BC EST #D204/98
Reconsideration of BC EST #D101/98

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 -

Dusty Investments Ltd.
d.b.a. Honda North
("Honda North")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATORS:	Lorna A. Pawluk
	Geoffrey Crampton
	Kenneth Wm. Thornicroft
FILE NO.:	98/170
DATE OF DECISION:	September 22, 1998

DECISION

OVERVIEW

This is an application for reconsideration under Section 116 of the *Employment Standards Act* of Decision #D101/98 issued by the Employment Standards Tribunal on March 11, 1998 (the "Original Decision"). That Decision confirmed the Determination issued by the Director of Employment Standards on November 24, 1997. The adjudicator concluded that Dusty Investments doing business as Honda North ("Honda North" or the "employer") is not entitled to introduce evidence on appeal which it did not provide to the Director during the investigation.

Honda North applies for reconsideration of #D101/98 on the grounds that the adjudicator failed to comply with the principles of natural justice; committed a serious mistake in applying the law; and misunderstood or failed to deal with a significant issue in the appeal. Specifically, it is argued that the adjudicator incorrectly refused to hear evidence which was not provided by the employer to the Director during investigation of the complaint. The employer also argues that, on the merits, Christopher Downey ("Downey" or the "employee"), is not entitled to payment for hours worked in excess of 8 per day or 40 hours per week.

ISSUE TO BE DECIDED

The issue is whether there are grounds to reconsider the Original Decision.

FACTS

In the Original Decision, the adjudicator defined the issue as an appeal from the Determination which concluded that although Downey was a manager, he was entitled to be paid at straight time for all hours worked. The adjudicator dismissed the appeal on the preliminary question of whether Honda North was entitled to introduce certain evidence which was not provided to the Director during the investigation of Downey's complaint. It is useful to reproduce certain facts as set out the original decision:

- August 20, 1997 a Demand for Employer Records was sent via Certified Mail to Honda North requiring that the records requested be provided on or before September 19, 1997
- August 26, 1997, an Acknowledgment of Receipt from Canada Post confirmed that the Demand had been received by Honda North on August 22, 1997
- September 23, 1997, the delegate of the Director telephoned Honda North and spoke to the bookkeeper who advised that she had just returned from holidays and the owner of the business was away until the

week of September 29, 1997. The bookkeeper requested and was granted an extension until September 30, 1997

- October 3, 1997, the delegate of the Director again spoke to the bookkeeper who indicated that she had just finished the "year-end" and that the records requested would be provided later that morning
- October 6, 1997, the delegate of the Director again spoke to the bookkeeper to inquire when the records would be dropped off and was advised that the records would be provided in the afternoon of the following day
- October 15, 1997, the delegate of the Director sent a letter to Honda North again requesting the records and requiring that they be provided by October 24, 1997. This letter advised Honda North in part as follows: *Under Section 46 of the Employment Standards Act Regulation I can impose a Penalty of $500.00 for a failure to produce the records requested in the Demand for Records. Further, it may be in the interest of the employer to produce the records requested because without them, I will use the best available evidence - in this case the records provided by the complainant.*
- October 22, 1997, the delegate of the Director spoke with another employee of Honda North who advised him that the bookkeeper had gone to England because her father was ill. Upon being advised by the delegate of the Director that the records were still required, this employee stated that she "could not produce them because that was not her area of responsibility".
- November 24, 1997, the delegate of the Director issued the Determination and delivered it by hand to the employer's place of business, the employer's registered and records office to the residences of both of the directors
- November 24, 1997, a Penalty Determination was issued in the amount of $500.00 for not producing the requested records as required

The only information available to the delegate to complete the investigation was that provided by Downey and on that basis the Determination dated November 24, 1997 was issued.

Honda North appealed to the Tribunal. In "Reasons for Appeal" and the oral hearing, the employer argued that the documents were not produced for several reasons related to the bookkeeper/accountant:

1. She was sick;
2. She had to prepare accounting updates to finalize "year-end";
3. She had to travel to England where her father was severely ill after she had completed the task in 2 above); and
4. She returned from England on November 10, 1997.

Counsel for Honda North also conceded that certain documents produced to the delegate *prior* to the issuance of the Determination were "limited and not what were requested". The bookkeeper/accountant also told the Tribunal that she chose not to deliver any records until she was certain that she had collected all that were necessary.

After hearing this evidence, the adjudicator noted that the Director's delegate had made numerous efforts to secure the necessary records. He concluded that Honda North had "ignored the delegate's concerted efforts to give them the opportunity to participate" and had failed to cooperate in "virtually all aspects" of the investigation. Citing *Tri-West Tractor Ltd.* B.C.E.S.T. #D268/96 and *Kaiser Stables Ltd.* B.C.E.S.T. #D058/97, he described the failure to participate as "significant", the original adjudicator added:

> I am not persuaded that the delegate of the Director should have to make numerous unsuccessful attempts to obtain the information from an employer prior to issuing a Determination. The Director is required, pursuant to Section 77 of the *Act*, to "*…make reasonable efforts to give a person under investigation an opportunity to respond."* In the case at hand, the efforts expended by the delegate of the Director to provide an opportunity for Honda North to respond were, in my view, more than reasonable and Honda North, by their own choice and for their own reasons, refused to participate.

In the result the adjudicator confirmed the Determination and the amount owing as $12,991.71 together with interest.

Honda North appeals, arguing that the adjudicator breached the rule against bias and the right to a fair hearing by limiting and restricting the appellant's ability to make submissions on failure to produce records during the initial investigation. Specifically, Honda North argues:

> He stated that he was not going to let the applicant participate in the proceedings whether it be with the introduction of new evidence, the explanation of why all the records requested by the Director were not provided, or providing submissions as to the application of the undisputed facts to the *Employment Standards Act* and *Regulations.*
>
> The applicant respectfully submits that this goes much further than the decisions of the Tribunal in *Tri-West Tractor Ltd.* BC EST #D268/96, *Kaiser Stables Ltd.*, BC EST #D058/97, and *Intrepid Security Ltd.* BC EST #D378/97.
>
> It is our further respectful submission that Adjudicator Suhr's comments clearly show that his mind was closed and that he had pre-decided the appeal prior to the hearing.

> It was only after counsel queried the purpose of setting down the matter for a hearing and of going through the time, effort and expense of preparing for and having a formal hearing did Adjudicator Suhr allow the applicant to make some very limited and restricted submissions.
>
> The submissions were limited and restricted in that Adjudicator Suhr only wanted to deal with the applicant's failure to provide all of the information requested by the Director's delegate. Despite this, Adjudicator Suhr would not let the applicant fully explain and call complete evidence as to why only some of the information was provided. He also would not let the applicant fully develop an argument relating to the jurisdiction of the Directors' delegate . . . (reproduced as written.)

It is submitted that by limiting submissions, the adjudicator misunderstood the submissions on the jurisdictional question and thus committed a serious mistake in applying the law. While it is conceded that Downey was an employee and manager within the meaning of the *Act*, it is argued that he is not entitled to payment for hours worked in excess of 8 per day or 40 per week. There are no provisions in the *Act* which entitle a manager to be paid for hours worked in excess of 8 per day or 40 per week. Honda North noted that the original adjudicator referred to sections 2(a), 3 and definition of employee in the *Act* and then concluded that while managers are exempted from Parts 4 and 5 of the *Act*, the remaining portions of the *Act* apply. This, submits Honda North, is a "serious mistake" in applying the law. It is further submitted that there is no jurisdiction in the *Act* to find that:

1. a maximum hours per day for a manager is 8 hours per day or 40 hours per week;
2. a manager is entitled to straight time for hours worked over 8 per day or 40 per week when Part 4 of the *Act* does not apply to give them overtime wages;
3. a salaried employee's bi-monthly salary can be converted into an hourly rate equivalent.

It is further argued that the adjudicator failed to understand or deal with the jurisdictional question and that this was demonstrated in both his conduct of the oral hearing and in Original Decision. Finally, it is argued that another issue arises on appeal by "the act that the applicant provided some information but not all of the information requested by the Director's delegate".

On behalf of the Director, it is submitted that the issue on reconsideration is whether the adjudicator correctly decided to dismiss the appeal from the Determination. It is submitted that the Original Decision was correct on the preliminary issue and that the merits of the Determination were not before the adjudicator. The adjudicator correctly refused to permit the employer to introduce evidence that could have been produced during the original investigation. It was further argued that even though this reconsideration application should be dismissed on the previous issue, the Director also made submissions on the

substantive question of whether the *Act* entitles managers to be paid for hours worked in excess of 8 per day or 40 per week.

The Director argues that even though persons employed as managers are excluded from Part 4 of the *Act*, they are covered by Part 3 which entitles them to be paid for all hours worked. The definition of "regular wage" provides for a conversion into an hourly rate equivalent and a manager is not excluded. The hourly wage is determined according to the contract between the parties and if the contract is for 40 hours per week, the manager/employee is entitled to payment for the additional hours worked at their regular rate of pay. Overtime is a premium to be paid to certain employees, but this does not eliminate a manager's right to be paid at a regular rate for all hours worked.

Though notified of the reconsideration application, the employee, Downey, made no submissions.

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.

This is not an opportunity to revisit the evidence or reconsider the original arguments. Rather, a reconsideration application will succeed in narrow circumstances. *Zoltan Kiss (BC EST #D 122/96)* outlines the principles used by this Tribunal in the exercise of its reconsideration powers:

- failure to comply with the principles of natural justice
- mistake of fact
- decision inconsistent with prior decisions indistinguishable on their facts
- significant new evidence not available to the first adjudicator
- mistake of law
- misunderstanding of or failure to deal with a serious issue
- clerical error

Honda North alleges that by failing to admit certain evidence, the adjudicator demonstrated bias and breached its right to a fair hearing. It is also argued that the adjudicator committed a "serious mistake in applying the law" and a "misunderstanding or a failure to deal with a significant issue in the appeal" by finding Downey was owed wages for hours worked in excess of 8 per day.

The evidence shows that Honda North was given seven opportunities over three months to respond to the request for documents and was informed of the consequences of failing to do so—that the Determination would be based on evidence provided by the employee alone and that a Penalty Determination would be issued. In the "Reasons for Appeal" described above, the employer outlined several reasons why the records were not produced in response to the request. The reasons were associated with the bookkeeper/accountant who also testified at the oral hearing that she wanted to be sure she understood the request. The adjudicator considered all of these explanations and concluded that the Director had discharged her obligation to "make reasonable efforts to give a person under investigation an opportunity to respond" under section 77 of the *Act*. Nothing in the arguments made on behalf of Honda North convinces us to intervene on the grounds of a breach of natural justice or bias on the part of the adjudicator. We find that despite being given every opportunity to respond or to request clarification of the Demand, Honda North failed to respond to the request for documents in a way that constitutes compliance with the *Act*. (Arguments that there was partial compliance prior to the issuance of the Determination were not pursued.) In fact, we find there is little more the Director could have done and certainly the delegate made "reasonable efforts" to permit a response by Honda North. Finally, we do not find that the circumstances of this case are distinguishable from those in *Tri-West Tractor* and *Kaiser Stables*. In effect, Honda North says that notwithstanding its clear (some might even say egregious) failure to respond to the Director's many document requests made during the course of the investigation of Downey's complaint, it should have nevertheless been allowed to present its documents to the adjudicator for his consideration. It should be recalled that the adjudicator conducted an appeal, not a *trial de novo*. The *Kaiser Stables* principle is merely a restatement of a well-established evidentiary rule that appeal tribunals will generally not permit the introduction of evidence that was available and could have been produced in the proceedings before the previous forum. Thus, the adjudicator in this case merely made a ruling as to the admissibility of evidence and we are of the view that the adjudicator's ruling was entirely proper. While there are undoubtedly circumstances where a hard and fast application of the rule would be inappropriate -- say, for example, where the evidence in question raises an issue of fraud or where the documents in question only came to light after the initial determination had been issued -- there are no such exceptional circumstances in this case.

Somewhat more troublesome is the allegation that the adjudicator refused to entertain certain arguments put forth by counsel in support of the appeal on the question of document production. Specifically, it was argued that the adjudicator would not give Honda North an opportunity to explain why the necessary documents had not been produced despite numerous opportunities. If we had found that the appellant had been deprived of such an opportunity, we would not have hesitated to find a breach of the principles of natural justice or a serious mistake of law that would clearly call for reconsideration. However,

we find this did not occur. In particular, we note that the "Reasons for Appeal" set out four reasons for the failure to respond. These reasons, along with the additional testimony of the bookkeeper/accountant, were considered by the adjudicator and the reconsideration submissions fail to offer any additional insights into why the employer failed to produce the records pertinent to Downey's complaint. We also note that at no time during the investigation did the bookkeeper/accountant advise that she was unclear about what needed to be produced, even though this was her statement to the adjudicator; indeed, on several occasions, she promised to deliver the documentation but did not follow up on those promises. Under the rules adopted in *Zoltan Kiss,* reconsideration is not an opportunity to re-argue the original case or to re-weigh the evidence and it would be inappropriate for us to re-weigh the reasons considered by the original adjudicator.

Counsel for the employer also complained that the adjudicator was rather abrupt in dismissing certain aspects of their appeal. Such a complaint provides grounds for reconsideration only where it establishes bias or a reasonable apprehension of bias on the part of the adjudicator or some other breach of the principles of natural justice. We also note that the merits of any reconsideration application must be made on the evidence and contents of the original Decision. The submissions on this point fall short of establishing a breach of natural justice or claim of bias.

In other grounds of appeal, it is argued that the adjudicator misunderstood the arguments concerning the jurisdiction of the Director to order payment for all hours worked. It is said that this constitutes a misunderstanding of or failure to deal with a significant issue in the appeal. We disagree. Here is what the adjudicator said about this question:

> The Determination, however, must still explain the basis of its conclusions. I am satisfied that it does that. The Determination sets out the uncontested hours worked by Downey during his period of employment with Honda North. The delegate of the Director's findings of hours work and not paid for is established in those documents.

While there is no reference to specific provisions in the *Act*, the Original Decision does refer to the Determination which clearly outlines the facts which led to the conclusion that the complainant was owed for certain unpaid wages, at straight time, for hours in excess of 40 hours per week. Thus the reasoning of the adjudicator, though brief, is clear.

Moreover, we cannot agree with the interpretation of the *Act* as suggested by Honda North. Section 1 of the *Act* defines "wages" to include "salaries, commissions or money, paid or payable by an employer to an employee for work". It is uncontested that Downey, though a manager, was an employee who performed work for Honda North. It is also clear that he was paid by a monthly salary of $3286.66. While the *Employment Standards Regulation 31(4)(f)* excludes managers from Part 4 of the *Act*, other provisions continue to apply. Part 4 deals with hours of work and over time, including such matters as minimum daily hours, maximum hours of work, hours free from work and overtime wages. None of these latter provisions apply to “managers” or to any other occupation listed in Section 34 of the

Employment Standards Regulation. However, "managers" remain entitled to be paid the "wages" that the employer has contracted to pay and those wages cannot fall below the floor established be Section 16 of the *Act.* In this case, the Employer's own appeal documents confirmed what the employee had alleged in his original complaint -- namely , that he contracted to work for a monthly salary based on 8 hour day and a 40 hour work week. Of course, the Employer now takes the position that Downey was obliged to obtain "prior authorization" before working beyond 40 hours per week or 8 hours per day. Downey, on the other hand, has consistently maintained -- and provided some independent corroboration to the Director -- that the Employer was very much aware of his overtime hours and either expressly or impliedly authorized his work schedule.

We do not wish to be taken as saying that an employer cannot contract with a "manager", or any other excluded occupation set out in Section 34 of the *Regulation*, for a fixed monthly salary based on a work schedule that would, in the case of other employees, require the payment of overtime. However, if the contract calls for a certain number of hours, then surely the employee's monthly salary was negotiated on the understanding that any hours worked beyond the "base hours" contracted for would be compensable. While an employee excluded by Section 34 of the *Regulation* cannot expect that those additional hours will be paid at the overtime rates provided for in Part 4 of the *Act*, that employee is still entitled to be paid for his or her additional work. The rate of pay will be a matter of contract -- there is nothing preventing the parties from negotiating a premium overtime rate or some other form of payment (say, equivalent time off in lieu); in the absence of an express contractual agreement, however, it is entirely reasonable to imply a term into the parties agreement whereby the "excess hours" will be paid at the same rate as the "base hours".

In this case, the Director's delegate simply concluded, based on all of the evidence before her (and recall that the employer refused to submit any evidence on this, or any other, point to the delegate for her consideration), that there was no contractual agreement between the parties setting out a higher wage rate for "excess hours" and thus she simply issued a determination based on the effective hourly rate actually agreed upon between the parties. We see no error at all in that finding, nor in the adjudicator's confirmation of that finding.

ORDER

Pursuant to section 116 of the *Act*, Honda North's request for reconsideration is refused and the Original Decision is confirmed.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal

Ken Thornicroft
Adjudicator
Employment Standards Tribunal

Geoffrey Crampton
Chair
Employment Standards Tribunal