

An Application for Reconsideration

- by -

The Director of Employment Standards
("the Director")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: David B. Stevenson

FILE No.: 2003A/266

DATE OF DECISION: November 24, 2003

DECISION

OVERVIEW

The legislature has conferred an express reconsideration power on the Tribunal in Section 116, which provides:

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.*

The Director of Employment Standards (the “Director”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “Act”) of an order of the Tribunal that is set out in Tribunal decision, BC EST #D263/03, dated August 29, 2003 (the “order”). The order was issued following a case management conference convened by the Tribunal to consider procedural issues relating to appeals filed by Super Save Disposal Inc. and Acton Transport Ltd. (“Super Save”) of four Determinations issued by a delegate of the Director on May 5, 2003. The order comprised six points, including the following:

- (2) Documents in the custody or control of the Director with respect to the four complainants’ claims but which, in the Director’s view, do not form part of the record or are otherwise privileged, are to be listed and the list is to be produced on the same terms as above and by the same deadline.

The Director says the order contains errors of law, in that:

- The Adjudicator has no authority to review privileged communications between the Director and her solicitors;
- The order is contrary to the common law rule of solicitor-client privilege;
- That part of the order requiring the Director to produce a list of documents in respect of which privilege is claimed is not supported by reasons; and
- The order is contrary to the stated purpose of the *Act* “to provide fair and efficient procedures for resolving disputes over the application and interpretation of the Act”.

The Director requests the order be cancelled or varied to exclude point (2), above.

Counsel for Super Save has responded, opposing the application and submitting it should be summarily dismissed. Counsel has added that if the application is not summarily dismissed, the issues raised by the application should be clarified and delineated and he be given an opportunity to expand on his submission.

The submissions of the Director and counsel for Super Save are comprehensive and sufficiently address all of the issues raised in the application. The Tribunal has not deemed it necessary to seek any further submissions on it.

ISSUE

In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the matter is appropriate for reconsideration, the substantive issue raised in this application is whether the order was one which the Adjudicator had authority to make, was insufficiently reasoned or is contrary to a stated purpose of the *Act*.

ANALYSIS OF THE THRESHOLD ISSUE

The principles and policies relating to reconsideration under Section 116 of the *Act* are now well established. The Tribunal reconsiders an order or decision only in exceptional circumstances. Reconsideration is not meant to simply provide a party with another opportunity to re-argue their case.

The Tribunal uses a two-stage analysis in the reconsideration process. In the first stage the Tribunal decides whether the matters raised warrant reconsideration. The Tribunal has identified a number of factors and a non-exhaustive list of circumstances that might generate an exercise of discretion in favour of reconsideration. The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, 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. If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue, or issues, raised by the reconsideration.

I am not persuaded that any of the matters raised in this application warrant reconsideration.

ARGUMENT AND ANALYSIS

The arguments made by the Director fall under three broad categories: the jurisdiction of the Tribunal to inspect records and documents over which a privilege is claimed; the nature and scope of solicitor-client privilege; and the absence of any demonstrated relevance to the issues raised in the appeals of documents which fall outside the record.

Included in the first category is a submission that the Tribunal does not have authority to order the Director to list documents over which privilege is claimed. The authority of the Tribunal set out in Sections 108 and 109 of the *Act* bear directly on this submission. The relevant parts of those sections say:

108 For the purposes of an appeal or a reconsideration, the tribunal and each member of it has the authority of a commissioner under sections 12, 15 and 16 of the Inquiry Act.

109 (1) *In addition to its powers under section 108 and Part 13, the tribunal may do one or more of the following:*

...

(c) *make, with the approval of the minister, rules about how appeals and reconsiderations are to be conducted;*

...

(e) *inspect any records that may be relevant to an appeal or reconsideration;*

...

(g) *require a person to disclose, either orally or in writing, a matter required under this Act and require the disclosure to be made on oath or affirmation;*

(h) *order a person to produce or to deliver to a place specified by the tribunal, any records for inspection under paragraph (e).*

Section 15 of the Inquiry Act, RSBC 1996, ch. 224 provides that:

15 (1) *The commissioners acting under a commission issued under this Part, by summons, may require a person*

(a) *to attend as a witness, at a place and time mentioned in the summons, which time must be a reasonable time from the date of the summons, and*

(b) *to bring and produce before them all documents, writings, books, deeds and papers in the person's possession, custody or power touching or in any way relating to the subject matter of the inquiry.*

(2) *A person named in and served with a summons must attend before the commissioners and answer on oath, unless the commissioners direct otherwise, all questions touching the subject matter of the inquiry, and produce all documents, writings, books, deeds and papers in accordance with the summons.*

Under Section 109(1)(c), the Tribunal has made rules about how appeals should proceed. Those rules authorize pre-hearing conferences and allow an adjudicator presiding at a pre-hearing conference to “require one party to disclose to the other, or to the Tribunal, originals or copies of information, documents, records or submissions” (Rule 18(e)). The applicable statutory provisions clearly and specifically provide the Tribunal with the authority to compel a party to disclose or produce documents that may be relevant to an appeal. Disclosure may be done orally or in writing, the Tribunal may require it be done on oath or affirmation. The authority in the Tribunal to inspect any documents that “*may be relevant*” necessarily includes both an obligation on the party under compulsion to produce any document that has potential relevance and a power in the Tribunal to inspect those documents even if they may ultimately have no relevance to any matter raised in the appeal or reconsideration. Relevance is not decided by the party under compulsion to produce or disclose, but by the Tribunal upon inspection of the records and documents produced. The Director argues that an order for production must be governed by relevance. Even if it were possible to determine with certainty the relevance of all documents at the pre-hearing stage, the Adjudicator has not required the production of any document not included in the record. He has only ordered documents in the custody and control of the Director and not included in the record

be *listed* and the list produced. In my view, point 2 of the order is a reasonable and balanced approach to ensuring production remains limited to only those documents which are relevant while ensuring any issue of relevance can be properly adjudicated.

The other arguments made by the Director are premature. The Director has produced the list apparently contemplated by point 2 of the order. The Adjudicator has not decided any of the substantive issues addressed in this application. Specifically, the Adjudicator has not decided that no solicitor-client privilege attaches to communications between the Director and counsel from the Legal Services Branch of the Attorney General's Ministry; he has not decided if any of the other listed documents should remain inaccessible to any other party; he has not decided that any document in the list requires his inspection; and he has not decided any of the documents not included in the record are relevant. If necessary, the Director may raise these issues before the Adjudicator.

For the above reasons, the Tribunal has decided it will not exercise its discretion under Section 116 of the *Act*.

ORDER

The order of the Tribunal as set out in Tribunal decision, BC EST #D263/03, dated August 29, 2003, is confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal