BC EST #D307/98
Reconsideration of BC EST #D109/98

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 -

Dek Tek Industries Inc.

("Dek Tek")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 98/335

DATE OF DECISION: July 3, 1998

DECISION

OVERVIEW

This is an application by Dek Tek Industries Inc. ("Dek Tek") for reconsideration of a Decision dated March 20, 1998 (BCEST #D109/98) - the "Original Decision." In the Original Decision, the Adjudicator ordered that the Determination dated October 14, 1997 be varied because he found that Mr. Witkowski had resigned his employment and, therefore, he was not entitled to compensation for length of service. The Adjudicator confirmed the other aspects of the Determination - Mr. Witkowski was not a manager and was entitled to receive overtime wages and statutory holiday pay.

Dek Tek's application for reconsideration was received by the Tribunal on May 29, 1998 and the parties were required to make their written submissions by June 22, 1998. The application is now decided on the basis of the parties' written submissions.

Dek Tek submits that there are three grounds for reconsidering the Decision:

(i) Mr. Witkowski was a manager during his employment;
(ii) there was a denial of natural justice because the Adjudicator did not grant a second adjournment to hear its appeal; and
(iii) the calculation of Mr. Witkowski's wage entitlement is incorrect.

ISSUES TO BE DECIDED

Did the Adjudicator err in deciding that Mr. Witkowski was not a manager, that he resigned his employment and that he was entitled to overtime wages and statutory holiday pay?

ANALYSIS

Section 116 of the *Act* allows for reconsideration of a Tribunal decision:

Reconsideration of orders and decisions

(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.

This Tribunal has adopted a conservative approach to granting applications for reconsideration. In a recent decision, *Director of Employment Standards* (BCEST #D479/97), the Tribunal's views were stated as follows:

> It is now firmly established that the Tribunal will not interpret (section 116) to allow a dissatisfied party an automatic right of review. To the contrary, the Tribunal has stated the reconsideration provision will be used sparingly and has identified a number of grounds upon which it may choose to reconsider an order or decision. These grounds may be summarized as cases demonstrating: a breach of the rules of natural justice; a significant error of fact that is either clear on the face of the record or that arises from the introduction of new evidence that is both relevant to the order or decision and was not reasonably available at the time of the original hearing to the party seeking to introduce it a fundamental error of law; or an inconsistency with other decisions of the Tribunal which are not distinguishable on their facts.

There is, therefore, a heavy onus on the person who applies for a reconsideration to demonstrate that the decision in question can be impugned on one of these grounds.

I will consider Dek Tek's application on each of the three grounds on which it makes its application.

Fundamental Error in Law?

One of the reasons given by Dek Tek for its application is what it describes as the "job clarification issue." The thrust of its submission under that heading is that the Adjudicator erred in deciding that Mr. Witkowski was not a manager. In particular, Dek Tek objects to the Adjudicator's finding that "...the evidence indicates that the complainant's position is that of a lead hand rather than a manager." It submits that finding was made "... without a shred of evidence" and is "...based solely on the claimant's word and questionable honesty." It also submits that Peter Bulkowski was supervised by Mr. Witkowski.

It is instructive, I think, to reproduce the following paragraph from the Original Decision:

> It is my finding that the complainant is not a manager under the definition of "manager" in the Regulations. The evidence indicates that the complainant's position is that of a lead hand rather than a manager. I acknowledge that the complainant did give instruction to co-workers but that alone does not make him a manager. The complainant had the skills and ability to organize work. The employer utilized those skills. The employer also utilized the complainant's practical skills of fabrication, assembly and installation of its product. Giving instructions in the shop or field regarding the installation of

> the product does not amount to supervision in the managerial sense. Furthermore, I am not persuaded that the complainant hired Mr. Bulkowski. It is Mr. Kaaria who determines whether a position exists in the shop and it is Mr. Kaaria who ultimately decides who will be hired and who will be retained. The complainant did present Mr. Bulkowski as a potential employee but the evidence indicates that it was Mr. Kaaria who made the final decision to hire him. Likewise, it was Mr. Kaaria who made the decision to terminate Mr. Bulkowski. Finally, Mr. Kaaria concedes that the complainant did not act in an executive capacity with the company. For the above reasons I find that the complainant is not a manager as contemplated under the *Act* or Regulations.

This paragraph follows several in which the Adjudicator addressed the question of whether Mr. Witkowski was a "manager" as that term is defined in the *Regulation* (BC Reg. 396/95) and set out the evidence which was put to him at the hearing. It is clear from reading the Adjudicator's reasons that he analyzed the evidence and applied the statutory definition of "manager" in a way which is consistent with the approach taken by this Tribunal. See, for example, *Director of Employment Standards* (BCEST #D479/97) at page 6:

> Any conclusion about whether the primary employment duties of a person consist of supervising and directing employees depends upon a total characterization of that person's duties, and will include consideration of the amount of time spent supervising and directing other employees, the nature of the person's other (non-supervising) employment duties, the degree to which the person exercises the kind of power and authority typical of a manager, to what elements of supervision and direction that power and authority applies, the reason for the employment and the nature and size of the business. It is irrelevant to the conclusion that the person is described by the employer or identified by other employees as a "manager". That would be putting form over substance. The person's status will be determined by law, not by the title chosen by the employer or understood by some third party ...
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> ... Typically, a manger has a power of independent action, autonomy and discretion; he or she has the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business. Making final judgments about such matters as hiring, firing, disciplining, authorizing overtime, time off or leaves of absence, calling employees in to work or laying them off, altering work processes, establishing or altering work schedules and training employees is typical of the responsibility and discretion accorded a manager. We do not say that the employee must have a responsibility and discretion about all of these matters. It is a question of degree, keeping in mind the object is to reach a conclusion about whether the employee has and is exercising a power and authority typical of a manager. It is not sufficient simply to say a

> person has that authority. It must be shown to have been exercised by that person.

I find this aspect of Dek Tek's application must fail. In my opinion, Dek Tek is attempting to re-argue the same issue that was decided by the Adjudicator. In reality, its submission on this point is nothing more than an attempt to challenge the findings of fact which were made by the Adjudicator after he had heard the witness' evidence and had weighed and considered the evidence. Also, I find that Dek Tek's submission falls far short of establishing that the Adjudicator made a fundamental error of law.

Breach of Natural Justice?

Dek Tek's application deals with this issue under the title of 'witness testimony issues' and submits that it was "...denied the right of an adjournment."

The Original Decision contains the following description of Dek Tek's request for an adjournment, the reasons it was granted one on January 12, 1998 and the reasons for not granting a further adjournment on February 3, 1998.

> At the commencement of the hearing on January 12, 1998 the employer made an application for adjournment. The employer based this application on two factors. Firstly, the employer states that he was unable to locate certain witnesses whose testimony he felt was essential to his case. Secondly, and this factor is related to the first factor, the employer states that due to the short period between the filing of his appeal and the notice of hearing, which encompassed the Christmas period, he was unable to adequately prepare for the hearing including the location of certain witnesses. It was agreed by both the complainant and the employer that one such witness, Mr. Peter Bulkoski, should be heard. It was further acknowledged that Mr. Bulkoski's evidence would require an official interpreter.
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> The employer had appeared with two witnesses who were prepared to give evidence. Therefore, the matter proceeded with the two persons who were present giving testimony. An adjournment was granted to allow the employer time to issue a summons for Mr. Bulkoski and to allow the Tribunal time to secure the attendance of an official interpreter. At the commencement of the continuation on February 3, 1998 the employer indicated that Mr. Bulkoski was present but that it was unable to locate certain other witnesses. It had been made clear to the employer and the other parties on January 12, 1998 that it would take very strong circumstances to secure any further adjournments. On that basis the hearing concluded on February 3, 1998 despite the employer requesting further time to produce witnesses who were not present that day.

It is clear from the Original Decision that Dek Tek was not denied an adjournment as it alleges in its reconsideration application. Rather, it was granted an adjournment from January 12, 1998 to February 3, 1998 to allow it additional time to produce the witnesses it required to give evidence. I note that the Determination was issued on October 17, 1997 and the first hearing date for Dek Tek's appeal was January 12, 1998 - almost three months later. Dek Tek's reconsideration application contains no reasons why that three month period was an inadequate length of time within which to locate and produce the witnesses nor why it was unable to produce its witnesses on the second hearing day (February 3, 1998).

I find that there was no denial of natural justice by the Adjudicator. On the contrary, Dek Tek was afforded a full and fair hearing and was granted one adjournment.

Significant Error of Fact?

The third ground of Dek Tek's reconsideration application, what it describes as the "compensation issue", is set out in the submission by Mr. Kaaria as follows:

> As Mr. Witkowski's employer I contest the Employment Standards Determination and now the Tribunal's conclusions solely because of the claimants attempt to have his position reclassified from a manager to a regular employee. **I have not challenged the claimants hourly rate of pay nor the hours he submitted each month on his time sheet.** It was my prerogative to pay Mr. Witkowski for the hours he submitted in spite of the fact that they were inflated (not actually worked), as has been previously documented, and again outlined below. Mr. Witkowski's padded time sheets were accepted only because of his job classification as a manager.
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> Should Mr. Witkowski's position at Dek Tek Industries remain as that of Operation's Manager then the question of compensation is not an issue. Should the claimant, however, be deemed to have been a regular employee then compensation would indeed have to be properly calculated. The calculations, as provided in the Employment Standards Determination, are totally wrong.
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> (emphasis added)

This 'compensation issue' was raised for the first time by Dek Tek in its reconsideration application. It was not raised as an issue in Dek Tek's appeal before the Adjudicator as acknowledged in the passage from its submission which I have highlighted above. Despite the very imaginative and somewhat unique nature of Dek Tek's arguments, I find it would not be proper to allow a reconsideration on this ground.

Dek Tek argues that if Mr. Witkowski is determined not to be a manager, then any overtime wages to which he would be entitled should be calculated at a lower wage rate, to reflect his non-managerial status. That argument, and any argument concerning

the calculation of Mr. Witkowski's wage entitlement, should have been made as part of its appeal. An appellant (Dek Tek in this case) can not wait until its appeal is decided and then attempt to make new or further arguments on one of the issues under appeal. As noted in an early decision of the Tribunal, *Zoltan Kiss* (BCEST #D122/96), there are some important reasons why the statutory power to reconsider decisions should be exercised with caution:

> Section 2(d) of the *Act* establishes one of the purposes of the *Act* as providing fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. Employers and employees should expect that, under normal circumstances, one hearing by the Tribunal will resolve their dispute finally and conclusive. If it were otherwise it would be neither fair nor efficient.
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> Section 115 of the *Act* establishes the Tribunal's authority to consider an appeal and limits the Tribunal to confirming, varying or canceling the determination under appeal or referring the matter back to the Director of Employment Standards (presumably, for further investigation or other action). These limited options (confirm vary or cancel a determination) imply a degree of finality to Tribunal decisions or orders which is desirable. 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 reason.
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> It would be both unfair and inefficient if the Tribunal were to allow, in effect, two hearings of each appeal where the appeal hearing becomes nothing more than a discovery process for a reconsideration application.

It is clear that after considering and analysing Dek Tek's submissions on the evidence, the Adjudicator made a finding about Mr. Witkowski's entitlement to overtime wages and statutory holiday pay (at page five of the Original Decision):

> I therefore find that the employer was knowledgeable of the hours being worked and paid for those hours on a straight time basis. The complainant is entitled to be compensated for the overtime premium for those hours and the statutory holiday premium for hours worked or statutory holidays.

Dek Tek submits that the Adjudicator has either misinterpreted its argument or failed to understand it. I disagree. The analysis by the Adjudicator which preceded his finding is clear and reveals that he gave full consideration to the arguments made by Dek Tek at the hearing:

> The employer argues that the complainant should not be entitled to overtime or statutory holiday pay. The employer supports this position with the argument that he and the complainant negotiated a hourly compensation

> package that recognized that the complainant would be paid at straight time for all hours worked. The employer further argues that many of the hours claimed as overtime were hours that were not worked. The employer acknowledges that he received and checked the time cards of all employees including the complainant. However, the employer argues that the complainant is not entitled to the overtime hours because those hours are padded in the sense that they were unproductive. By that the employer means that although the complainant was in the shop for the time marked on his sheets he was not producing valuable hours for his employer. In other words he was taking much longer to perform tasks than it would take if there was more work available or, alternatively, he was performing personal tasks. For these reasons the employer argues that it should not be penalized with the overtime premium or the statutory holiday premium.

The Adjudicator also considered the provisions of Section 4 of the *Act* before making his finding about Mr. Witkowski's wage entitlements.

If Dek Tek believed that Mr. Witkowski's hours of work or payroll records were inaccurate (or "padded" to use its phrase) it could have taken some remedial action during the employment relationship (October, 1994 to October, 1995). Also it could have indicated its concerns with those records to the Director's delegate rather than providing them to the delegate as the basis for calculating Mr. Witkowski's wage entitlement. It would be contrary to the principles of natural justice to allow Dek Tek to argue now that Mr. Witkowski's hours of work and rate of pay should now be changed and reduced by some arbitrary amounts. Similarly, it would be improper for me to consider Dek Tek's submissions that the calculations in the Determination are "totally wrong" and the "vacation pay already paid is not acknowledged." One of the purposes for including calculations in a determination is to give employers and employees an opportunity to review those calculations and, if there are errors, to include any such errors as a ground for appealing the Determination. I cannot allow Dek Tek an opportunity to make arguments or to introduce evidence during the reconsideration process which could have and should have been made during the appeal process.

ORDER

I order, under Section 116 of the *Act*, that Dek Tek's application for reconsideration be dismissed and I confirm the Original Decision.

Geoffrey Crampton
Chair