An Application for Reconsideration

- by -

Protect Security Services Ltd.
("Protect" or "Appellant")

- 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: Paul E. Love

FILE No.: 2003A/148

DATE OF DECISION: July 31, 2003

DECISION

OVERVIEW

This is an application for reconsideration made by the Protect Security Services Ltd. ("Protect", or "Employer" or "Appellant") of a decision of the Employment Standards Tribunal ("Tribunal") dated April 15, 2003 (the "Original Decision"). The Delegate issued a Determination, dated December 30, 2002, finding David Kennett (the "Employee") was entitled to overtime wages, for hours worked in excess of a schedule set by a variance. The Original Decision was issued on the basis of written submissions, without an oral hearing. The Adjudicator reviewed the form of appeal filed by the Employer, which did not contain submissions or evidence. The basic argument raised by the Employer was that the Delegate and the Adjudicator "erred" in imposing liability for overtime wages, based on the variance. The Employer's position was that the variance did not express its intentions, was issued in error, and that the Employer should only be liable for "its interpretation" or the "intention" of the variance. The Employer alleged that important evidence was not considered, the full scope of appeal was not properly considered, a significant issue was not fairly scrutinized, and that there was an error in the facts.

The Employer seeks to have the Tribunal reconsider the Decision on the basis that important evidence was not considered because the Tribunal elected to proceed on the basis of written submissions from the parties rather than an oral hearing. The appellant submits that the full scope of the appeal was not considered because the Adjudicator did not consider the issue of "whether Protect Security should be liable for the issuance of a variance with flawed wording". The appellant submits that a significant issue was not fairly scrutinized because the Adjudicator failed to consider the appellant's point that the Employer's initial variance request did not call for an inverted schedule. The appellant submits that there was an error in the facts in the finding relating to the amount of overtime.

The Tribunal is not obliged to hold an oral hearing for every case. The issues raised by the Delegate did not require an oral hearing in order to provide a fair opportunity to the appellant to challenge the Determination. The premise underlying the Employer's application for reconsideration was the 'failure of the Adjudicator to give effect to the Employer's understanding of the Variance, or the Employer's intention in applying for the Variance'. This "intention" or "understanding" directly contradicted the unambiguous terms of the Variance. The Employer did not appeal the Variance issued by the Delegate.

The failure to appeal the Variance is fatal to the Employer's main points on the appeal and reconsideration application. The Employer did not comply with the Variance. The Employer alleges that the Adjudicator erred in failing to consider the "Delegate's" liability for an error made in issuing the Variance. The Adjudicator, however, has no jurisdiction under the *Act* to relieve the Employer from liability based on the clear words in a Variance setting out a shift schedule. The Adjudicator has no jurisdiction to require the Branch to pay any portion of wages otherwise owing by the Employer to the Employee. The arguments raised by the Employer did not meet the threshold for re-consideration of the merits of the Decision. I, therefore, dismissed the application for reconsideration and confirmed the Decision.

ISSUES TO BE DECIDED

Did the Employer meet the threshold for a reconsideration of the merits of the Decision?

If the Employer met the threshold for reconsideration, did the Delegate err in finding an entitlement to wages, based on a shift schedule contained in a variance?

FACTS

This reconsideration application is decided upon written submissions of the Employer, the record and submissions filed by the Delegate. The Employee did not file a submission in this reconsideration process.

The decision in this matter was rendered by the Adjudicator on April 15, 2003 ("Original Decision").

The Determination:

The appeal arose out of a shift cycle variance which was issued by the Director on October 12, 2000. The variance reads as follows:

> Employees will work an 11-hour shift with 1 hour of unpaid breaks. Averaging 38.5 hours per week over a two week cycle as follows: 1 shift on, 2 shifts off, 3 shifts off, 2 shifts on, 2 shifts off, 2 shifts on. 77 hours over the two-week cycle (38.5 hours per week). The cycle will invert every other period (1 shift off, 2 shift on, 2 shifts off,).

David Kennett, the Employee who filed the complaints, commenced working for the Employer in 2001. The Employee claimed daily and weekly overtime as the Employer did not adhere to the shift scheduling set out in the Variance. All the wages, which were the subject of the complaint, were "earned" by the Employee after the period for an appeal of the Variance by the Employer expired. During the course of the investigation, the Employer argued that the "intention" was never to invert the shift cycle every other period, and the shift cycle was supposed to operate without such inversion of the shift cycle. The Delegate found with some exceptions, the hours worked by the Employee conformed to the Employer's version of the schedule. In the Determination dated December 30, 2002, the Delegate found that David Kennett was entitled to the sum of $2,742.86 (inclusive of interest) for wages earned. The Delegate found that the Employer contravened the terms of the Variance issued on October 12, 2003. The Delegate, pursuant to section 79(3) of the *Act*, ordered that the Employer cease violating the provisions of the Variance.

The Appeal:

Protect filed two appeal forms. In the appeal form filed January 22, 2003, (the "old form of appeal") the Employer alleged an error in the facts, a different explanation of the facts, facts that weren't considered during the investigation, and alleged a denial of opportunity to respond in the investigation. The Employer also filed an appeal form dated January 23, 2003, alleging that the Director erred in law, and that the Director failed to observe a principle of natural justice in making the Determination. Protect sought an "other remedy"- that Protect Security should pay Kennett $304.20 based on Protect's

interpretation of the schedule, and that any other costs should be borne by the Employment Standards Director. The notice of appeal, filed by the Employer raised the following grounds of appeal:

1. There has been a breach of procedural fairness. The Employment Standards Branch is directing Protect Security to pay monies to Kennett based on a conclusion that Protect Security operated a schedule outside of the approved variance. This conclusion is based on an interpretation of the variance which falls outside of its intended meaning. Since the Employment Standards Branch issued the variance, it should be liable for its misinterpretation and/or incorrect wording. Protect Security should not be made to pay for the mistakes of the Employment Standards Branch. The investigation has taken too long.

2. The conclusions reached by the delegate of the Employment Standards Branch, David Oliver, do not fairly present the facts. There are different explanations of the facts.

3. There are other facts which were not considered in the investigation.

4. There are errors in the facts in the determination.

Each of these concerns will be addressed in the following submission.

The appellant filed an extensive written submission. In the notice of appeal, the appellant requested an oral hearing giving the explanation:

> Yes, we may want to present witnesses to prove our case.

The Original Decision:

The original Adjudicator found that the Employer had failed to demonstrate an error in the Determination. The Decision partly rested on the fact that the Employer filed no appeal materials, and therefore did not meet the burden of establishing error. Further, the Adjudicator found that the failure to appeal the Variance was fatal to the Employer's appeal. In the Original Decision, issued by Adjudicator Stevenson, the Adjudicator found:

> There are two responses to this aspect of the appeal: first, the Variance is sufficiently clear in its language that extrinsic evidence of the "intent" of the application would not be allowed to override it; and second, to the extent it might be relevant, the requirement to invert the cycle is consistent with the wording in the original application. The obligation of Protect Security was to comply with the Variance as issued. That obligation is not altered because some elements of the variance were required by the Director to be included and may not have been fully understood by Protect Security.

In the appeal, the Adjudicator dealt with an argument related to an oral hearing:

> The allegations in the appeal relating to the conduct of the delegates involved in the investigation are unsubstantiated. While Protect Security requested an oral hearing in the appeal, there was no reason for it to presume an oral hearing would be granted. Protect Security was clearly notified, in correspondence from the Tribunal dated January 23, 2003, that the appeal might be decided on written submissions alone and was, at the same time, provided with an information sheet on the appeal process. Under the Tribunal's Rules of Procedure, Protect Security was required to provide

> all relevant information and evidence with its appeal. No evidence relating to the allegations was included in the appeal. Protect Security was specifically advised on March 13, 2003 that the Tribunal intended to adjudicate its appeal based on written submissions. There was no indication following that notice that Protect Security wished to supplement its appeal with sworn statements relating to the issue of the appeal. In any event, in addition to being unsubstantiated, the allegations made are unrelated to whether Protect Security was notified of the substance of Kennett's complaint and provided with a fair and reasonable opportunity to respond.

