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 -

The Director of Employment Standards
(the "Director")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATORS: David Stevenson
Carol Roberts
John McConchie

FILE NO.: 1999/144 and 1999/145

DATE OF DECISION: June 29, 1999

DECISION

OVERVIEW

Pursuant to Section 116 of the *Employment Standards Act* (the *"Act"*), the Director of Employment Standards (the "Director") seeks reconsideration of two decisions (the "original decisions") of a panel of the Employment Standards Tribunal (the "adjudicator"), BC EST #D539/98 and BC EST #D557/98, both dated January 6, 1999. The original decisions addressed appeals by Park Hotel (Edmonton), operating the Dominion Hotel, and Hunter's Grill Ltd., Associated Corporations ("Dominion") from two Determinations of the Director. The first dated July 28, 1998 concluded Dominion had contravened Sections 21, 40, 45, 46 and 58 of the *Act* in respect of the employment of two former employees of Dominion, Morgan Bensten ("Bensten") and Francis McKenna ("McKenna") and the second, dated August 11, 1998, concluded Dominion had contravened Sections 21 and 63 of the *Act* in respect of another former employee of Dominion, Robert Mitchell ("Mitchell").

In addition to the usual orders that Dominion cease contravening and comply with the *Act*, the Determination ordered Dominion to pay an amount of $4995.87 in respect of the employment of Bensten and McKenna and an amount of $464.80 in respect of the employment of Mitchell.

In its appeal of the first Determination (the Bensten and McKenna appeal), Dominion argued that the Director was wrong to conclude that Dominion was not entitled under the *Act* to withhold wages otherwise payable to Bensten and McKenna because they believed both employees had stolen money from them. They also argued the Director was wrong to conclude that Bensten and McKenna were "required" to pay part of their business costs.

In its appeal of the second Determination (the Mitchell appeal), Dominion alleged Mitchell had given just cause for termination and argued the Director was wrong to conclude he was entitled to length of service compensation. Dominion also argued that the Director was wrong to conclude that Mitchell was "required" to pay part of their business costs.

An oral hearing was held on both appeals on November 23, 1998. In the Bensten and McKenna appeal, the adjudicator framed the issues as follows:

> The issues to be decided in this case are whether the employer is entitled to withhold the payment of wages in relation to an employee or employees who have been found to be stealing from the employer. Secondly, whether the employee was "required" to pay back bar shortages and was therefore required to pay part of the employer's business costs as prohibited by section 21(2) of the *Act*.

In the Mitchell appeal, the adjudicator framed the issues as follows:

> The issues to be decided in this case are whether there was just cause for dismissal and whether the employee was "required" to pay back bar shortages and was therefore required to pay part of the employer's business costs as prohibited by section 21(2) of the *Act*.

In the Bensten and McKenna appeal, the adjudicator concluded the Director had not erred on the first issue and the employer was required to pay wages for work performed by Bensten and McKenna. The adjudicator concluded:

> The employer's remedy is through the criminal or civil courts for restitution of the monies stolen if the actual amounts can be established. It is not open for the employer to refuse to pay wages earned.

On the second issue, the adjudicator concluded that Bensten and McKenna had not been "required" to pay part of the employer's business costs and Dominion had not contravened Section 21(2) when it totaled the bar shortages for each employee and encouraged employees to pay them back. The adjudicator disbelieved the evidence of the employees that they felt compelled under threat of discipline or adverse employment consequences to repay the shortages. The adjudicator did conclude there was "encouragement and even some moral persuasion for employees to pay", but that did not support a conclusion that employees were "required" to pay:

> The common meaning of "require" is to insist upon, command, order, compel, or demand authoritatively. All of these terms imply some form of coercion with consequences for non-compliance. In my opinion a requirement is something more than a request and is backed with something stronger than moral suasion.

As a result of the findings and conclusions made by the adjudicator, the determination was varied to reduce the amount owed by the amount of the shortages paid back "under some moral persuasion".

In the Mitchell appeal, the adjudicator concluded Dominion had met the burden of showing Mitchell was dismissed for just cause. The adjudicator also concluded, on the same evidence and for the same reasons as outlined above, that Mitchell had not been "required" to repay bar shortages. The Determination in respect of Mitchell was canceled.

The Director has sought reconsideration of the original decisions. The Director says the original decisions were wrong in law and inconsistent with previous decisions of the Tribunal. She argues that the interpretation of subsection 21(2) of the *Act* by the adjudicator was wrong as was the conclusion that the employees were not "required" to pay part of the employer's business costs when they paid back the bar shortages which were attributed to them. Dominion filed a reply

submission to the reconsideration application. None of the affected employees has made any submission on the reconsideration application.

We have applied the approach suggested in *Milan Holdings Ltd.*, BC EST #D313/98 and *Zoltan Kiss*, BC EST #D122/96, which, taken together, say the applicant must make out an arguable case of sufficient merit, within those limited circumstances listed in *Zoltan Kiss*, to warrant reconsideration. In *Milan Holdings Ltd.*, the Tribunal stated:

> 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.

The limited circumstances in which an application for reconsideration would be successful include a mistake of law and an inconsistency between decisions of the tribunal that are indistinguishable on their critical facts. In our opinion, this is an appropriate case for reconsideration as it raises an important question of the interpretation of the *Act* and an important issue of principle under the *Act*.

ARGUMENTS

As stated above, the Director challenges the conclusion of the adjudicator on two grounds: first, that it constitutes a mistake in applying the law of the *Act*; and second, that it is inconsistent with other decisions of the Tribunal that are indistinguishable on their facts.

We shall first address the second ground for reconsideration. In the reconsideration submission, the Director says:

> By the Director's count, the Tribunal has dealt with sixty-seven appeals pertaining to the interpretation and application of section 21. In none of these decisions has another adjudicator found a difference between "require" and "request"; nor, a difference between a direct or indirect recovery of a cost of doing business. It has not mattered to other adjudicators that an employer has deducted the cost from wages, or has cashed the pay cheque and withheld the cost, or has accepted a voluntary payment from an employee to defray the cost. All that matters is that an employee has borne part of the cost of doing business; something prohibited by section 21(2).

The Director has failed to establish a basis to this ground for reconsideration.

The submission of the Director has not identified any Tribunal decisions that are indistinguishable on their facts in the manner contemplated by this ground for reconsideration. It is not sufficient to simply say there are sixty-seven cases that have considered Section 21 of the *Act* and to suggest that other adjudicators have been concerned only with whether an employee has "borne part of the cost of doing business". At a minimum, the burden on the Director under this ground for reconsideration is to identify the cases which are asserted to be "indistinguishable", establish that they are not distinguishable on their essential facts and show that the interpretive issue was addressed in some meaningful way. None of this has been done and, as a result, we conclude that no error on this ground has been established.

On the first ground for reconsideration, the basis for the Director's objection to the original decisions arises in the following passage from each decision:

> The common meaning of "require" is to insist upon, command, order, compel, or demand authoritatively. All of these terms imply some form of coercion with consequences for non-compliance. In my opinion a requirement is something more than a request and is backed with something stronger than moral suasion.

The Director says this is an error in law and raises three arguments to support that assertion. First, the Director argues that the above passage is inconsistent with the proper interpretive approach to the *Act*, which, says the Director, is to give the legislation such "fair, large and liberal construction and interpretation as will best ensure attainment of its objects". The Director says the conclusion of the adjudicator that a "request" is not a "requirement" is too subtle, representing only a difference in form, not substance, and does not represent a "fair, large and liberal" approach to the interpretation of Section 21(2).

Second, the Director argues that the interpretation placed on the term "require" by the adjudicator re-opens a loop-hole in the legislation that was intended to be closed when subsection 21(2) was enacted.

Third, the Director argues that subsection 21(2) should take its meaning from subsection 21(1), which states:

> *21 (1) Except as permitted or required by this Act or any other enactment of British Columbia or Canada, an employer must not, directly or indirectly, withhold, deduct or require payment of all or part of an employee's wages for any purpose.*

The Director argues that the request by Dominion for the employees to repay shortages contravenes subsection 21(1). In effect, that argument simply begs the same question addressed in the first argument, which is whether the employees were "required" to pay anything as there was no action

by Dominion that could be construed as a withholding or deduction from wages in respect of the shortages.

Finally, the Director says that "moral suasion" by an employer on an employee to pay part of the employer's business costs contravenes Section 4 of the *Act*, which (subject to Sections 43, 49, 61 and 69) gives no effect to any agreement to waive the minimum requirements of the *Act*. It should be noted that Section 4 only appies to agreements to waive the minimum requirements of the *Act*. We do not intend to address this argument for three reasons: first, it is by no means clear that the request to repay the bar shortages should be considered an "agreement" to contravene minimum requirements; second, the argument presupposes the principal issue in this reconsideration, which is whether the request by Dominion that the employees repay the bar shortages contravened any requirements of the *Act* at all, and specifically whether it contravened subsection 21(2); and third, this assertion is being made for the first time in this reconsideration. The original Determinations made no finding that Dominion had contravened Section 4, even though it was open to the Director to do so, nor was any issue that Section 4 had been contravened raised in the appeals.

In reply, Dominion says that the adjudicator was correct to interpret the term "require" in subsection 21(2) as being exclusive of the request that was made to the employees to pay back their bar shortages. Dominion also argues the conclusion of the adjudicator was essentially a finding of fact relating the circumstances of the two appeals:

> There is a further finding of fact that the employer attempted to address a serious situation through the use of "encouragement" and "moral persuasion" directed towards these dishonest individuals. To encourage is to inspire with courage, hope or resolution. It is also an expression of helping or fostering. It is submitted the employer in fact showed great restraint in dealing with such dishonest employees. It is submitted that these words, carefully chosen by the Adjudicator, are a true reflection of the findings of fact and fall far short of "requiring" these dishonest individuals to do anything but stop being dishonest and/or incompetent.

ANALYSIS

Any provision of the *Act* must be interpreted in the context of the purposes and objects of the Act, bearing in mind the consequences our decision might have on employment relationships in general. The objective of Section 21(2) is to prevent employers from unilaterally seeking contribution from employees to the cost of doing business. The experience of the Tribunal has shown that the ingenuity of some employers to avoid the prohibition contained in Section 21 justifies a broad and liberal interpretation of that provision. Accordingly, we agree with the Director that by construing the term "require" in subsection 21(2) as excluding a "request" by an employer that an employee pay part of the employer's business costs, the adjudicator has misinterpreted that provision of the *Act*.

We agree with the adjudicator that the touchstone of the term "require" implies some form of coercion. However, if the adjudicator has concluded that the term is limited to forms of coercion demonstrated by insistence or compelling, an order, a command, or an authoritative demand, to the exclusion of other, more subtle, forms of coercion, and must be accompanied by consequences for non compliance, we do not agree. The Tribunal must be conscious of the fact of employee dependence on the employer and the opportunity this gives the employer to unduly influence an employee. What might seem like an innocuous request in most situations may, in an employer/employee context, take on a very different hue. Whether such a request contravenes the prohibition found in Section 21 of the *Act* will be a question of fact to be decided in all the circumstances. Additionally, the presence or absence of consequences for non compliance is not determinative of whether an employee has been "required" to pay all or part of an employer's business costs, but is a factor which, along with others, must be considered when deciding that question.

We do not accept the Director's position that *any* participation by an employee to the employer's cost of doing business is prohibited by subsection 21(2). Purely voluntary payments to the employer's business costs would not be prohibited by subsection 21(2). As above, issues about the "voluntariness" of such payments will be questions of fact to be decided in all the circumstances.

While we accept the argument of the Director that the adjudicator erred in interpreting subsection 21(2) of the *Act*, the remedy sought by the Director is denied. As a matter of fact, the adjudicator did not accept that either McKenna or Mitchell were coerced in any way to pay back the shortages. While both claimed they "feared" being disciplined or terminated for failure to pay back the shortages, the adjudicator found no factual basis for this claim and no other objective evidence of coercion. This conclusion is not inconsistent with the circumstances of the two cases and, in respect of Mitchell, was reinforced by the fact he never repaid any shortages for approximately 3 months following the request. The same circumstances applied to Bensten. As we said earlier, coercion is the touchstone of subsection 21(2). The absence or presence of coercion is a question of fact to be decided in all the circumstances of the case. In the absence of finding the employees were unduly influenced through some form of coercion, either direct or implicit, we would not say the adjudicator was wrong in concluding there was no requirement on these employees to pay back the shortages and, consequently, no contravention of subsection 21(2) of the *Act*.

CONCLUSION

We agree with the position of the Director that the adjudicator erred in the interpretation of subsection 21(2) of the *Act* and, pursuant to Section 116 of the *Act*, vary the original decisions accordingly. We do not agree, however, that the error affects the result in the original decisions and, pursuant to Section 116 of the *Act*, will neither cancel nor vary the orders made by the adjudicator.

David Stevenson
Adjudicator
Employment Standards Tribunal

Carol Roberts
Adjudicator
Employment Standards Tribunal

John McConchie
Adjudicator
Employment Standards Tribunal