BC EST # D237/97
(Reconsideration of BC EST #D024/97)

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 -

Steelhead Business Products
("Steelhead")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Ian Lawson

FILE NO.: 97/323

DATE OF DECISION: June 5, 1997

DECISION

OVERVIEW

This is a request by Steelhead Business Products ("Steelhead") for reconsideration pursuant to section 116 of the *Employment Standards Act* (the **"***Act")* of the decision of Adjudicator Lorne Collingwood, made on January 17, 1997 (BC EST #D024/97). The decision dismissed Steelhead's appeal from Determination #CDET 003834, issued by the Director of Employment Standards (the "Director")on August 29, 1996, that required Steelhead to pay compensation to its employee Rod Peacock for length of service, vacation pay and wages.

The request for reconsideration was made on February 21, 1997, and the parties were allowed until March 25, 1997 to file written submissions. The request is now decided on the basis of these submissions.

ISSUE TO BE DECIDED

I must decide whether there are sufficient grounds to warrant setting aside or varying the Adjudicator's decision.

ANALYSIS

The basis for Steelhead's request for reconsideration is that new facts were gathered since the appeal hearing which, they submit, cast doubt on the findings made by the Adjudicator. Steelhead presents three new issues of fact: first, Mr. Peacock had falsely reported being sick on three of his last days of employment; second, Mr. Peacock was given a salary advance of $1,000.00, which was not apparently made clear at the time of the appeal hearing; and third, Mr. Peacock had improperly incurred a number of expenses in the name of the business, some of which were for personal benefit.

This Tribunal has adopted a justifiably conservative approach to section 116 of the *Act*, which allows for reconsideration of its decisions. In dismissing a recent request for reconsideration made by the Director of Employment Standards, the Chair of this Tribunal stated:

> The Tribunal has consistently held that applications for reconsideration should succeed only when there has been a demonstrable breach of the rules of natural justice, or where there is compelling new evidence that was not available at the time of the appeal hearing, or where the adjudicator has made a fundamental error in law. The reconsideration provision of the *Act* should not be a second

> opportunity to challenge findings of fact made by the adjudicator, especially when such findings follow an oral hearing, unless such findings can be shown to be as
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> lacking in evidentiary foundation. [*Re Director of Employment Standards and the Employment Standards Tribunal*, BC EST #D344/96, p. 2]

A heavy onus therefore rests on the party requesting reconsideration to demonstrate that the decision in question was arrived at in a procedurally unfair manner, that it contains a fundamental error of law, or that there is some compelling new evidence which could now lead to a different decision.

Steelhead's request for reconsideration is based on new evidence which was not put before the Adjudicator. In her written submission, Jennifer Yeager on behalf of Steelhead states that "we have recalled information" since the hearing. In my review of the new information presented in support of Steelhead's request, and in my review of the Adjudicator's decision, it appears to me that in its entirety the new information was available to Steelhead at the time of the hearing. All of the facts set out in Steelhead's submission were obtained as a result of an apparently more thorough investigation into the matter than was done to prepare for its appeal. In this light, the request for reconsideration is an effort to bolster the case presented to the Adjudicator after the appeal has been dismissed.

To succeed on an application for reconsideration, it is not sufficient to show only that the new information was not put before the Adjudicator. The new information must also have been unavailable to the party at the time of the appeal hearing, or perhaps not even in existence at the time of the hearing. To hold otherwise would allow parties a second opportunity to present facts which could and should have been presented to the Adjudicator. A party's failure or omission to adduce facts at the appeal hearing is not a ground for reconsideration, when such facts were available to the party at the time of the hearing.

ORDER

Pursuant to section 116(1) of the *Act*, I dismiss Steelhead's application for reconsideration.

Ian Lawson
Adjudicator
Employment Standards Tribunal