The Employer challenged the findings of fact related to the amount of overtime wages on the following basis:

(1) The Delegate was wrong to assume that the Employee fell under the Variance on the first day worked, and the Delegate should have considered an alternative start date.

(2) The Delegate failed to consider the schedules that were provided when the Variance application was requested.

(3) That the Delegate erred in the calculation of hours.

The Adjudicator considered arguments presented relating to factual errors in the Determination relating to the amount of the Employee's entitlement. The Adjudicator found that the Employer had not challenged the finding of the Delegate that the Employer "never inverted the cycle". The Adjudicator found that the schedule was the schedule set out in the Variance and not any schedule "intended" by the Employer, which was not in compliance with the Variance. The Adjudicator found that the Employer had not proven any error.

Employer's Argument:

The Employer says that the Determination is unfair because it results in the Employer "having to pay for the mistakes of the Employment Standards Branch". The Employer seeks to reconsider the Decision on the basis that important evidence was not considered because the Tribunal elected to proceed on the basis of written submissions from the parties rather than an oral hearing. The appellant submits that the full scope of the appeal was not considered because the Adjudicator did not consider the issue of "whether Protect Security should be liable for the issuance of a Variance with flawed wording". The appellant submits that a significant issue was not fairly scrutinized because the Adjudicator failed to consider the appellant's point that the Employer's initial Variance request did not call for an inverted schedule. The appellant submits that there was an error in the facts in the finding relating to the amount of overtime. The appellant says that the Delegate erred in determining the "start" of the Variance cycle. The appellant says that the amount found in the Determination is "in excess of the amount owed had no Variance existed".

The Employer argues that the Employment Standards Branch erred in issuing the Variance, and seeks to adduce evidence proving that error on reconsideration. The Employer says that the evidence was not considered previously, and the liability of the Branch was not considered previously, in the Original Decision.

Director's Argument:

The Delegate submits that the Employer did not follow the provisions contained in the Variance. The Delegate submits that the Employer did not appeal the Variance. The Delegate submits that the "new evidence" concerning the schedule is an attempt by the Employer to have the case "reconsidered or re-weighed".

Employee's Argument:

The Employee did not file an argument in this reconsideration application.

ANALYSIS

In an application for reconsideration, the burden rests with the appellant, in this case the Employer, to show that this is a proper case for reconsideration, and that the Adjudicator erred such that I should vary, or cancel the Decision. An application for reconsideration of a Tribunal' s decision involves a two stage analysis, as set out in *Milan Holdings Ltd.*, BCEST #D313/98:

> 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)*, BCEST #D122/98. In deciding this 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: *Re British Columbia (Director of Employment Standards)*, BCEST #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 BCEST #D007/97).
> >
> > (b) Where the application's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): *Re Image House Inc.*, BCEST #D075/98 (Reconsideration of BCEST #D418/97); *Alexander (c.o.b. Pereguine Consulting)* BCEST #D095/98 (Reconsideration of BCEST #D574/97); *323573 BC Ltd. (c.o.b. Saltair Neighbourhood Pub)*, BC EST #D478/97 (Reconsideration of BCEST #D186/97);
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> > (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 multiplicity of proceedings, confusion or delay": *World Project Management Inc.*, BCEST #D134/97 (Reconsideration of BCEST #D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.
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> 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*. As noted in previous decisions,
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> > "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* (BCEST #D199/96, reconsideration of BCEST #D114/96).
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> After weighing these and other factors relevant to the matter before it, the Panel may determine that the application is not appropriate for reconsideration. If so, it will typically give reasons for its decision not to reconsider the adjudicator's decision. Should the Panel determine that one or more of the issues raised in the application is appropriate for reconsideration, the Panel will then review the matter and make a decision. The focus of the reconsideration panel "on the merits" will in general be with the correctness of the decision being reconsidered.
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> The very point of reconsideration being to provide a forum for sober reflection regarding questions which are considered sufficiently important to warrant such review, we consider it sensible to conclude that questions deemed worthy of reconsideration - particularly questions of law - should be reviewed for correctness.

