

**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 -

Qualified Contractors Ltd.  
("Qualified")

- of a Decision issued by -

The Employment Standards Tribunal  
(the "Tribunal")

**ADJUDICATOR:** David Stevenson

**FILE No.:** 1999/366

**DATE OF DECISION:** August 11, 1999

## DECISION

### OVERVIEW

Qualified Contractors Ltd. ("Qualified") seeks a reconsideration under Section 116 of the *Employment Standards Act* (the "Act") of a decision of the Employment Standards Tribunal (the "original decision"), BC EST #D086/99, dated May 6, 1999. The original decision substantially confirmed a Determination made by a delegate of the Director of Employment Standards (the "Director") on November 2, 1998 that concluded Qualified had contravened Sections 17(1), 21(1), 34(2), 36(1), 40(1) and 40(2) of the *Act* in connection with a silviculture contract on behalf of the Ministry of Forests In Hazelton and Terrace, B.C. The issues addressed in the original decision are stated as follows:

The issues to be decided in this case are: whether Qualified was legally entitled to deduct the costs of room and board from certain employees pay, whether other former employees were entitled to overtime pay or compensation for minimum hours worked and Pelletier's status while he was travelling to work.

The issues raised in the reconsideration are:

1. whether employees who were told not to work more than 40 hours a week are entitled to claim overtime;
2. whether effect should have been given to agreements made with employees after the fact to deduct room and board; and
3. whether Pelletier was entitled to claim overtime compensation.

### ISSUES TO BE DECIDED

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 case is appropriate for reconsideration, the issues, which are framed above, are whether the applicant is able to show any reviewable error in the original decision.

### ANALYSIS

Section 116 of the *Act* confers reconsideration powers on the Tribunal:

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.*

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Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is "to provide fair and efficient procedures for resolving disputes over the interpretation and application" of its provisions. Another stated purpose, found in subsection 2(b), is to "promote the fair treatment of employees and employers". In *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97), the Tribunal noted:

To realize these purposes in the context of its reconsideration power, the Tribunal has attempted to strike a balance between two extremes. On the one hand, failing to exercise the reconsideration power where important questions of fact, law, principle or fairness are at stake, would defeat the purpose of allowing such questions to be fully and correctly decided within the specialized regime created by the *Act* and the Regulations for the final and conclusive resolution of employment standards disputes: *Act*, s. 110. On the other hand, to accept all applications for reconsideration, regardless of the nature of the issue or the arguments made, would undermine the integrity of the appeal process which is intended to be the primary forum for the final resolution of disputes regarding Determinations. An "automatic reconsideration" approach would be contrary to the objectives of finality and efficiency for a Tribunal designed to provide fair and efficient outcomes for large volumes of appeals. It would delay justice for parties waiting to have their disputes heard, and would likely advantage parties with the resources to "litigate".

Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. In *Milan Holdings Ltd.*, *supra*, the Tribunal outlined that analysis:

At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration: *Re British Columbia (Director of Employment Standards)*, BC EST #D122/98. In deciding the question, the Tribunal will consider and weigh a number of factors. For example, the following factors have been held to weigh against a reconsideration:

- (a) where the application has not been filed in a timely fashion and there is no valid cause for the delay: see *Re British Columbia (Director of Employment Standards)*, BC EST #D122/98. In this context, the Tribunal will consider the prejudice to either party in proceeding with or refusing the reconsideration: *Re Rescan Environmental Services Ltd.*, BC EST #D522/97 (Reconsideration of BC EST #D007/97).
- (b) where the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the Adjudicator (as distinct from tendering new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): *Re Image House Inc.*, BC EST #D075/98 (Reconsideration of BC EST #D418/97); *Alexander (Perequine Consulting)*, BC EST #D095/98 (Reconsideration of BC EST #D574/97); *32353 BC Ltd.*, (c.o.b. *Saltair Neighbourhood Pub*), BC EST #D478/97 (Reconsideration of BC EST #D186/97).
- (c) Where the application arises out of a preliminary ruling made in the course of an appeal. "The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid

a multiplicity of proceedings, confusion or delay”: *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.

The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, 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. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in a previous Tribunal decision by requiring an applicant for reconsideration to raise “a serious mistake in applying the law”: *Zoltan Kiss, supra*. “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 reasons”: *Khalsa Diwan Society*, BC EST #D199/96 (Reconsideration of BC EST #D114/96). . .

The circumstances where the Tribunal’s discretion will be exercised in favour of reconsideration are limited and have been identified by the tribunal as including:

- failure to comply with the principles of natural justice;
- mistake of law or fact;
- significant new evidence that was not reasonably available to the original panel;
- inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

Consistent with the approach outlined above, I will first assess whether the applicant has established any matters that warrant reconsideration.

Each of the arguments raised by counsel for Qualified were raised in the appeal and were considered and decided in the original decision. This application simply seeks to have another panel of the Tribunal consider those arguments again. Quite apart from the fact that I agree completely with the analysis and conclusion in the original decision, this type of application is not appropriate for reconsideration. I accept the argument of the Director that an application for reconsideration that seeks only to re-argue points of evidence or re-examine the arguments made before the original adjudicator does not meet the criteria established by the Tribunal for a favourable exercise of discretion under Section 116 of the *Act*.

Counsel for Qualified suggests the grounds for reconsideration may be viewed in the context of a mistake of fact and a failure to deal with a serious issue. I find neither of these suggestions compelling. The Adjudicator noted in the original decision that the only issue regarding Pelletier was whether he was entitled to be paid overtime. That decision turned on whether he was entitled to be paid for his travel time. On that point, the Adjudicator stated:

In this case, Pelletier was responsible for providing first aid services to other employees while en route to work. After analyzing essentially the same facts, the Director’s delegate concluded that it was more probable that Pelletier’s contract of employment provided for travel time. No evidence to refute that conclusion was presented.

The position of counsel for Qualified is that the above conclusion, initially made in the Determination and confirmed in the original decision, is disputed. His dispute with the conclusion is supported by nothing more than what was presented to the Adjudicator, who specifically noted the conflicting positions in reaching his decision.

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Additionally, there is no basis for suggesting the Adjudicator misunderstood or failed to deal with a significant issue. All of the issues raised in this application for reconsideration were raised in the appeal. A plain reading of the original decision is all that is necessary to reach a conclusion that the Adjudicator clearly understood what those issues were and answered all of them.

There is nothing in this application for that warrants reconsideration and I refuse to exercise my discretion to reconsider the original decision.

**ORDER**

Pursuant to Section 116 of the *Act*, I reject the application for reconsideration of the Tribunal's decision of May 6, 1999.

**David Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**