BC EST #D179/00
Reconsideration of BC EST #D209/99

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 -

The Director of Employment Standards
(the " Director ")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

PANEL: David B. Stevenson
Carol Roberts
Lorne Collingwood

FILE No: 2000/032

DATE OF DECISION: May 2, 2000

DECISION

OVERVIEW

The Director of Employment Standards (the "Director") seeks a reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision of the Employment Standards Tribunal (the "original decision"), BC EST #D209/99, dated June 22, 1999. As it relates to this application, the original decision cancelled a Determination made by a delegate of the Director on February 8, 1999 that Aries Property Maintenance (Canada) Ltd. ("Aries") owed $26,353.77 in unpaid wages and interest pursuant to the provisions of the *Skills Development and Fair Wage Act* (*"SDFWA"*) and the *SDFWA Regulation*. The original decision concluded that the *SDFWA* did not govern the work performed by the employees of Aries included in the Determination.

The Director says that conclusion was wrong.

The original decision was based on written submissions from Aries, from Walter Construction (Canada) Ltd., who was given "intervenor" status by the Tribunal, and by the Director. None of the parties sought a hearing on the appeal.

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 sole issue raised in the reconsideration is whether the original decision was wrong in fact and in law in its conclusion that the *SDFWA* did not govern the work in question.

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).
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> (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).
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> (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.
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> 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 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.

In our opinion, this is not an appropriate case for reconsideration.
There has been inordinate delay by the Director in pursuing this application that is neither justified nor explained by the Director. As pointed out in the submission of Walter Construction Ltd., the Tribunal has refused to exercise its discretion to consider applications for reconsideration where there was a delay in the range of six months: see *Webb*, BC EST #D328/98; *Jewell*, BC EST #D310/98; *Policarpio*, BC EST #D229/98; and *Re British Columbia*, BC EST #D122/98.

The original decision was issued on June 22, 1999. This application was filed with the Tribunal on January 18, 2000, nearly seven months after the original decision was made. In *Re British Columbia (Director of Employment Standards)*, BC EST #D122/98, the Tribunal made the following comments while assessing the timeliness of application for reconsideration before it:

> 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, 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.
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> (pages 7 - 8)

Those comments are equally applicable to this application, except here the Director gives no reason at all for the delay. In her final submission, dated February 23, 2000, the Director says:

> . . . there is no obligation upon it to prove a "valid cause" or "compelling reasons" or demonstrate any other "exceptional circumstances" for the timeliness of its application.

The Director is wrong about that. A delay of this magnitude does require the Director to establish a compelling reason for the delay, as we have said on several occasions.

The Director relies on a recent Tribunal decision, *Alnor Services Ltd.*, BC EST #D495/99, where the Director says the Tribunal considered an application for reconsideration filed nine months after the original decision. That is not a correct reading of that decision. In fact, the application for reconsideration was denied in that case. The issue of timeliness was not considered or argued, as there was a more direct and obvious reason for refusing to exercise a discretion to reconsider the original decision. The *Alnor Services Ltd.* decision does not assist the Director.

The Director also relies on correspondence sent to the Tribunal on September 23, 1999, three months after the original decision and almost 4 months before this application was filed, which says:

> I am writing to advise the Tribunal of the Director's intention to request a reconsideration of the above noted decision of the Employment Standards Tribunal.
>
> I will have further submissions for you in the very near future.

The reference to "further submissions" is curious, since the above communication could not by any stretch of the imagination be considered a "submission". The correspondence does not constitute an application under Section 116 of the *Act*. It does not provide any basis upon which

the Tribunal might exercise its discretion under section 116. The letter is no more than a statement of intention. Given the objective of the *Act*, to deal fairly and efficiently with disputes, and in view of the narrow approach taken by the Tribunal to reconsideration applications, the Director should not have presumed that the letter would crystallize a right to reconsideration at a later date, in this case nearly seven months after the decision. Even from the date of the above communication, the Director filed no application for almost four months, a length of time we would not consider as being "in the very near future".

In our view there is no overriding or compelling reason to grant this application. If, as the Director says, the original decision adopted a definition of "construction" under the *SDFWA* that is too narrow and, in the context of the activities and processes that form part of a construction project, is unworkable, that concern can be revisited in an appropriate case. Otherwise, the arguments raised in this application to support the position that the *SDFWA* governed the work performed were considered in the original decision.

ORDER

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

David B. Stevenson
Adjudicator
Employment Standards Tribunal

Carol Roberts
Adjudicator
Employment Standards Tribunal

Lorne Collingwood
Adjudicator
Employment Standards Tribunal