The reconsideration power is one to be exercised with caution. A non-exhaustive list of grounds for reconsideration include:

- a failure by the adjudicator to comply with the principles of natural justice;
- a mistake of fact;
- inconsistency with other decisions which cannot be distinguished;
- significant and serious new evidence that has become available and that would have lead the adjudicator to a different decision;
- misunderstanding or failing to deal with an issue;
- clerical error.

The Employer raises allegations of a breach of natural justice, new evidence, and misunderstanding or failing to deal with the issues. These allegations technically bring this application within the permissible scope of a reconsideration application. For the reasons set out below, however, it is my view that the appellant has not satisfied me that this is a proper case for reconsideration of the Original Decision.

New Evidence:

The Employer sought to file an affidavit from Byron Ramsey on the reconsideration application. The affidavit outlines the Employer's intention in applying for a Variance, and the Employer's error in failing to detect the alleged error made by the Director in the Variance. I am not prepared to admit or consider this evidence on the reconsideration application. The Employer failed to file this evidence in the appeal. It was apparent that the Tribunal would be deciding this matter on the basis of written submission and this

procedure was outlined to the Employer. The affidavit is not new evidence but in essence the position advanced by the Employer "all along" to the Delegate. This does not fall under the terms:

> significant and serious new evidence that has become available and that would have lead the adjudicator to a different decision;

Is "Intention" or "Error" Relevant:

I note that in the original appeal, the Employer sought to reverse a Determination that it pay the sum of $2,742.86 (inclusive of interest) to David Kennett, for violation of the terms of a Variance relating to shift scheduling. The Employer sought to argue that the Branch erred in issuing the Variance, and that the Branch and not the Employer ought to be responsible for all, or a portion of overtime wages. The Employer wished to establish that error by leading oral evidence of the "Employer's intent" in seeking the change, that the Employer complied with its intent, and that the Delegate erred in issuing the Variance. The Employer seeks to reconsider the Decision of the Adjudicator which dismisses the appeal. Part of the reasons for dismissing the appeal was the failure of the Employer to prove its appeal submission because it failed to provide evidence. The Employer argues that the Tribunal ought to have permitted an oral hearing, rather than deciding the case on written submissions.

In my view, the original appeal of the Determination by the Employer is ill founded. It appears to be based on a misunderstanding of the nature of a Variance, and the powers of the Delegate in issuing a Variance. Under section 72 of the *Act*, the Employer and any of the Employees may join in a written application to the Director for a Variance. A Delegate is not obliged to issue the Variance in the exact form requested. Under section 73(3) the Director may [...] attach any conditions to a Variance. The Director is not required to "rubber stamp" a Variance application: *Arcas Consulting Archaelogists Ltd., BCEST #D410/98*. Generally, there must be some benefit to the Employees from a Variance. It is not simply issued to permit the Employer to evade the hours of work sections of the *Act*, which would otherwise give the Employees a right to overtime.

If the Director grants a Variance under section 73, the Director makes a decision which is a Determination. The Employer has a right under section 112 (3) of the *Act* to appeal a Determination within time limits specified in section (3). The Employer did not appeal the Variance and those time limits for an appeal have long passed. In my view, the Employer must "live with" the consequences of its failure to appeal the Variance.

I accept for the purposes only of evaluating the grounds for reconsideration raised, that the Director issued the terms of the Variance in a different form from that "intended" by the Employer. The Director, however, has a discretion to exercise in the issuance of a Variance, and is not required to issue the Variance on the basis sought by the Employer. The terms of the Variance are very clear, and call for an inversion in the schedule. The facts clearly establish that the Employer did not invert the schedule, as required by the Variance. It is the terms of the Variance, and not the Employer's understanding of the terms, or the Employer's intent in seeking the Variance, which is important.

The Employer is obviously unhappy with the terms of the Variance, but the appeal process for correcting the Variance, if indeed it was incorrect, has long since passed. I dismiss this grounds for reconsideration of the Original Decision.

Oral Hearing:

The Employer raised an error in natural justice, in failing to grant an oral hearing as a grounds for reconsideration. In essence, the Employer wished an oral hearing in order to lead evidence which would require the Tribunal not to enforce a wage claim based on the Variance or for the Delegate to pay the wages of the Employee for a Variance imposed in excess of what the Employer intended in seeking the Variance.

In *# 1 Cellular Group Inc.*, BC EST # RD021/03, the appellant sought reconsideration solely on the basis of the failure of the Tribunal to grant an oral hearing. The Adjudicator stated as follows:

> Generally, the Tribunal will not hold an oral hearing on an appeal unless the case involves a serious question of credibility on one or more key issues or it is clear on the face of the record that an oral hearing is the only way of ensuring each party can state its case fairly (see *D. Hall & Associates Ltd. v. British Columbia (Director of Employment Standards)* [2001] B.C.J. No. 1142 (B.C.S.C.). A party may not presume an oral hearing will be held simply because one has been requested. I see nothing in the appeal or the appeal material that indicates an oral hearing was required in order to fairly decide the issues raised.

In my view, an appellant has no absolute right to an oral hearing before an Adjudicator. The Tribunal advised Protect that it intended to proceed by way of a consideration of written submissions. Protect did not submit further written submissions, and the Adjudicator made a decision on the basis of materials before him. While there is an issue of natural justice raised by the Employer in this reconsideration application, it is not an issue upon which I am not prepared to reconsider the merits of the Decision. The Tribunal has jurisdiction to decide and control the use of its process. The process is not one that can be dictated by an appellant. The Appellant may not have provided its "full submission", in that it did not supply the affidavit which it filed in this reconsideration application. In taking that approach, the Employer failed to consider the procedural rulings and advice given by the Tribunal. In a written submission process, an appellant must make all its submissions in writing to the Tribunal. An appellant who does not participate in the written process, will not be permitted to attempt to make its case on a reconsideration application, raising the issue of a failure to grant an oral hearing.

Further, I note that given the nature of the Employer's appeal, this appeal particularly lent itself to resolution by way of a written process. The Employer's arguments related to the interpretation and application of the terms of a Variance. The Variance was reduced to writing, and argument was made to the legal effect of the Variance. In an appeal submission dated March 5, 2003, the Employer in essence admitted that there was no dispute on the actual hours worked by Mr. Kennett:

> (1) The pay records submitted by Kennett vary slightly to those provided by Protect Security in the appeal. We standby our records and we also point out that this issue does not have a substantive effect on the primary issue being examined.

There was no "issue of credibility", and no need for an oral hearing in order for the Tribunal to fairly decide the issues raised. The Tribunal is not obliged to hold an oral hearing, and the issues raised by the appellant did not require an oral hearing in order to provide a fair opportunity to the appellant to challenge the Determination.

It was not necessary for the Adjudicator to hold an oral hearing to resolve the issue of the parties' intent in seeking the Variance, and whether the Employer complied with the parties' intent. These points were

irrelevant to the Employee's entitlement to overtime wages. The Adjudicator correctly decided that it was not necessary to hear oral evidence which would contradict the clear wording of the Determination. There was "no ambiguity" in the terms of the Variance that required an Adjudicator to consider oral evidence to resolve the interpretation of the Variance. The proper question for consideration was whether the Employer established that the Delegate erred in applying the very clear wording of the Variance to the facts in the case. I would dismiss this grounds for reconsideration.

