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 -

Michael W. Hoyle

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal ")

ADJUDICATOR: John M. Orr

FILE No.: 2000/101

DATE OF DECISION: May 15, 2000

DECISION

OVERVIEW

This is an application by Michael W. Hoyle ("Hoyle") under Section 116 (2) of the *Employment Standards Act* (the "Act") for a reconsideration of a Decision #D040/00 (the "Original Decision") which was issued by the Tribunal on January 31, 2000.

The Director of Employment Standards ("the Director") issued a determination on September 16, 1999 (ER #094463) which found that Hoyle was not entitled to any outstanding wages from his employer, G.D.S. Direct Countertops Ltd. ("GDS") or ("the employer").

Hoyle was originally employed as a sales person working wholly on commissions but his duties were altered to include shop work. A key issue was whether he was solely employed to do shop work or whether he was doing both shop work and sales. When Hoyle's employment terminated he made a claim for unpaid wages including overtime in the amount of about $14,000.00. The dispute centred around the nature of the work being done by Hoyle, the basis for his payment, and his rate of pay. There was also considerable issue over the failure of the employer to maintain proper employment records and the accuracy and reliability of various employment records and government required employment forms.

In the determination the Director's delegate pointed out the failure of the employer to keep proper records and that Hoyle had kept his own records of hours worked. The delegate noted that in such a situation he would base his calculations on the records provided by Hoyle. However, after applying the rate of pay to those hours the delegate found that, in fact, Hoyle had been overpaid significantly and that there was no money owing to him from the employer.

Hoyle appealed to the Tribunal. His appeal was prepared and submitted by a Peter E. Hoyle and was comprehensive in that it disputed, *inter alia*, many of the facts found by the delegate, the stated positions of the parties, the findings of fact and analysis, the amount claimed by Hoyle, and the conclusion of the delegate that the *Act* had not been contravened.

Hoyle's appeal was heard, on December 17, 1999, by the Tribunal by way of oral hearing with evidence given by witnesses under oath and subject to cross-examination. Submissions were made and the original decision was subsequently issued on January 31, 2000. The original decision confirmed the determination that there were no wages owing by the employer to Hoyle.

On February 21, 2000 Peter E. Hoyle, on behalf of Michael Hoyle, made application to the Tribunal, pursuant to section 116 of the *Act*, for reconsideration of the original decision.

ANALYSIS

The current suggested approach to the exercise of the reconsideration discretion under section 116 of the *Act* was set out by the Tribunal in *Milan Holdings Ltd.*, BC EST #D313/98 (applied in decisions BC EST #D497/98, #D498/98, et al). In *Milan* the Tribunal sets out a two stage analysis in the reconsideration process. The first stage is for the panel to decide whether

the matters raised in the application for reconsideration in fact warrant reconsideration. In deciding this question the Tribunal should consider and weigh a number of factors such as whether the application is timely, whether it is an interlocutory matter, and whether its primary focus is to have the reconsideration panel effectively "re-weigh" evidence tendered before the adjudicator.

The Tribunal in *Milan* went on to state that the primary factor weighing in favour of reconsideration is whether the applicant has raised significant questions of law, fact, principle or procedure of sufficient merit to warrant the reconsideration. The decision states that "at this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general". Although most decisions would be seen as serious to the parties this latter consideration will not be used to allow for a "re-weighing" of evidence or the seeking of a "second opinion" when a party simply does not agree with the original decision.

It is one of the defined purposes of the *Act* to provide a fair and efficient procedure for resolving disputes and it is consistent with such purposes that Tribunal's decisions should not be open to reconsideration unless there are compelling reasons: *Khalsa Diwan Society,* BC EST #D199/96.

In this case, Peter Hoyle has once again made a very comprehensive submission on behalf of Michael Hoyle. In his submission dated February 18, 2000 he submits five grounds to support the application for reconsideration. He says that the adjudicator in the original decision (1) made mistakes in stating the facts, (2) failed to be consistent with a previous decision regarding the value as evidence of the Record of Employment, (3) failed to accept certain employer's evidence and (4) failed to be consistent with previous cases regarding the effect of inadequate records. Hoyle also wishes the Tribunal to take into account "new evidence".

Mr. Hoyle's submission is largely an extensive and detailed re-examination of the evidence heard by the adjudicator at the original hearing. The allegations of inconsistency with previous decisions relate primarily to the weighing of evidence and inferences to be drawn from the failure to keep proper records or preferences to be given to certain records. He raises issues of credibility of the employer's witnesses based upon new evidence.

In my opinion this is a case which does not warrant the exercise of the reconsideration discretion. The request does not raise any issues which were not dealt with on their merits either by the Director or the adjudicator in the original decision. I have read the original decision, the original file, and all the submissions on this request for reconsideration and can find no basis upon which it would be proper to substitute my opinion for that of the original adjudicator.

The original decision carefully analyses the submissions made by, and on behalf of, Hoyle. The adjudicator in the original decision applied the proper tests for the weighing of evidence and the onus of proof and came to a carefully analyzed and reasoned decision. It is important to note that inferences drawn from records or the lack of them are a matter of weight to be applied by the adjudicator who has had the opportunity to hear all of the evidence through the witnesses who testified. While Hoyle may have drawn other conclusions from the evidence it is not appropriate for the Tribunal on reconsideration to attempt to assess the credibility of witnesses and the appropriate weight to be given to certain evidence.

Mr. Peter Hoyle states in his submission dated March 29, 2000 "*It is the weighing of the credibility and the weighing of the evidence which are two of the issues raised in our request for reconsideration"*. I might add that all five grounds for reconsideration relate to the weighing of evidence and credibility. Effectively, Hoyle is seeking a re-hearing because he is dissatisfied with the result.

The primary focus of the application is to have the reconsideration panel effectively "re-weigh" the evidence and submissions tendered before the adjudicator and effectively seek a second opinion. I am not satisfied that there has been any breach of administrative law principles either by the Director's delegate or by the adjudicator. I am satisfied that Mr. Hoyle received a full and fair hearing. Having concluded that the matter was properly adjudicated I do not believe that it would be a proper exercise of the reconsideration discretion to further review the substance of the original decision.

ORDER

This Tribunal orders that the application for reconsideration is denied.

John M. Orr
Adjudicator
Employment Standards Tribunal