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 -

D. Hall & Associates Ltd.

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATORS: Frank A.V. Falzon (Panel Chair)
John Orr
Carol Roberts

FILE No: 2000/30

DATE OF DECISION: July 5, 2000

DECISION

I. OVERVIEW

Derek Pedersen ("Pedersen") worked as a grader operator for D. Hall & Associates Ltd. ("Hall") from August 23, 1996 to July 18, 1998. In the record, Hall describes itself as being "in the business of building, repairing, and maintaining well sites for oil and gas companies in Northern British Columbia".

On March 22, 1999, the Director of Employment Standards concluded that Hall owed Pedersen $13,985.22, consisting of monies owed for overtime, travel time, pay in lieu of notice for dismissal without cause, plus interest.

In April 1999, Hall appealed the Determination on all issues, and in May 1999 sought to add another ground of appeal, concerning the Director's calculation of wages paid to Pedersen. In a preliminary decision issued August 18, 1999, all issues were permitted to proceed to appeal, except the unjust dismissal issue. The travel time issue was left for the Adjudicator who heard the merits of the appeal: *D. Hall & Associates*, BC EST #D354/99 (Preliminary Decision: McConchie, Adjudicator).

On December 10, 1999, Adjudicator Stevenson dismissed Hall's appeal from the Determination.

On January 13, 2000, Hall applied under s. 116 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 ("the *Act*") for the Tribunal to reconsider and reverse the Adjudicator's decision. A three person panel (F.A.V. Falzon, J. Orr and C. Roberts) was appointed to undertake the reconsideration.

II. ISSUE

Hall advances its reconsideration application on this basis:

> First, the Employer submits that there was a failure by the Adjudicator to comply with the principles of natural justice. Second, the Employer submits that the Adjudicator made serious mistakes in applying the law to the application of the Variance and *Regulation*, as well as with respect to his decision on travel time.

The threshold question before us is whether we ought to embark on the requested reconsideration. If we answer that question "yes", the second question is whether Hall has successfully demonstrated either a breach of natural justice or errors of law.

III. ANALYSIS

The threshold test for whether a reconsideration application should be granted was summarized in *Milan Holdings Ltd.*, BC EST D#313/98 (Reconsideration of BC EST No. D559/97). We agreed that this application raises issues sufficiently serious and important to warrant

reconsideration except for the calculations issue, which does not warrant consideration, for reasons outlined below.

We now turn to the substance of the application.

A. The Regulatory Framework and the Adjudicator's decision

To place the arguments before us into proper focus, it is necessary first to underline that a key purpose of the *Act* is to "ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment": *Act*, s. 2(a). To use examples relevant here, there are minimum standards of pay for "work", which may or may not include travel time depending on whether the travel constitutes, on the facts, "labour or services an employee performs for an employer whether in the employer's residence or elsewhere": *Act*, ss. 1, 16. There are also minimum standards of pay for overtime work: *Act*, ss. 40-43.

It would be an error, however, to conclude that the legislation requires identical treatment for all employees. The *Act* empowers the Director to grant "variances" from certain of the standards set out in the *Act*: ss. 72, 73. The *Act* confers even greater powers on the Lieutenant Governor in Council to make regulations "excluding, on any conditions, for any periods, and in any circumstances that are considered advisable, a class of persons from all or part of this Act or the regulations": s. 127(2). On our view of the matter, these regulatory variances and exclusions, which are contemplated by the *Act* and reflect conscious policy choices, must be given effect. At the same time, the overarching purposes of the *Act* require that genuine ambiguities in an exclusion should be resolved in favour of the employee. As confirmed in *Re Rizzo & Rizzo Shoes*, [1998] 1 S.C.R. 27 at para. 36: "doubt arising from difficulties of language ought to be resolved in favour of the claimant".

The "oil patch industry" has, over time, been subject to both a "variance" issued by the Director, and "exclusions" created in regulations made by Cabinet.

The Oilpatch Industry Overtime Variance, in its most recent form, was in effect from March 1, 1995 to June 30, 1997.

It was therefore in effect for the first 10 months of Pedersen's employment.

As its name implies, the Overtime Variance relaxed the *Act*'s overtime standards in this industry. Its origins were canvassed in *Re Kosick Holdings Ltd.*, B.C.E.S.T. #D362/96. It read as follows:

> …I vary the overtime provisions under s. 30(1) and the hours free from work provisions under s. 35(1) and (2) of the *Employment Standards Act*, as follows:
>
> > Employees employed in the oil or natural gas well drilling, and the oil/natural gas well servicing industry, and employed in connection with oilpatch operations as defined by the Director of Employment Standards shall be paid at not less than time and one half (1½) for each hour worked

> in excess of 8 hours in any one day and 40 hours in any one week, with all overtime to be calculated on the employer's regular hourly rate of pay.
>
> Except for an emergency an employer shall ensure that each employee has at least 8 consecutive hours free of work between each shift worked.

The Variance appeared to modify the *Act*'s requirement that time over 11 hours must be paid at double time. The scope of the Variance was set out in a document headed "Oilpatch Industry – Overtime Variance Definitions":

> 1. Employees employed in the following areas will be covered by the Oil Patch Variance:
>
> (c) "construction" means the work performed in the road construction, to a site, the site preparation in regard to an oil or natural gas well.
>
> 2. An employee employed outside the municipal boundary will be covered by the Oilpatch Variance in the above areas.
>
> 3. An employee while employed in an office, shop or yard is not covered by the Oilpatch Variance.

Because the Variance was in effect for the first 10 months of Pedersen's employment, the first issue for the Adjudicator was whether Pedersen was captured by its terms, thus relieving Hall of the overtime prescriptions in the *Act.* The Adjudicator concluded that Pedersen was not covered by the Variance, on the grounds that (a) the Variance is limited to employees covered by paragraph 1 of the conditions, and (b) Pedersen, a grader operator, was engaged in maintenance, not "construction" within the meaning of paragraph 1: Decision, pp. 6-8.

Effective July 1, 1997, the Variance was revoked and the standards in the *Act* applied fully to Pedersen for nearly 4 months.

On October 22, 1997, the Lieutenant Governor in Council passed an exclusion in the *Employment Standards Regulation,* B.C. Reg. 396/95, as amended ("the Exclusion"). Section 37.5 reads as follows:

> *Oil and gas field workers – hourly rate of pay*
>
> 37.5(1) Sections 35, 36(1), 40 and 41 of the Act do not apply in the oil and gas well drilling and servicing industry in an occupation listed in Appendix 3.

In place of the *Act*'s requirements, s. 37.5(3)-(5) creates a code of lesser overtime entitlements for any "occupation listed in Appendix 3". Appendix 3 of the Regulation contains this description, which was relied upon by Hall before the Adjudicator:

> Heavy, motorized equipment operators for the preparation, construction and maintenance of all aspects of industry work purposes, specifically: equipment operators, labourers.

Because this Exclusion was in effect during the last 9 months of Pedersen's employment, the second question for the Adjudicator was whether Pedersen was captured by the Exclusion, thus relieving Hall of the *Act*'s overtime provisions. The Adjudicator answered this question "no". We quote from his reasons (pp. 9-10):

> More directly, maintenance, which is the proper characterization of the work done by Pedersen on the existing road, is not included in what is construction for the purposes of the *Act*. In the listed occupation of "heavy motorized equipment operator for the preparation, construction and maintenance of all industry work purposes", the terms preparation, construction (which would incorporate the definition of construction in the *Act*) and maintenance are three separate components of the work of that listed occupation.
>
> In its ordinary meaning, the phrase "for the preparation, construction and maintenance" in the listed occupation is conjunctive. Before a person can be considered employed in the listed occupation, that person must be performing all of the work activities encompassed by that phrase. This drafting stands in stark contrast to other listed occupations whose duties are stated disjunctively, such as slashing and timber salvage workers, who are described as employees engaged in the "removal *or* disposition" of vegetation, and the gathering systems and facility installers, who are described as employees engaged in "construction, installation, *or* establishment of pipelines".
>
> Also, the reference to "all aspects of industry work purposes" in the listed occupation indicates that the "preparation, construction and maintenance work" must have some aspect of industry work, whether it is exploration, drilling or servicing, as its purpose. In this case, Pedersen was doing maintenance, *simpliciter*, on an existing private road. There was no element of preparation or construction involved in that work. In addition, there is no evidence from the material on file or from the submissions of any industry work purpose. I agree with the suggestion found in the Determination that Section 37.5 was not intended to exclude employees whose job was merely incidental to an aspect of industry work, exploration, drilling and servicing oil and natural gas wells.
>
> I reiterate that the *Act* is remedial legislation and an interpretation that extends its protection to as many employees as possible is more consistent with the purposes of the *Act* and is preferred over the interpretation proposed by Hall.
>
> …I agree with the Director that [s. 37.5] does not, in any event, apply to maintenance work on an existing private road in an old oilfield, which was the work being done by Pedersen in this case.

The next two questions before the Adjudicator concerned "travel time". These questions did not depend on the scope of the Variance and Exclusion, but turned instead on whether travel time was properly construed as "work" in this case. (If that question was answered "yes", then of course the proper rate of compensation for this work could be affected by the answer to the earlier issues about the applicability of the Variance and Exclusion).

The first question on "travel time" was whether the Determination was wrong to treat time travelling from camp to the worksite as time "worked" within the meaning of s. 1 of the *Act*:

> 1(1) In this Act:
>
> "work" means the labour or services an employee performs for an employer whether in the employer's residence or elsewhere.
>
> 1(2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.

The Adjudicator held that, in the present circumstances, Hall had failed to show that the Determination was wrong in concluding that Pedersen was performing work in the travel period, such as transporting fuel and other material to the grader: Decision: pp. 10-11.

The final issue was whether the Director made errors in the calculation of wages owing to Pedersen as a result of payments Hall had made to him. This ground of appeal was raised for the first time in submissions before the Adjudicator, one month after the appeal had been filed. The Adjudicator decided that it was unnecessary whether to grant leave to raise it, as the ground itself was without merit: Decision, p. 12.

B. The Natural Justice issue

Hall argues that the Adjudicator breached its right to a fair hearing. It says that it disputed the Director's characterization of Pedersen's job duties and of the grader maintained roads, and also disputed whether there was travel time for which Pedersen should have been paid. It submits as follows:

> The nature of the Employee's duties and the nature of the roads upon which the Employee performed those duties are central to the application of the Variance and the *Regulation*. The nature of the tasks performed by the Employee in travelling to and from his work site is central to the issue of the Employee's entitlement to travel time. Yet the Employer was not permitted to call oral evidence on any of these issues, or to cross-examine the Employee with respect to his evidence. This is clearly a denial of a fair hearing.
>
> In addition, the Employer clearly indicated to the Tribunal that it wished to call oral evidence on that issue. On May 18 and 20, 1999 counsel for the Employer

> indicated to the Tribunal's Registrar that she and Mr. Moore [the Director's program advisor] had agreed to proceed by way of oral hearing. At no time did the Tribunal advise the Employer that it would not be proceeding by way of oral hearing.
>
> Despite all the above, the Tribunal decided that it did not need to hear evidence on the those disputes and made factual findings without any oral evidence. It did not "hear" the Employer. In such a case, the Employer submits that it is clear that it was denied a fair hearing.

By way of remedy on this ground, the Employer asks the Tribunal to set aside the Adjudicator's decision, and to remit the matter for an oral hearing. For reasons that follow, we dismiss this submission.

At common law, natural justice does not dictate that the only fair hearing is an oral hearing according to the traditional civil trial model in which *viva voce* evidence is led and witnesses are cross-examined. It has long been recognized that what is procedurally fair varies with the circumstances. Administrative tribunals are created as an alternative to courts, and it would therefore be wrong to automatically import the full panoply of trial procedures onto such tribunals.

Several factors inform the content of the duty of fairness at common law. These include the nature of the decision being made, the terms of the statute, the impact of the decision on the individual, any legitimate expectations occasioned by agency promises or procedural practices and the agency's own choice of procedures made in light of its institutional constraints. The common law's concern is not for perfect or idealized justice, but for a hearing in which each side has been given a meaningful opportunity to be heard: *Baker v . Canada (Minister of Citizenship and Immigration)* (1999), 174 D.L.R. (4th) 193 (S.C.C.). Even in those administrative contexts requiring "full and fair consideration of the issues", where a claimant's "important interests are affected by the decision in a fundamental way", an oral hearing is not necessarily a pre-condition to fairness: *Baker*, paras. 32-34. The courts themselves recognize that fundamental justice in civil proceedings does not require a full trial proceeding, and that justice may be done in summary proceedings, even in the face of conflicting evidence: *Johnstone v. Island Scales Ltd.*, [1999] B.C.J. No. 1892 (S.C.), citing *Inspiration Management Ltd. v. McDermid* (1989), 36 B.C.L.R. (2d) 202 (C.A.). The same is true in judicial review proceedings: *BX Neighbourhood Pub Ltd. v. British Columbia (Minister of Labour and Consumer Services* [1990] B.C.J. No. 2946 (S.C.).

It is also important to recognize that, consistent with the principle of legislative supremacy, common law rules of procedural fairness are subject to modification by statute – which modifications may either expand or limit the procedural obligations on administrative tribunals: *Knight v. Indian Head School Division No. 19*, [1990] 1 S.C.R. 653. In this context, section 107 of the *Act* specifically provides that this Tribunal may conduct an appeal proceeding "in the manner it considers necessary and is not required to hold an oral hearing". In our view, this language is more than merely declaratory. Section 107 reflects a strong legislative intention to

give the Tribunal a broad discretion over the manner of proceeding on a given appeal, particularly in light of large numbers of cases the Tribunal decides, the purely economic interests at stake in most decisions, the power imbalance sometimes present between opposing parties, and the need to be efficient and accessible: *Act*, s. 2(d). We do not go so far as to read section 107 as ousting the Tribunal's obligation to hold an oral hearing where it is impossible to otherwise do justice, as where credibility is central and impossible to resolve in the absence of an oral hearing. We do however read s. 107 as a strong legislative signal that, within this statutory context, the tribunal is intended to be master of its own procedure, and that oral hearings are legally required only where it is impossible to do justice otherwise.

In applying this test to the facts of this case, we begin by noting that the onus lies on an Appellant to show that the Determination was wrong: *Re: John Ladd's Imported Motor Car Co.*, BCEST #D313/96. To put it another way, this was a case in which it was entirely appropriate that Hall "bear the risk of non-persuasion" since Hall was given an opportunity to provide relevant information to the Director's Delegate: *Re World Project Management*, BCEST #D134/97. As noted at p. 2 of the Determination:

> Mr. Pedersen advises his main work was on a private road, approximately 270 kilometres in an old oilfield. He claims over the past 2 years, he worked 6 or 7 days on actual new lease roads during the time or prior to the oilrigs presence. The employer was to provide dates and times, Mr. Pedersen was involved in actual lease and lease road construction. This information was not supplied….
>
> Mr. Pedersen [sic] job was that of grading a private road(s).

The Appellant should be taken to have known that it would bear the onus of demonstrating error in the Determination. Its appeal documents reflect such awareness. On April 14, 1999, Hall's counsel wrote to the Tribunal briefly setting out the grounds of appeal, the remedy requested, and noting: "I will be filing a full appeal submission with the Tribunal in the future, outlining in more detail the reasons, as well as the factual and legal basis, for the appeal". This letter contained no request for an oral hearing.

On the same day (April 14, 1999), the Registrar wrote to the parties, advising them of the appeal, assigning a submissions schedule, and advising as follows:

> The parties are advised that this matter will be decided by an Adjudicator. The Adjudicator may decide this appeal based solely on written submissions or an oral hearing may be held. An oral hearing may not necessarily be held.

On April 26, 1999, counsel for Hall wrote to the Tribunal again:

> We have now had an opportunity to discuss this matter with our client more fully, and to receive and review the material relevant to this appeal.

> As noted in our letter to the Tribunal dated April 14, 1999, we will be filling [sic] a full appeal submission with the Tribunal in the near future, outlining in more detail the reasons, as well as the factual and legal basis, for the appeal.

This letter is conspicuous by the absence of any request for an oral hearing, or statement of the grounds for such a hearing.

On May 5, 1999, the Director objected to the appeal on the basis that the appeal was deficient and incomplete. On May 20, 1999, Hall responded to the Director's preliminary objection, and in turn challenged the Director's standing. On June 7, 1999, the Director replied. On August 18, 1999, Adjudicator McConchie issued his decision on these preliminary questions, allowing "the appeal to proceed" on all issues except the just cause issue:

> The appellant's submission dated May 12, 1999 and the complainant's submission dated May 11, 1999 may now be exchanged.

The May 11, 1999 submission referred to was Pedersen's brief, hand-printed response to the appeal. The May 12, 1999 submission refers to the submission of that date filed by Hall, which Hall described as "a more detailed submission regarding the factual and legal grounds for appeal". Under the heading "facts" Hall described its general business:

> The Employer is in the business of building, repairing, and maintaining well sites for oil and gas companies in Northern British Columbia. The oil and gas companies lease large tracts of land, and explore those areas for oil and gas deposits. Part of the exploration process is the preparation of the well site, including levelling, stabilizing, and ensuring proper drainage for the site. This is the work carried out by the Employer. In addition, the Employer is responsible for the maintenance of the well site, including re-levelling, monitoring drainage, snow removal, and seeding the sites. The preparation and maintenance work done by the Employer includes the construction and repair of access roads from the nearest highway to the well site. These roads are situated on the land leased by the oil and gas companies and are, generally, rudimentary dirt roads. As these roads are used by heavy equipment and machinery, they require a good deal of ongoing repair and maintenance.

Beyond this general description of the company, Hall made these comments about Mr. Pedersen's specific duties:

> Among those employed by the Employer are grader operators, who are responsible for the bulk of the road work required. The Complainant in this matter was employed by the Employer as a grader operator. *In this capacity, his job duties included building and repairing private roads for use by oil and gas companies.* The Complainant was employed in this capacity from August 23, 1996 to July 19, 1996. (p. 3) [emphasis added]

The italicized paragraph, taken alone, might be read in one of two ways – either as a factual disagreement with the physical acts performed by Pedersen, or as a legal disagreement about how to properly characterize physical acts which were not really in issue. However, the following passage from page 6 the same submission makes clear that what was really at issue was the proper legal characterization of the common act of "grading":

> …the Employer submits that the work being done by the Complainant involved the construction and repair of roads. *Specifically, grading involves the repair and restoration of road surfaces degraded by weather and use.* [emphasis added]

In our view, this conclusion is further reinforced by the overwhelming focus in Hall's submission on the intent of the Variance, the definition of "construction" in section 1 of the *Act* ("the construction, renovation, repair or demolition of property or the alteration or improvement of land") and the suggestion that the Tribunal ought to focus on the "totality of the work done by both this Employer and the other employers" in the Oilpatch: submission, pp. 5-12. As framed by the Hall, this was not a case where resolution turned on issues of credibility concerning fundamental contested primary facts. Rather, it was overwhelmingly a case about the scope and application of the Variance and the Exemption to the activity of grading for an oilpatch employer. The May 12, 1999 submission presents as a complete and thorough submission on all relevant issues – the submission in no way presents as depending on the need to lead evidence and cross examine witnesses for credibility.

Following Adjudicator McConchie's August, 1999 decision, the Registrar required responses to the May 11 and 12 submissions. On October 13, 1999, the Director replied to the May 12, 1999 submission. This submission reinforces the view that the real issue was the legal characterization of the act of grading:

> One, the employment duty of [Pedersen] was to operate a grader. The grader was used to scrap [sic] off "washerboard" in summer, and to plow snow off in the winter. This type of work, the Director contends, can not be characterized as "repair", and therefore, does not place it within the ambit of "construction".

On October 29, 1999, Hall replied. On the issue of Pedersen's duties, Hall submitted that "maintaining" roads fell within both the Variance and the Exemption: p. 2. Hall also repeated "our earlier submission" that Pedersen's duties, involved:

> …building, maintaining and repairing roads for use by oil and gas companies. Although the Director appears to dispute this description, neither the Director nor complainant have provided any evidence to the Tribunal in this regard.

We observe firstly that the onus was not on the others but rather on Hall, as appellant, to show that the Director committed fundamental factual errors. Second, while couched in the language of error of "fact", a full and fair reading of Hall's submissions makes clear that what was really in issue was the proper legal characterization of the primary and uncontested reality that Pedersen was a grader. As such, Hall's numerous references to "construction" were properly understood as argument, not evidence. At no time did Hall ever take issue with the understanding that the

grader was used to scrape off "washerboard" in the summer, and to plow snow off in the winter. If Hall had contested this version of reality, one would have expected that contest to appear with particularity somewhere in the many written opportunities to be heard that Hall received before the Adjudicator.

Based on the record before the Adjudicator and the way in which the case was argued, it was in our view not only reasonable but correct for the Adjudicator to proceed with this matter by way of written submission. Hall was given a meaningful opportunity to be heard. A fair hearing, in this context, did not require an oral hearing.

Before concluding on this issue, we propose to address the remaining points Hall has raised on this issue.

Hall asserts that there also were "conflicts" on other factual issues, such as the nature of the roads that the Employee maintained (note here Hall's own characterization of the Pedersen as "maintaining" the roads: January 13, 2000 submission, p. 3). On our view of the law, any factual dispute about whether the roads are "specific to the oil and has industry" does not affect the outcome on the merits. As a result, an oral hearing was not necessary.

Hall also asserts that there were factual disputes on the "travel time" issue, and that in the absence of an oral hearing, it was unfair for the Adjudicator to rule on this issue. We disagree. We note the uncontested information that was before the Adjudicator. Hall in fact paid Pedersen for all travel time between the camp and workplace at straight time. Later, Hall took the position, reflected in its May 12, 1999 submission, that the only times Pedersen was actually entitled to be paid for travel time was where he needed to use a company truck to refuel the grader and other vehicles, and that his objection was to the Director's inclusion of "all" travel time (p. 13):

> On those occasions when the Complainant was required by the Employer to use the truck to refuel other vehicles, the Complainant was paid for travel and service time in respect of this task.

The Delegate's reply to this before the Adjudicator was this:

> Later, however [during the investigation process], the employer took the position that he only owed wages for those occasions when the complainant hauled fuel or transported supplies. He supplied a list of days and hours of those occasions when, in the employer's view, the complainant was simply going to and from the workplace ("commuting"). <u>The delegate deduced [sic] those hours from the time worked by the complainant</u>. [emphasis added]

For the first time in reply, Hall appeared to go even further than its original argument and asserted that "it is difficult to determine, from the statements made by the Director in the Determination, on what basis it was found that the Complainant was entitled to <u>any</u> travel time" [emphasis in original]. Significantly, Hall did not contest the Director's statement that the

Director in fact accepted Hall's information about commuting time, and deducted those hours from time worked.

In short, both parties before the Adjudicator accepted that travel time should be paid when the Employee is carrying fuel or parts, and not paid when simply commuting. The issue of how much time was commuting versus work time was resolved in the Determination based on the information provided by Hall. In these circumstances, it is our view that an oral hearing was not necessary before the Tribunal.

Finally, we address Hall's submission that, on May 18 and May 29, 1999, counsel for Hall advised the Tribunal Registrar that "she and Mr. Moore had agreed to proceed by way of oral hearing". It will be noted that following Adjudicator McConchie's August 18, 1999 decision, the Registrar wrote to the parties on August 19, 1999 and October 15, 1999 requesting submissions. At no time was notice of hearing issued. At no time does the record disclose that Hall inquired about the matter prior to its final submission on October, 1999 or prior to the December 10, 1999 decision. Nor does its subsequent written submission expressly or implicitly assume an upcoming oral hearing.

The law is clear that the Tribunal in general, and an Adjudicator seized of a matter in particular, is master of its own procedure. Procedural agreements by the parties are not binding. If an oral hearing is not otherwise required as a matter of natural justice, no agreement of the parties can change that reality. Nor in our view is verbal "advice" to the Registrar the same as a submission to the Panel and an order that the matter will proceed orally, particularly in view of s. 107. Hall does not suggest that the Tribunal ever informed it that an oral hearing would be held. In our opinion, it cannot plausibly be suggested that verbal advice to a Registrar about how the parties would like to proceed creates a legal obligation on an Adjudicator to be governed by the parties' wishes where an oral hearing is not otherwise required. If Hall truly perceived that an oral hearing was critical to its case, one would have expected at least a shred of written correspondence to that effect in the 7 months that this matter was before the Tribunal.

We conclude that Hall received a fair hearing. It was represented by legal counsel. It was well able to, and did, advance its points comprehensively, in writing, in a meaningful fashion and one more than one occasion. This was not a case in which justice was impossible in a written format. A careful review of the content of all the submissions before the Adjudicator makes clear that this was not a case in which the central issue turned on questions of credibility. The case turned on issues of legal characterization rather than primary fact. We reject the view that Hall's submissions were compromised, or were less than complete, because of its "understanding" that there would be an oral hearing.

This ground of review is dismissed.

C. Interpretation of the Variance and Exclusion

While we have reviewed this ground carefully and comprehensively, we propose to deal with it much more briefly.

We agree with the careful and comprehensive reasons given by the Adjudicator that Mr. Pedersen was not captured by either the Variance or the Exclusion, during the periods when they were in effect during his employment. We make only two comments in addition to the reasons given by the Adjudicator.

First, this case provides an excellent operational illustration of the principle in *Rizzo Shoes*, *supra*. Where, as here, ambiguity exists in a statutory definition, the Supreme Court of Canada has directed decision-makers to resolve those issues in a fashion most likely to confer the *Act*'s basic standards on employees. This was the approach properly taken by the Adjudicator here. In our view, the result reached in this case also furthers a consistent application of the *Rizzo* principle throughout the *Act*. Apart from the Exclusion, the only statutory provision which uses the term "construction" is s. 65(1)(e) of the *Act*, which is yet another limitation on the benefits-conferring principles of the *Act* (in that case, the "Termination of Employment" benefits"). The Adjudicator's interpretation therefore ensures a harmonious and appropriate interpretation of the term "construction" throughout the legislation, in accordance with the Supreme Court of Canada's direction.

Second, and with respect to the Variance, we note that the Adjudicator accepted Hall's argument that its definition of "construction" in the Variance should be interpreted in accordance with the definition of "construction" in section 1 of the *Act*. Since the Variance is an administrative instrument of the Director, who has discretion as to the scope of a variance, this particular instrument falls to be construed primarily based on the Director's language and intent. While one properly presumes that words in a Variance have the same meaning as identical words in the *Act*, we note that at the time March, 1995 version of the Variance was issued, the present *Act*, with its definition of "construction", was not in effect and only came into force in November, 1995. The former Act [S.B.C. 1980, c. 10] did not contain a definition of "construction". A nice issue therefore arises as to whether, despite various renewals of the Variance over time under the present *Act* up to July 30, 1997, the fact that the Variance remained in its March, 1995 form commends a focus on the original intent of the Variance, which on its face seemed to envision a more limited and conventional definition of "construction". Because we agree with the Adjudicator that Pedersen does not fall within the Variance even under the new *Act*'s more expanded definition of "construction", we need not finally decide that issue here.

D. Calculation of Travel time

We dismiss the application for reconsideration in respect of this issue, which was raised as a ground of appeal for the first time in the May 12, 1999 submission. As we read the material on this issue, Hall's real dispute is not with the fact that it had some obligation to pay travel time as "work", but rather with the way in which Hall's wages owing to Pedersen were calculated in the Determination following Hall's advice to the Director about the number of Pedersen's non-work "commuting" days. As a result of Hall's representations, the Determination deducted the commuting "hours" from Pedersen's time worked, and consequently excluded these moneys from wages paid to Pedersen, on the basis that if the hours were not "worked", the moneys could not be "wages". Hall objects, stating that the monies Hall in fact paid for commuting time

should otherwise be set off against other wages it owes Pedersen. The Adjudicator properly dismissed this argument on the basis that Hall cannot have it both ways. On the facts, it paid Pedersen for all commuting time. Either the money was "wages", in which case the commuting time was "work", or it is not wages, in which case the time was not "work". Hall now says, for the first time on reconsideration, that the moneys were wages but the time was not "work" since the money was in fact paid as an "incentive", relating to "production and efficiency", in contrast to actual "work": *Act*, s. 1: "wages". We dismiss this argument. Hall's attempt to re-characterize these payments arises for the first time in its reconsideration reply argument. The ground relating to the calculations issue itself was not raised until May 12, 1999, and as such was out of time. We agree with the Adjudicator's approach on the matter. Further, in our view, valid grounds did not exist to raise this ground late before the Tribunal, and is certainly not appropriately raised for the first time on reconsideration.

ORDER

The Adjudicator's decision is confirmed.

Frank A.V. Falzon
Adjudicator, Panel Chair
Employment Standards Tribunal

John Orr
Adjudicator

Carol Roberts
Adjudicator