Misunderstanding or Failing to Deal with an Issue:

Protect argues that the Adjudicator did not deal with the issue raised by the appellant. The Employer says that the issue is "whether Protect Security should be liable for the issuance of a Variance with flawed wording". I agree that the Adjudicator did not deal expressly with this question of relief raised by the appellant, in particular, that the Branch ought to pay any amount owing to the Employee as a result of failing to issue the Variance as requested by the Employer. It is unnecessary for me to rule, in this application, whether the Branch erred in the issuance of the Determination in order to deal with the merits of this argument for reconsideration of the Decision.

The failure of the Adjudicator to deal with the Branch's "liability for error" does not entitle this applicant to a review of the merits of the Original Decision. In my view, the Tribunal does not have the jurisdiction to deal with the merits of these requests. The Tribunal is a creature of statute, with its jurisdiction limited by the *Act*. The *Act* does not empower the Tribunal to order that the Director pay any portion of the wages of the Employee. The *Act* does not empower the Tribunal to "relieve an Employer from paying a portion of the wages in excess of that which would have been earned on the basis of the Employer's 'understanding' of a Variance". The Tribunal does not have any jurisdiction to consider issues of "negligence" of the Branch in issuing a Variance, or divide wages based on the "degree of negligence" of the Delegate. While as a technical matter, the Adjudicator did not address this argument of the Employer in the written decision, the argument raised is one that clearly falls outside the jurisdiction of the Tribunal. The failure to address this issue, is not germane to the proper disposition of the appeal.

The Adjudicator did deal with the argument that the Delegate erred in issuing the Variance. The Adjudicator found that the Variance was a Determination, and the Employer did not appeal the Determination. In my view, this is a correct statement of law, and therefore I am not prepared to re-consider the merits of the Original Decision. Again, I reiterate the liability of the Employer rests on the terms of the Variance issued, and not on the Employer's intention in applying for the Variance, or the Employer's understanding of the terms of the Variance granted by the Delegate. The failure of the Employer to appeal the Variance, at the appropriate time, is fatal to the argument advanced.

The Amount of Overtime:

The appeal points raised by the Employer related to the findings of fact on the amount overtime will not be reconsidered by the Tribunal. I note that the *Milan Holdings* case has to be interpreted consistent with the amendments to the *Act*. In the *Act*, the original appeal jurisdiction of the Tribunal is set out in section 112 (1)(c) of the *Act* , which provides for an appeal on grounds that:

(a) the director erred in law;
(b) the director failed to observe the principles of natural justice in making the determination;
(c) evidence has become available that was not available at the time the determination was made.

With the recent amendments to section 112(1) of the *Act*, it is apparent that the Tribunal does not have jurisdiction to review the facts generally, however, an error in law may include a finding of fact made without an evidentiary foundation, a perverse or unreasonable finding of fact. This is not the proper case for the Tribunal to spell out in detail the distinction between "error of law" and "error of fact". In the appeal of the Determination, the Employer, in essence, presented no evidence from which one could conclude the Delegate erred in the fact finding process. In this case, the "facts" on which the Adjudicator is said to err relate to evidence relating to the "cycle" of the schedule, and inversion of the cycle. I note that the Employer did not present any evidence of this argument in the original appeal. The Adjudicator correctly placed the burden of proof on the Appellant to demonstrate error.

I note that the Employer argues that the amount found in the Determination exceeds the amount that would have been owed without the Variance. The material before the Adjudicator was very deficient and did not demonstrate any error. Having had its "kick at the can" in the appeal, in effect, the Employer now invites the Reconsideration Adjudicator to consider new arguments, "re-weigh" the evidence, or come to a different conclusion on issues of fact. This is not the proper purpose of reconsideration, as outlined in the authorities set out above.

For all the above reasons, I dismiss this application for reconsideration.

ORDER

Pursuant to section 116 of the *Act*, I order that the Decision dated April 15, 2003 is confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal