# 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 -

Wildflower Productions Inc. and James Elderton and Stephanie Elderton, Directors of Wild flower Productions Inc.

(" Wildflower ")

- of a Decision issued by -

The Employment Standards Tribunal

(the "Tribunal")

**ADJUDICATOR:** David B. Stevenson

**FILE Nos:** 2000/117 and 2000/118

**DATE OF DECISION:** May 10, 2000

## DECISION

### OVERVIEW

Wildflower Productions Inc. ("Wildflower") and James Elderton ("Mr. Elderton") and Stephanie Elderton ("Ms. Elderton"), Directors of Wildflower Productions Inc. (collectively, the "directors") seek reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of two decisions of the Employment Standards Tribunal (the "original decisions"), BC EST #D064/00, dated February 11, 2000 (the "company decision") and BC EST #D065/00 (the "director/officer decision").

The original decisions were issued following a hearing on February 1, 2000 which considered three appeals, one filed by Wildflower and one by each of the directors.

The company decision confirmed, with a small variance, a Determination made by a delegate of the Director on September 9, 1999 that three persons employed by Wildflower, David Hechenberger ("Hechenberger"), Beverley Nicole (Nicky) Cain ("Cain") and Durwin Partridge ("Partridge"), employees of Wildflower for the purposes of the *Act*, were owed unpaid wages, statutory holiday pay and annual vacation pay.

The director/officer decision confirmed two Determinations issued September 9, 2000 under Section 96 of the *Act* against Mr. Elderton and Ms. Elderton in their capacity as directors of Wildflower.

Wildflower has filed one application in respect of the original decisions.

### 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, there are two issues that are raised in the application. The first is whether the company and Ms. Elderton were denied a fair hearing because the Adjudicator refused to grant an adjournment of the February 1, 2000 hearing. The second issue is whether the original decisions were wrong in their conclusion that Partridge and Cain were employees for the purposes of the *Act* and not independent contractors.

It is unclear from the application and the subsequent submissions whether any aspect of the original decisions relating to Hechenberger are being contested. There are sporadic references to him throughout, including a suggestion that he is an independent contractor because he claimed one or more of the projects that were being developed by Wildflower while he was an employee. There is a later comment that the applicants "have never contested the employment status of Mr. Hechenberger". To resolve any confusion, I find that any suggestion Hechenberger was not an employee under the *Act* is not an appropriate issue for reconsideration. The company decision and a submission on the reconsideration application note that Wildflower did not dispute

Hechenberger's status as an employee and they would not, in any event, be allowed to do so in this application.

Also, there is some suggestion in parts of the submissions made by the applicants that Wildflower and the directors are requesting a reconsideration of the company decision confirming Hechenberger's entitlement to receive wages for his last 10 days of employment. There is, however, nothing in any of the submissions made or documents filed by the applicants that raise any grounds for such a request and I will not consider it further.

**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 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.

At the first stage, it is necessary to review the two issues raised by Wildflower and the directors in order to determine whether the applicants have made out an arguable case of sufficient merit to warrant the reconsideration requested.

**Fair Hearing**

Mr. Elderton appeared at the hearing on February 1, 2000 on behalf of Wildflower and the directors. At the commencement of the hearing he asked for an adjournment. The original decisions note that the request was based on his assertion that he had insufficient time to prepare for the hearing and that Ms. Elderton, who Mr. Elderton claimed was an essential witness, was ill and unable to attend.

In support of the first reason, Mr. Elderton indicated that the lawyer who had been involved in the appeals was no longer acting on behalf of Wildflower and the directors and Mr. Elderton had only obtained the file on January 28. In support of the second reason, Mr. Elderton produced a doctor's note dated January 28 indicating that as of that date Ms. Elderton had a kidney infection and a high fever. Mr. Elderton advised that her condition had not improved as of the hearing date.

In the reconsideration application, which was prepared by Stephanie Elderton on behalf of Wildflower and the directors, it states, among other things:

> Because of a disability, I was unable permitted to attend the Tribunal on February 1st, 2000, and there will be a Human Rights Investigation into the matter. In my absence, evidence about me - "hear-say" should not be considered. The Tribunal was conducted with four people versus one. This is hardly fair. I suggest that before a doctor's note is ignored, that you speak to the doctor. . . . John Orr and David Oliver made the outrageous suggestion that the president and representative of the company making the appeal had nothing to add. How do they know this?

> Are they psychic? How is James Elderton expected to cross-examine these people on conversations where he wasn't there? . . . And how is he expected to answer to comments I made? Comments made about our relationship and no secrets are offensive and discriminatory and irrelevant. It is not a matter of no secrets - it is a matter of me attending some events that James Elderton did not attend. It is also a matter of me having a case prepared, and James Elderton not having the benefit of this.

This statement contains the substance of the applicants' position on the first issue. There are several matters raised in that statement. I will address them in the order in which they arise.

(1) Disability:

First, the Adjudicator of the original decisions was careful to note he confirmed with Mr. Elderton that Ms. Elderton's inability to attend was not associated with her disability. The comment made in the application the Ms. Elderton was unable to attend "because of" her disability is completely inconsistent with the assurance given to the Adjudicator by Mr. Elderton. There is no basis for suggesting the Adjudicator's decision amounted to a refusal to reasonable accommodate her disability.

(2) Accepting alleged "hear-say":

While the above submission implies that alleged "hear-say" concerning Ms. Elderton was placed before the Adjudicator, there is nothing in the application that identifies what this alleged "hear-say" was and how it may have prejudicially affected the appeals.

(3) Four versus one:

The hearing was attended by the three individuals whose claims were being attacked, the Director and Mr. Elderton, acting on behalf of Wildflower and the directors, all of the parties and interested parties to the appeal. This point is spurious.

(4) Nothing to add:

The original decisions note the following:

> Mr. Elderton conceded that there was no evidence that Ms. Elderton could give that would be different from his own but that her evidence would support his.

In light of that concession, it is a reasonable and justifiable conclusion that Ms. Elderton would have nothing to add.

(5) Limited knowledge by Mr. Elderton:

There is nothing in the application, or in the original decisions, that identifies what, if any, conversations were identified by any other party about which Mr. Elderton was unaware. As a result, there is no evidentiary basis for this assertion.

The Adjudicator also notes that he was not satisfied from anything in the information conveyed by Mr. Elderton that Ms. Elderton was an essential witness. The Adjudicator was alive to the possibility that Ms. Elderton's "essentialness" might become apparent during the course of the hearing. This conclusion is exemplified by the Adjudicator noting, that he had "accepted Mr. Elderton's evidence as far as the Hechenberger issue is concerned" and that "the non-attendance of Ms. Elderton was not a factor.

(6) "Secrets":

The comments referring to "secrets" is confusing, as I can see no reference in the original decisions to this term. Its relevance to the general issue of fair hearing has not been established.

(7) Preparation:

Finally, the last sentence implies that while Mr. Elderton may not have been prepared to present the appeals on behalf of Wildflower and the directors, Ms. Elderton was. If that were so, there is absolutely no indication that Mr. Elderton conveyed that to the Adjudicator. As an aside, the implication of that statement is quite inconsistent with the information relayed to the Tribunal by Mr. Elderton, that Ms. Elderton was "very ill", was confined to bed-rest, was "running a high fever" and was on antibiotics. Based on the representations made about her condition, it seems unlikely that between January 28, when Mr. Elderton acquired the file from their former lawyer's office, and February 1, the hearing date, that Ms. Elderton had prepared the appeal on behalf of Wildflower and the directors.

The Adjudicator clearly outlined the reasons for refusing to grant the adjournment sought:

> . . . the reasons for not granting the adjournment are as set out above. These include the lack of diligence by Wildflower, the short notice of the application, the length of time that Wildflower had to prepare its case, the prejudice to the other parties, the uncertainty of any reasonable return date, and the fact that Mr. Elderton is able to represent the company and to present its case adequately at the hearing.

There is a burden on the applicants in this issue to at least produce some evidence that supporting their allegations of denial of fair hearing as a result of the Adjudicator's decision to deny the adjournment. As the Tribunal noted in *Biport Forest Products Ltd. and the Director of Employment Standards*, BC EST #D149/00 (Reconsideration of BC EST #D429/99):

> When a party alleges a denial of fair hearing, 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.

This burden has not been met. Wildflower and the directors have not shown an arguable case of sufficient merit to warrant reconsideration of the original decisions on this issue.

Wildflower and the directors also contend that the investigating officer did not give them any opportunity to respond, as required by Section 77 of the *Act*. Such an allegation ought to have been raised in the appeal. There is no indication that it was and the Tribunal will not allow reconsideration to be used to raise new arguments that could and should have been raised in the appeal.

**Employee vs. Independent Contractor**

The position of Wildflower and the directors on this issue is that Partridge and Cain were joint venturers, not employees. The same position was advanced by Wildflower and the directors at the appeal hearing:

> Elderton says he told the employees that there was no money to keep them employed but that Partridge elected to stay on as a form of joint-venturer. . . .
>
> The company asserts that Cain also became an independent contractor subsequent to her initial hiring as an employee. Elderton acknowledged she was definitely, at the start, an employee. When it became clear that there was no money for wages the company says that Cain stayed on as a joint-venturer hoping to get paid when a project became successful.

It should also be noted that this position was not a position taken by Wildflower and the directors during the investigation of the complaints and was only raised by Wildflower and the directors in the appeal. The cornerstone of this position is the assertion that Cain and Partridge could not possibly be employees because they have claimed ownership of the projects they were working on while allegedly employed by Wildflower. Wildflower and the directors advanced that same argument in the appeals, as noted in the following excerpts from the company decision:

> [Mr. Elderton] pointed out that Partridge worked on a number of projects and that Partridge claimed ownership of one of them.
>
> . . .

Mr. Elderton submitted that Ms. Cain had claimed certain intellectual property rights in regard to certain projects and that these claims were inconsistent with her employment status.

In the company decision, the Adjudicator stated:

> . . . in my opinion, such [intellectual] property rights exist independently of employment status and are not relevant to the application of the statutory definition of employer and employee under the *Act*.

I agree with that comment. Although it is apparent that the applicants disagree with that opinion, no sound reason for rejecting that comment has been provided by them.

As well, the Adjudicator did not, on the facts, accept the notion that Cain and Partridge were joint-venturers. He concluded that the relationships between Cain and Partridge, on the one hand, and Wildflower on the other, were employment relationships. In reaching that conclusion, the Adjudicator noted that:

> . . . the question of whether a person is an employee is one based on an assessment of the relationship between the parties and not on the unilateral intention of one of them.

This ground for reconsideration is nothing more than an attempt to by Wildflower and the directors to re-argue the appeal. The position expounded on behalf Wild flower and the directors at the appeal hearing is undoubtedly expanded in this application, but it remains fundamentally identical. There is nothing in the application for reconsideration nor in any of the subsequent submissions and documents that do anything more than express disagreement with the conclusion of the Adjudicator that Cain and Partridge were employees, not joint-venturers or independent contractors.

The request for reconsideration is supported by a view of the facts that is selective and often ignores or downplays key findings of fact in the original decisions. The applicants do not address where the original decisions were wrong in the context of either those findings of fact or the relevant provisions and objectives of the *Act*. They simply disagree with them. This is not a matter that warrants reconsideration by the Tribunal.

In the final analysis, Wildflower and the directors have not established that this application is a matter which is appropriate for reconsideration

**ORDER**

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

**David B. Stevenson**
**Adjudicator**
**Employment Standards Tribunal**