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 -

Harrison Doig & Associates
(" Doig " or the "Employer")

- of a decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Mark Thompson

FILE No.: 2000/075

DATE OF DECISION: May 8, 2000

DECISION

OVERVIEW

This is an application by Harrison Doig Associates ("Doig" or the "Employer") under Section 116 of the *Employment Standards Act* (the "*Act*") to reconsider Tribunal Decision BC EST #D0001/00 issued on January 14, 2000. The Decision upheld a Determination by a delegate of the Director of Employment Standards (the "Director") issued on September 23, 1999. The Determination found that the Employer owed the complainant, Linda Cosco ("Cosco") a total of $1,043 for overtime, vacation pay and interest. The basis of the Determination was the delegate's conclusion that Doig had allowed Cosco to work overtime on January 26 and 27, 1998 without paying her any compensation. In addition, the Determination concluded that Employer did not pay Cosco for all hours worked on January 28 and 30, 1998 and had not paid Cosco for her vacation time according to her contract of employment.

In Decision BC EST #D0001/00 (the "original Decision"), the adjudicator found that Doig had not presented any evidence to show that the Determination was wrong in fact or in law.

Doig has requested a reconsideration of the earlier decision on the grounds that he had not been given the opportunity to present his evidence under oath and that Cosco had worked the overtime without his permission.

This decision was based on written submissions of the parties.

ISSUE TO BE DECIDED

The issue to be decided in this case is whether the Employer has met the burden for establishing that grounds for reconsideration of Decision #D0001/00 exist.

FACTS

The relevant facts of this case are contained in the original Decision. Cosco was employed as a legal secretary for Doig from July 24, 1997 through January 30, 1999. It appears that she normally worked seven hours per day. The matter in question in this case is the number of hours Cosco worked on January 26 and 27, 1999. Cosco claimed that she worked 13 hours on each of those days and that she worked 8 hours on January 29 and 30, 1999, but was paid for 7 hours each day. The Determination found that Cosco had worked the hours in question and calculated the amount owed to her at straight time, time and one half and double time rates.

Doig filed an appeal of the Determination on the grounds that it was based on incorrect facts "in that it concludes that there was no evidence provided that the Complainant did not work the overtime for which she claimed." The Director accepted Cosco's statement of the overtime hours she worked. The Employer did not provide any evidence to the Director's delegate or to the Tribunal in the appeal to prove what hours Cosco worked on the dates in question. The Employer also argued that the Director's delegate had not obtained any evidence that Cosco was authorized to work overtime on those days. Cosco stated that she worked the hours in question

because Mr. Harrison Doig ("Doig"), the principal of the Employer, had told her in her employment interview that she should work overtime when necessary. Doig never offered any reply to that statement. The original Decision found that the Director's delegate was correct in concluding that Cosco had worked the overtime.

The Determination concluded that the Employer had allowed Cosco to work overtime, at least indirectly. The original Decision reviewed the facts and statutory framework and upheld the Director's decision.

The Employer applied for a reconsideration of the original Decision first because Doig had not been given the opportunity to give evidence under oath. Subsequently, the Employer argued that Cosco had not requested payment for the overtime hours in question until August 1999, and that she had decided to work the extra hours unilaterally because she had lost time at work due to an illness. Doig stated that it would not be practical to pay a legal secretary overtime as Cosco claimed.

ANALYSIS

Section 116 of the *Act* gives the Tribunal the discretion to reconsider a decision. The appropriate criteria for exercising this discretion has been stated by the Tribunal on a number of occasions, most notably in *Re Milan Holdings Ltd.*, BC EST #D313/98. In *Milan Holdings*, the Tribunal set out a two-stage process for analyzing requests for reconsideration. The first stage is to decide whether the matter raised in the application for reconsideration warrants a second examination. In deciding this question, the Tribunal considers whether the focus of the request for reconsideration is to have a second panel effectively re-examine the evidence presented to the adjudicator in the first decision. The primary factor weighing in favour in reconsideration is whether the applicant has raised significant questions of law, fact, principle or procedure of sufficient merit to merit reconsideration. Reconsideration will not be used to allow a "re-weighing" of evidence or the seeking of a "second opinion" when a party simply disagrees with the original decision. See *Wicklow Properties Ltd., et al.*, BC EST #D518/99.

The second stage of the analysis the Tribunal applies is to deal with the request on its merits. Among the grounds for reconsideration are: a failure by the adjudicator to comply with the principles of natural justice; a mistake of fact, inconsistency with other decisions of the Tribunal not distinguishable on the facts; significant and serious new evidence that has become available and that would have led the adjudicator to a different decision; a serious mistake in applying the law or failure to deal with a significant issue and a clerical error. See *Zoltan Kiss*, BC EST #D122/96.

In this case, the Employer has failed to meet the burden of demonstrating that the original Decision contains a significant error of fact or law as stated in *Milan Holdings, supra*. The first ground for the request was that Cosco filed her complaint some time after she carried out the work. In fact, Section 74(3) permits a complaint to be filed within six months after the last day of employment. No allegation was raised that Cosco's complaint was out of time. Secondly, the Employer argued that Cosco was not authorized to work overtime on the two days in question. This is a re-statement of the argument made to the Director's delegate and the adjudicator in the original Decision.

Doig stated that the Determination and the original Decision were made without affording him an opportunity to be heard. On the contrary, as the original Decision noted, he was offered the opportunity to respond to Cosco's statement that she was authorized to work overtime in her interview in July 1997, and he did not reply. He presented no new evidence to the adjudicator for the original Decision. Nor did he provide any new evidence in support of his request for reconsideration. The Tribunal frequently makes decisions based on written submissions. Section 107 of the *Act* gives the Tribunal the authority to decide if an oral hearing is required to decide an appeal or other proceedings. The Tribunal decided, appropriately, in this case that no oral hearing was necessary.

The Employer has not met the burden of demonstrating that sufficient grounds exist to reconsider the original Decision.

ORDER

For these reasons, pursuant to Section 116 of the *Act*, I confirm the original Decision.

Mark Thompson
Adjudicator
Employment Standards Tribunal