

An Application for Reconsideration

- by -

Fast Trac Enterprises Ltd.  
("Fast Trac")

- of a Decision issued by -

The Employment Standards Tribunal  
(the "Tribunal")

pursuant to Section 116 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

**ADJUDICATOR:** David B. Stevenson

**FILE No.:** 2003/38

**DATE OF DECISION:** July 17, 2003

## DECISION

### OVERVIEW

Fast Trac Enterprises Ltd. (“Fast Trac”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “Act”) of a decision of the Tribunal, BC EST #D182/03 (“original decision”), dated June 6, 2003. The original decision confirmed a Determination issued on November 29, 2002 which had found that Mr. Robert Glen (“Glen”) was employed by Fast Trac as a truck driver during a six month period from September 9, 2000 to March 6, 2001 and was owed an amount of \$4,317.46 in overtime wages, annual vacation and statutory holiday pay, length of service compensation and interest under Section 88 of the *Act*.

Fast Trac seeks reconsideration on the basis that the Adjudicator of the original decision erred on the facts, erred in law and failed to consider numerous breaches of the rules of natural justice and the original decision did not meet “administrative law requirements, is contrary to other decisions of this tribunal and contrary to case law of superior courts”.

### BACKGROUND

A full understanding of the elements of this application requires some background information, parts of which have been set out in an another reconsideration application generated by this matter, *Fast Trac Enterprises Ltd.*, BC EST #RD162/03 (Reconsideration of BC EST #D143/03):

This is an application by Mr. Albert G. Constantini, on behalf of Fast Trac Enterprises Ltd. (“Fast Trac”) for reconsideration of Tribunal Decision BC EST # D143/03 (the “Preliminary Decision”) wherein Mr. Constantini, Fast Trac’s agent, was prohibited from making legal argument or legal submissions on behalf of Fast Trac in accordance with the decision in *Fast Trac Enterprises Ltd. v. Riverfront Corporation Centre Ltd. et. al.*, 2002 BCSC 1399 (“*Fast Trac Enterprises*”).

Mr. Constantini, a former lawyer, was disbarred in 1986 as a result of serious acts of malfeasance. On October 15, 2002, a decision was rendered in *Fast Trac Enterprises* stating in part (at paras. 84 and 89):

Accordingly, there will be an order denying Mr. Constantini the privilege of appearing on behalf of any corporation before this court and neither may he appear before the Provincial Court of British Columbia.

...

... Constantini is prohibited from providing any legal advice or services to any corporation or doing any act that constitutes the “practice of law” as defined by the Legal Profession Act.

At the outset of the appeal hearing, counsel for the Director of Employment Standards (the “Director”) made a motion that Mr. Constantini be prohibited from appearing as the agent for Fast Trac in the proceedings, citing the decision in *Fast Trac Enterprises, supra*. Counsel for the Director did not object to Mr. Constantini appearing as a witness solely for the purpose of testifying about relevant facts and circumstances relating to the issue at hand. Mr. Robert Glen, the other party to the hearing, supported the Director’s motion. Adjudicator Thornicroft considered the decision of the British Columbia Supreme Court and the arguments advanced by Mr. Constantini.

The Adjudicator found that the material before him showed that Mr. Constantini is “practising law”. He also noted at p. 6:

...Taylor J.’s order, at paragraph 89, has two separate components, namely, “providing any legal advice or services to any corporation” (an order that encompasses Fast Trac) or “doing any act that constitutes the ‘practice of law’ as defined by the Legal Profession Act”. If Mr. Constantini’s representation of Fast Trac in these proceedings does not contravene the second component, in my view, it most certainly contravenes the first. (emphasis in original)

After responding to Mr. Constantini’s submissions, Adjudicator Thornicroft made the following order at p. 7 of his reasons:

I order that Mr. Constantini be prohibited from making any legal argument or legal submissions on behalf of Fast Trac in this appeal. To put it another way, my order simply recognizes and effectuates the terms of Taylor, J.’s valid and subsisting order. My order does not prohibit Mr. Constantini from providing evidence, based on his own personal knowledge, regarding the relevant facts and circumstances with respect to Mr. Glen’s unpaid wage claim.

It should be noted that the above referenced reconsideration application was dismissed on May 15, 2003.

In the Preliminary Decision, the Adjudicator made the following additional orders relating to the procedure for adjudicating the appeal:

At the conclusion of the hearing of the motion, all parties expressed the view that this appeal could be adjudicated on the basis of written submissions. In my view, this is not a particularly complicated matter and can readily be adjudicated solely on the basis of written submissions (see section 107 of the *Act*). I might add that the parties have previously filed detailed and lengthy submissions and I would not expect, in the ordinary course of events, that any party would have anything further to meaningfully add to the material that has already been filed. Nevertheless, I will allow the parties one final opportunity to provide submissions to the Tribunal.

Mr. Constantini vigorously expressed the view that regardless of my ruling on the motion, Fast Trac would not be retaining independent legal counsel to act on its behalf. Even so, I think it appropriate to give Fast Trac one last opportunity to reconsider its position. Accordingly, all parties will be given 21 days from the issuance of these reasons to file, if they choose to do so, a final submission with respect to this matter. Mr. Constantini, for his part, may only file a submission setting out the relevant facts and documents within his own personal knowledge. If Fast Trac wishes to file any legal argument, that submission may only be prepared and filed by a barrister and solicitor duly qualified to practise law in the province of British Columbia.

