufficient evidence to convince me to change the Determination. It is the responsibility of the appellant to provide the adjudicator with reasons why the Determination should be altered."

The Employer is seeking to reconsider the Decisions.

ISSUES TO BE DECIDED

First, with respect to the Stevens Decision, the Employer puts forward the following grounds of appeal. The Employer says that the Adjudicator's decision breached "principles of natural justice" because he accepted the evidence of Stevens over that of an "unbiased" witness, while questioning his credibility. The Employer says that the Adjudicator accepted that there was no evidence that other employees had difficulty reporting their time and that "one question that has not been answered is why only Stevens seemed to have had difficulty with reporting his time". The Employer also says that the Adjudicator accepted that Law, who was a manager, and the office manager may not have been as diligent in enforcing company policy "as they might have been and their credibility may be in some question". The Employer suggests that Steven's "day timer log entries could have been created and initialled by Mr. Law after fact."

Second, with respect to the Law Decision–in addition to arguments that relate to Lee and Rowlett in their capacity as director/officers, which I do not propose to deal with here–the Employer says that the Adjudicator failed to apply "principles of natural justice." It appears that the Adjudicator preferred the testimony of Law over that of the Employer's two witnesses and a written statement from the former office manager. The Employer says:

> "We contend that in the face of this evidence, <the Adjudicator> was willing to take the word of Mr. Law over the word of ourselves. We would like to know the reason why <the Adjudicator> would not take the word of two equally credible witnesses (ourselves) and the statement of Holly Lenk. Ms. Lenk has nothing to gain or lose by making such statement, therefore it must be the truth. Mr. David Paul would also have corroborated the our statements had he been in attendance.
>
> We would also like the record to show that Holly Lenk was willing to testify to the facts stated in her letter, and would have attended this hearing if not for the fact that the hearing conflicted with a class she was taking and could not miss.

> We would like an opportunity for the Labour Standards Tribunal to hear the testimony of Ms. Holly Lenk to confirm her statements and ours."

The Employer also says that the fact that the Adjudicator expressed "some difficulty" with the fact that Law took no action with respect to his commissions from the end of March 1998 to August 1998 indicates that principles of natural justice were not applied. The Adjudicator also stated:

> "The manner in which Law left Posscan, including the hiring of the former employees, might cause one to question his credibility however that matter is to be dealt with in another forum."

The Employer says:

> "An error in the statement of facts has been made and we would like to correct that statement by saying that some of the former employees were not only hired, but also were shareholders in the new company, therefore part of the conspiracy. The transcripts of the discovery examination of Mr. Law will show that there were several meetings of these former employees at least one week prior to their resignations ...."

Moreover, the Employer argues that Law lied when he denied taking any documents from Posscan when he left the Employer (to start a competing business). The Adjudicator appear to have accepted this denial. The Employer says that this is a "complete lie" and that Law, in examination for discovery in a law suit between Posscan and the company started by Law, admitted taking a rolodex from the Employer, explaining that it contained personal information. The Employer says that if the Adjudicator had read the transcripts, the outcome of the hearing would have been in Posscan's favour. The transcript shows, according to the Employer, that Law was "uncooperative and evasive". The Employer says:

> "We did not know the legalities of introducing the transcripts as evidence at the Tribunal hearing. If it is permitted, and Mr. Law has no objections, we would like to submit these transcripts as evidence in our defence."

Finally, the Employer argues that it is "ludicrous" to order that Posscan pay commissions to Law when he left the Employer without notice, started a competing business, took Posscan's employees with him, took confidential information, and so on. The Employer says that the sales of the video department in July and August 1998 were far below previous months.

The issue is whether the Employer, in these circumstances, is entitled to have the Adjudicator's decisions reconsidered?

ANALYSIS AND DECISION

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*
>
> *(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 may make an application under this section.*

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 system. Consistent with those principles, the Tribunal has adopted an approach which resolves into a two stage analysis (see *Milan Holdings Inc.*, BC EST #D313/98, reconsideration of BC EST #D559/97). At the first stage, the reconsideration panel decides "whether the matters raised in the application in fact warrant reconsideration" considering such factors as:

1. the timeliness of the application together with any valid reason for a delay;

2. whether the primary focus is to have the reconsideration panel "re-weigh" the evidence;

3. whether the application arises out of a preliminary ruling made in the course of an appeal;

4. whether the application raises 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; and

5. whether the application raises an arguable case of sufficient merit to warrant reconsideration.

The panel in *Milan Holdings* noted, at page 5 (QL version):

> "After weighing these and other factors relevant to the matter before it, the Panel may determine that the application is not appropriate for reconsideration. If so, it will typically give reasons for its decision not to reconsider the adjudicator's decision. Should the Panel determine that one or more of the issues raised in the application is appropriate for reconsideration, the Panel will then review the matter and make a decision. The focus of the reconsideration panel "on the merits" will in general be with the correctness of the decision being reconsidered."

1. Stevens Decision

In my opinion, considering the principles set out above, there is no merit to the application for reconsideration. The issue before the Adjudicator was, as stated by him, whether Stevens

worked the hours claimed. The Employer suggests that the basis for that conclusion, the day timer log entries, "could have been created and initialed by Mr. Law after fact." It is not clear from the application what evidence was presented by the Employer at the hearing with respect to that issue.

However, the Employer had the opportunity to cross examine Stevens, and witnesses appearing on his behalf, and make submissions in that regard. The Employer's failure to do so would not constitute a ground for reconsideration. Similarly, if the Employer did cross examine and make submission on the issue of the credibility of Stevens and the diary, and the Adjudicator, as would appear to be the case, nevertheless preferred Stevens' evidence over that provided by Posscan, that would not in itself be sufficient for reconsideration. The Adjudicator heard the testimony and had the opportunity to observe the witnesses and, therefore, is in a better position to evaluate the evidence. At the minimum, I would expect that the applicant would clearly identify the evidence presented at the original hearing and clearly identify where the Adjudicator misapprehended the evidence. While it is clear that the Employer disagrees with the findings, I am not satisfied that the Adjudicator misapprehended the evidence before him. In my view, the Employer simply disagrees with the Adjudicator's findings and is now seeking to re-argue the case. I am not prepared to allow that. 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. That not being the case, in short, I am not persuaded that the Decision should be set reconsidered.

2. Law Decision

The central issue in dispute in the Decision was whether or not Law's contract of employment had been amended. There is no dispute about the relevant terms prior to the alleged amendment, *i.e.*, a monthly salary and 2% commission on video sales. This agreement was not reduced to writing. The Adjudicator, therefore, had to rely on the oral evidence presented by the parties. As often is the case in cases of this nature, parties–for a variety of reasons–have different and conflicting views of the material events. In other words, the Adjudicator would consider the conflicting evidence and arrive at a conclusion as to what happened. Often that is done with reference to the words of the B.C. Court of Appeal in *Faryna v. Chorny*, <1952> 2 D.L.R. 354, at 357:

> ".... the best test of the truth of the story of a witness ... must be its harmony with preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in the place and in those conditions."

In this case the Adjudicator preferred the evidence of Law over that of the Employer. The Decision recognizes that Law denied that a meeting took place, and that the Employer's witnesses said that it did. He is entitled to make that judgement. The Adjudicator heard the testimony and had the opportunity to observe the witnesses and, therefore, is in a better position to evaluate the evidence. While I accept that there is no express explanation why the Adjudicator preferred Law's evidence over that of Lee and Rowlett, I do not, in the circumstances, consider that sufficient ground for reconsideration. The Adjudicator considered Law's testimony and, in fact, expressed "some difficulty" with Law's conduct. Such doubt–as the appellant puts it –

may–or may not–be a reason for rejecting part or all of the evidence of a particular witness. Ultimately, that decision rests with the Adjudicator. While I agree that the letter from Lenk could be read to circumstantially support an argument that Law's agreed to amend his employment contract in April–because he did not question his commission statement after that time–I do not understand Lenk's letter to unequivocally support the Employer's version of the events. The application before me is also defective in the sense that there is nothing before me as to exactly what evidence was presented to the Adjudicator at the hearing which is not to be found at the face of the decision. Preferably such evidence would be by way of an affidavit or a statutory declaration. In any event, there are not even basic particulars of what the Employer's witnesses, Lee and Rowlett, testified at the hearing. In my opinion, the Employer is simply seeking to have me "re-weigh" the evidence. That is not an appropriate use of the reconsideration process.

I am not going to consider whether or not Law "lied" in his evidence before the Tribunal, as argued by the Appellant, because his evidence at the hearing, that he did not take "any documents from Posscan" is different from his evidence given in an examination for discovery, namely, that he removed a rolodex (though, in all fairness, he explained that the rolodex contained personal information). It may well be, but I need not decide this point, that there is a difference between Law's statements in these different fora. I hasten to add that I am not convinced, based on the material before me, that there is such a difference. In any event, in my view, the time to question Law and impeach his credibility was at the hearing conducted by the Adjudicator, not on reconsideration. The discovery evidence is not new evidence that was not available at the time of the hearing. As stated in the appeal:

> "We did not know the legalities of introducing the transcripts as evidence at the Tribunal hearing. If it is permitted, and Mr. Law has no objections, we would like to submit these transcripts as evidence in our defence."

In other words, the evidence was available at the time of the hearing. The problem was that the appellant did not know how to put the transcript into evidence. That is not a ground for reconsideration. It is important to remember that a party is responsible for presenting its case before the Tribunal. In my view, the Employer is seeking to reargue the case before the Adjudicator upon the realization that it needs to bolster its case. That is not an appropriate use of reconsideration.

Importantly, and correctly, in my view, the Adjudicator based his decision on the burden of proof in these cases. First, it is trite law that the appellant has the burden to show that the Director's delegate erred in making his Determination. Second, the burden of proof that there was a change in the contractual relations between Posscan and Law rests with Posscan as the party making that assertion. In that context, the fact that Posscan was unable to provide any documentation–in the form of notes or a contract"–was important. I do not, of course, mean to suggest that written evidence is required. In fact, oral evidence is equally acceptable. The benefit of documentary evidence is simply that it is often easier to prove whatever change was made to the contractual relationship.

In that regard, the Employer's assertion that Lenk and another individual, David Paul, would have corroborated Lee and Rowlett's evidence is wholly irrelevant. The appellant is responsible

for presenting its case. This entails a responsibility for ensuring that its witnesses are present at the hearing.

In short, the application for reconsideration of the Law Decision is dismissed.

ORDER

Pursuant to Section 116 of the *Act*, I order that the Decisions #D430/99, dated 13, 1999, and #D431/99, dated October 21, 1999, be confirmed and the applications for reconsideration be dismissed.

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal