

**EMPLOYMENT STANDARDS TRIBUNAL**

In the matter of an application for reconsideration pursuant to Section 116 of the

*Employment Standards Act, S.B.C. 1995, c. 38*

-by-

Stanmar Property Management Ltd.

(“Stanmar”)

-of a Decision issued by-

The Employment Standards Tribunal

(the “Tribunal”)

**ADJUDICATOR:** Kenneth Wm. Thornicroft

**FILE No.:** File No. 96/221

**DATE OF DECISION:** November 13th, 1996

**BC EST # D321/96**  
**Reconsideration of BC EST # D155/96**

**DECISION**

**OVERVIEW**

Stanmar Property Management Ltd. (“Stanmar”) has filed an application, pursuant to section 116 of the Employment Standards Act (the “Act”), for reconsideration of an adjudicator’s decision to cancel Determination No. CDET 001469 issued by the Director of Employment Standards on March 6th, 1996 (the “Determination”). The Director found that a former Stanmar employee, Kathy Bolenback (“Bolenback”), had not proved that she was entitled to either daily or weekly overtime as set out in subsections 40(1) and (2), respectively, of the Act.

Bolenback appealed the Determination and the matter came on for hearing on June 21st 1996 at Penticton, B.C. The adjudicator concluded, based on the evidence before him (which included testimony from Bolenback and from three employer witnesses), that Bolenback had made out a valid claim for unpaid overtime. The calculation of the precise amount owed was referred back to the Director.

The request for reconsideration is contained in a letter from Stanmar’s solicitors dated September 23rd, 1996. Two grounds are advanced in support of the application for reconsideration:

1. The adjudicator failed to properly assess the evidence before him as to the hours of overtime claimed by Kathy Bolenback; and
2. The adjudicator incorrectly defined the issue to be decided as being whether Bolenback was entitled to overtime pay for hours she says were worked but which Stanmar says were not authorized.

**ANALYSIS**

The Tribunal has issued several decisions regarding the permissible scope of review under section 116 of the Act (the “reconsideration” provision). In essence, the Tribunal has consistently held that applications for reconsideration should succeed only when there has been a demonstrable breach of the rules of natural justice, or where there is compelling new evidence that was not available at the time of the appeal hearing, or where the adjudicator has made a fundamental error of law. The reconsideration provision of the Act is not to be used as a second opportunity to

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challenge findings of fact made by the adjudicator, especially when such findings follow an oral hearing, unless such findings can be characterized as lacking any evidentiary foundation whatsoever.

The first ground advanced in support of the application for reconsideration is an undisguised challenge to certain findings of fact made by the adjudicator. I might add that, so far as I can see, there was a proper evidentiary basis for the adjudicator's findings of fact. In particular, the *employer's own evidence* supported Bolenback's claim that she worked extensive overtime hours. For example, her former supervisor, Frans Andrews, conceded in a letter that Bolenback "put in some overtime". Frans Andrews and Malcolm Scott (on behalf of Stanmar) apparently told Bolenback that she was working so many overtime hours that perhaps she should "bring a bed to the office".

I similarly see no merit to the second ground advanced, namely, that the adjudicator mischaracterized the issue before him. One of the Reasons for dismissing the complaint as set out in the Determination itself was that the overtime hours were not authorized by the employer. A similar argument was advanced by Frans Andrews in his aforementioned letter. Clearly, "authorization" was an issue that needed to be addressed by the adjudicator. It is apparent from reading the adjudicator's Reasons for Decision that he turned his mind to two questions--first, whether overtime hours were in fact worked and second, if so, whether the absence of employer authorization for such overtime hours was relevant.

**ORDER**

The application to vary or cancel the decision of the adjudicator in this matter is refused.

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**Kenneth Wm. Thornicroft, *Adjudicator***  
**Employment Standards Tribunal**