BC EST #D265/97
Reconsideration of BC EST #D010/97

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-

Luciano J. Allard
(the "Employee")

-of a Decision issued by-

The Employment Standards Tribunal
(the "Director")

ADJUDICATOR: E. Casey McCabe

FILE NO.: 96/506

DATE OF DECISION: June 18, 1997

OVERVIEW

This is an application by Luciano J. Allard under Section 116(2) of the *Employment Standards Act* (the "*Act*") for a reconsideration of Decision No. D010/97 (the "Decision") which was issued by the Employment Standards Tribunal (the "Tribunal") on January 15, 1997. The reconsideration is being dealt with by written submissions.

ISSUE TO BE DECIDED

Did the Tribunal err by refusing to consider the value of certain escrowed performance shares as constituting wages under the *Act?*

FACTS

On August 13, 1996 the Director's Delegate issued Determination No. CDET003645 against Cascadia Technologies Ltd. On August 14, 1996 the Director's Delegate issued Determination No's. DDET00375, DDET000376 and DDET003777 against certain officers and directors of Cascadia namely Anthony D. Cohen, Glen Coward and Willam A. Travnik respectively. One of the issues in the above noted Determinations was whether the value of certain shares held in an escrow share agreement should be considered as part of Mr. Allard's compensation package. The Director's Delegate determined that the shares were not wages within the meaning of the *Act*.

Cascadia Technologies Ltd. and the above officers and directors, through legal counsel, appealed other portions of the aforesaid Determinations. Mr. Allard appealed that portion of the Determinations that dealt with the escrow share agreement. A preliminary hearing was held on December 3, 1996 and a subsequent hearing was held on January 6, 1997. The issue of the value of the escrowed shares was dealt with by written submission. The Tribunal issued reasons for decision dated January 15, 1997 and in those reasons dismissed the appeal by Mr. Allard.

In its original decision at page 4 the original panel found that by letter dated November 28, 1994 the employer confirmed an employment offer to Mr. Allard that included, inter alia, "a monthly retainer of $3,000.00", "a car allowance of $625.00/month plus fuel" and "300,000.00 escrowed performance shares subject to the approval of the VSE to transfer these shares to you". Mr. Allard took the position that the "escrow share transfer agreement" should have been considered as part of his unpaid wage claim. The original panel found that there was no evidence before it that the VSE had ever approved the share transfer and indeed found that in his appeal of the Director's Determination Mr. Allard had stated that Cascadia was negligent in not filing the appropriate documents for review by the VSE. The original panel then went on to determine that whether or

not Mr. Allard had a contract claim against Cascadia in tort for negligence was not the issue before it. The issue before it was to determine whether the share agreement constituted an agreement to pay "wages" as defined in Section 1 of the *Act.*

The original panel considered the definition of wages in the *Act* and determined that as the escrow shares were never transferred the shares could not be considered as "paid". The original panel then turned its attention to the question whether the escrowed shares were "payable". The original panel then noted that the agreement was subject to a condition precedent, namely, that the VSE must approve any such transfer. Such approval was neither sought nor obtained.

The original panel also noted that the employer asserted that the transfer of the shares was subject to a further "performance" requirement that would have Mr. Allard generate $2,000,000.00 in sales. The panel noted that it was conceded that Mr. Allard did not meet this target and that by his own evidence his sales were approximately $50,000.00 during the term of his employment. The original panel further found that because the issuance of the escrowed shares depended on the characterization of those shares as a performance incentive that the release of any escrowed shares was subject to the condition that Mr. Allard generate at least $2,000,000.00 in sales.

The original panel determined that the 300,000.00 shares being held in escrow did not constitute "wages" under the *Act* and that those shares never became "payable" to Mr. Allard pursuant to the terms of the November 28, 1994 employment letter. The original panel therefore dismissed the appeal.

In his reconsideration submission Mr. Allard takes the position that at no time was there any mention, discussion or interpretation of a $2,000,000.00 sales objective in relation to the performance shares. He states that if this $2,000,000.00 item had been made known to him he would have asked the Employment Standards Officer to disclose to the Tribunal more complete details regarding the lack of sales and in particular details about the employer's law suit against a third party which Mr. Allard alleges caused the cancellation of sales worth approximately $3,355,000.00 US Mr. Allard also argues that the Tribunal failed to understand the December 31, 1995 Cascadia interim financial statements which were entered as an exhibit at the hearing. Mr. Allard asks for another hearing or the opportunity to allow the Employment Standards Officer to submit the complete file including previously undisclosed evidence in support of his sales efforts. Finally, Mr. Allard states that he was prepared to deliver certain transcripts from a trial involving the employer for consideration in this matter. Mr. Allard did submit an Affidavit sworn May 23, 1995 by Mr. William A. Travnik.

The employer filed a submission, through legal counsel, responding to Mr. Allard's reconsideration application. The employer maintained that the performance level of $2,000,000.00 in annual sales was common knowledge between Mr. Allard and the employer and that numerous references to sales objectives and sales performance by Mr. Allard is apparent in the file material. Secondly, the employer takes the position that the law suit against the third party

is based on a patent infringement and that the orders that Mr. Allard referred to were never placed. The employer submitted financial statements for the fiscal year ending March 31, 1996 and took the position that any consideration by the original panel of the law suit involving this third party would have been an extraneous consideration. Thirdly, the employer takes the position that the decision to deny an evaluation of the escrow shares was not based on an imaginary $2,000,000.00 sales quota but rather on a finding on a question of law that such performance shares were not "wages" within the meaning of the *Act.* Fourthly, the employer takes the position that Mr. Allard has had two opportunities to make his argument regarding the performance shares and that his remedy now lies in tort in the Courts.

ANALYSIS

Section 116 of the *Act* reads:

> *Reconsideration of orders and decisions*
>
> *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.*

It is the policy of the Tribunal that the power to reconsider orders and decisions under Section 116 is a power that should be exercised with caution and should only succeed where there has been a demonstrable breach of the rules of natural justice, or a fundamental error in law or where compelling new evidence is available. This policy has been established in order to provide a fair and efficient process where one hearing will provide a means of final and conclusive resolution of a dispute. The purpose is to allow cases to be resolved quickly, efficiently and inexpensively and it is contrary to the spirit and intent of the *Act* to allow a rehearing where a submission is based on a rehash of evidence and argument before the original panel. Indeed it has been stated that reconsideration should be used sparingly and only in exceptional cases. (see *World Project Management Inc. et al* BC EST No. D134/97).

In the instant case I do not see any demonstrable breach of the rules of natural justice. The parties were given full opportunity during the investigative process and after the Determinations were issued to present their respective cases. Indeed a preliminary hearing was held in order to narrow the issues. A full hearing was held in which the parties had the opportunity to lead evidence, cross-examine witnesses and make submissions. Furthermore, the issue regarding the escrow share agreement was dealt with through written submissions. I see no breach of the rules of natural justice in this process.

Secondly, I do not see where the original panel has committed a fundamental error of law. The panel considered the evidence and argument before it regarding the shares that were held in escrow. The panel considered the definition of wages in the *Act* and determined that the benefit of the shares being held in escrow had neither been paid nor was it payable. I am not prepared to disturb that finding.

Thirdly, Mr. Allard presents the Affidavit of Mr. Travnik sworn May 23, 1995. The Affidavit contains material that was known to Mr. Allard at the time of the investigation, the issuance of the Determinations and the hearings of December 3, 1996 and January 6, 1997. I do not see where the material contained in the aforementioned Affidavit is compelling new evidence. The evidence was before the original panel and was argued by Mr. Allard to support his position. Reconsideration under Section 116 is not a vehicle to rehash evidence or reargue points made before the original panel. The reconsideration process is not a second opportunity to challenge findings of fact made by an adjudicator.

For the above reasons I dismiss this application for reconsideration.

ORDER

Pursuant to Section 116 of the *Act*, I decline to vary or cancel Decision BC EST No. D010/97.

E. Casey McCabe
Adjudicator
Employment Standards Tribunal