Fast Trac filed a final submission on the appeal on May 21, 2003. In respect of that submission, the original decision states:

As noted above, at the conclusion of the hearing on April 14th, 2003 all parties agreed that, irrespective of my decision with respect to the Director’s motion, the merits of this appeal should be addressed on the basis of written submissions and that a further evidentiary hearing was not necessary. The parties were subsequently advised by the Tribunal’s Administrator that any final submissions must be received by no later than 4:00 P.M. on May 21st, 2003.

The only further submission that was filed was a voluminous submission from Mr. Constantini dated May 20th and filed May 21st, 2003. Having reviewed this latter submission, I should note

that it goes well beyond the permissible scope of my earlier order and, in large measure, amounts to a fundamental refusal on Mr. Constantini's part to respect and abide by my earlier order.

## THE APPLICATION

A substantial part of this application seeks to have the Tribunal re-visit the decision prohibiting Mr. Albert Gene Constantini from making any legal argument or legal submissions on behalf of Fast Trac in the appeal. That matter will not be addressed in any way as it has already been the subject of a reconsideration application which was dismissed by the Tribunal. Subsection 116(3) of the *Act* states:

116 (3) An application may be made only once with respect to the same order or decision.

## ALLEGATIONS OF BIAS

This application alleges the comments of the Adjudicator in the original decision have raised a reasonable apprehension of bias that he could not decide the appeal in an entirely impartial manner. If that allegation has any substance, there will be no need to consider the merits of the reconsideration application as finding a reasonable apprehension of bias on the part of the Adjudicator would nullify the original decision.

I commence my analysis of this allegation by noting the standard for a finding of reasonable apprehension of bias is high. There is a presumption of impartiality. The Tribunal has accepted the well known and clear test for determining if a reasonable apprehension of bias arises - whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator (see *Dusty Investments Inc. d.b.a. Honda North*, BC EST #D043/99 (Reconsideration of BCEST #D101/98)).

The Tribunal has also noted that the test is an objective one, that because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: see *A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541, and that the evidence presented should allow for objective findings of fact that demonstrate actual bias or a reasonable apprehension of bias.

The application says the reasonable apprehension of bias arises from the statement in the original decision that the May 21, 2003 submission "goes well beyond the permissible scope of my earlier order and, in large measure, amounts to a fundamental refusal on Mr. Constantini's part to respect and abide by my earlier order" and the bald assertion that the Adjudicator treated the submission as though it were filed by Albert Gene Constantini rather than by Craig Constantini.

I have carefully reviewed both the original decision and the May 21, 2003 submission and have the following comments. First, notwithstanding Craig Constantini's signature appears for Fast Trac at the bottom of each of the arguments in the six divisions of the submission, the submission was filed by Albert Gene Constantini - his signature is on the letter attached to the submission delivered to the Tribunal. Second, the submission contains a substantial amount of legal argument, including references to case law, and, in form and format, strongly suggests it was prepared by Albert Gene Constantini. The order of the Adjudicator, which was directed at Fast Trac and Albert Gene Constantini, was that if Fast Trac wished to make any legal argument, such could only be prepared and filed by a barrister and solicitor duly qualified to practice law in British Columbia. The rationale for that limitation is set out in BC EST #D143/03.

Even if Albert Gene Constantini had no involvement in preparing the legal argument, there was non-compliance with that order, for which Albert Gene Constantini must bear responsibility as he filed the submission with the Tribunal and confirmed its receipt by the Tribunal in a fax dated May 22, 2003 which states in part:

This fax memo will confirm the writer [Albert Gene Constantini] delivered the final submissions of Fast Trac Enterprises Ltd. at approximately 1:00 pm on May 21<sup>st</sup>, 2003, well before the deadline of 4:00 pm . . .

Simply put, the comment which forms the basis for the allegation of reasonable apprehension of bias was both correct and justified, as well as being relevant to the decision. I am not satisfied that a comment made by a person charged with making a decision that is correct and justified and relevant to the decision making process is any evidence of a reasonable apprehension of bias, let alone the clear evidence required to support the allegation. This aspect of the application is dismissed.

I turn now to the merits of the remaining aspects of the application.

## ISSUE

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 substantive issues raised in this application are set out, in the overview.

## ANALYSIS OF THRESHOLD ISSUE

The legislature has conferred an express reconsideration power on the Tribunal in Section 116 which provides:

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) confirm, vary or cancel 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*". The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. An assessment is also be made of the

merits of the Adjudicator's decision. Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. 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.

A reconsideration application is not an opportunity to revisit the facts or re-argue the merits of the Determination or original decision.

If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration.

I am not satisfied this is a case that warrants reconsideration. As indicated above, Fast Trac seeks reconsideration on the basis that the Adjudicator of the original decision erred on the facts, erred in law and failed to consider numerous breaches of the rules of natural justice and the original decision did not meet "administrative law requirements, is contrary to other decisions of this tribunal and contrary to case law of superior courts". In my view, this application represents nothing more than an attempt to re-cast and re-argue the case that was not accepted by the Adjudicator of the original decision. Nothing new has been added and no error has been shown.

This application is denied; the Tribunal will not exercise its discretion under Section 116 to reconsider the original decision.

## **ORDER**

Pursuant to Section 116 of the *Act*, I order the decision, BC EST #D182/03 be confirmed.

---

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