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 -

316465 B.C. Ltd.

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: John M. Orr

FILE No: 2000/368

DATE OF DECISION: August 18, 2000

DECISION

OVERVIEW

This is an application by 316465 B.C. Ltd. ("the company") under Section 116 (2) of the *Employment Standards Act* (the "*Act*") for a reconsideration of a Decision #D169/00 (the "Original Decision") which was issued by the Tribunal on April 26, 2000.

The company engaged Ernest and Lucy Merry ("the Merrys") as resident caretakers of a 94 unit apartment in Prince George. The Merrys terminated the engagement on November 30, 1997. They made a complaint claiming unpaid wages, overtime, holiday pay, and vacation pay. The company alleged that the Merrys were independent contractors.

The company was originally contacted by the Director's delegate in January 1998 and advised of the Merrys' complaints. The delegate was advised that the principal of the company was travelling but would respond fully in three weeks. A response was not received within the three weeks as promised. The delegate wrote to the principal of the company on February 18, 1998 requesting all payroll records, time sheets, or other supporting documents and requested a response by March 18, 1998. A telephone response maintained that the Merrys were independent contractors but also claimed that all records, which were maintained at the workplace, had been stolen.

On March 09, 1998 the delegate sent a "Demand for Employer Records". The demand required the records to be produced by April 01, 1998. The company did not respond until May 06, 1998. In the May 6th letter the company still maintained that the Merrys were independent contractors but in addition claimed that the Merrys had stolen all the records, abused their position of trust, and had fraudulently misappropriated funds from the company. The letter noted that all accounts and records were being audited.

The delegate telephoned the company and advised them that failure to produce some form of evidence and records may result in a determination being made solely on the basis of the evidence provided by the Merrys. The delegate gave the company until the end of the year before taking any further action. But in January 1999 the delegate again attempted to get a response from the company.

On January 14, 1999 the delegate sent another letter advising the company of all the details of the Merrys' claims and further reminded the employer that should he fail to produce any information to refute the claims by January 28, 1999 a determination would be made based on the Merrys' evidence.

The delegate followed-up this letter with phone calls on January 14, 15, 22, and 29, 1999. On February 01, 1999 the principal of the company telephoned the delegate and indicated that the company was going to initiate embezzlement charges against the Merrys. The company also stated that copies of cancelled cheques would be obtained in the next 2-3 weeks to support the

company's position. The company apparently made their first request to the bank for these cancelled cheques by letter dated February 11, 1999.

The delegate finally issued the Determination on March 24, 1999. He had still not received any documentation from the company. The company appealed the Determination and argued in the submission to the Tribunal, as set-out in the original decision, that

> "I did not have a fair and reasonable opportunity to present our case to the Industrial Relations Officer, because the complainant, Mr Merry, took all bank records/payment account without authority without authorization when he left my employ, and to this day has never returned them to me. I therefore had no documents to submit readily to the Industrial Relations Officer when requested by him to respond to the claims of the Merrys. Once the facts are taken into account they show such claims to be entirely unfounded."

At the Tribunal hearing the delegate argued that the company had failed to produce or submit any evidence, documented or otherwise, to support its position (that the Merrys were contractors) or to negate and/or refute the Merrys' claims despite all the opportunities given during the 15 months duration of the investigation. The delegate submitted that the company should not be allowed to introduce evidence before the Tribunal that had not been provided during the investigation.

The adjudicator in the original decision dealt with a preliminary issue concerning the admissibility of the company's evidence on the appeal. In his ruling on this preliminary issue ("the preliminary ruling") the adjudicator declined to hear or accept any new evidence which had not been provided to the delegate during the investigation. The adjudicator reviewed the determination and varied the determination somewhat but otherwise confirmed it.

The adjudicator's decision in the preliminary ruling regarding new evidence was "reconsidered" under section 116(2) of the *Act* on application by the company and the reconsideration panel decided that the matter should be referred back to the original panel to consider the admissibility of the company's "new evidence" in light of the Tribunal's decision in *Speciality Motor Cars (1970) Ltd.* (1999) BCEST #D570/98.

Following the reconsideration decision, several attempts were made to schedule the re-hearing to accommodate the company. A hearing was scheduled for March 13, 2000 in Prince George. The company's representative was not available. It was rescheduled for March 20 and again adjourned for the company's benefit. On March 29, 2000 the parties were notified that the appeal hearing would take place in Kamloops on April 13, 2000. The notice of hearing contained the following paragraph:

> Any records or documents that you want to be considered by the Adjudicator must be delivered to the Tribunal no later than April 7, 2000 so that they can be disclosed to the other parties.

At the re-hearing the issue again arose about whether the employer should be allowed to introduce evidence to challenge the Determination which it had failed or refused to provide to the Director during the investigation of the complaints. The Adjudicator at the re-hearing carefully analyzed the reasons for failing to adduce the evidence. The Adjudicator agreed to admit some bank records which had not been available to the company before the determination.

However, the Adjudicator declined to admit certain other documents as he found that they had been in the employer's possession and control at the time the complaint was made and at the time the Director issued the Demand for Employer Records on March 19, 1998. The Adjudicator rejected the employer's explanation for not producing the documents earlier finding that there was no indication in the explanation provided or in any other material in the file that the employer tried to comply with the Director's demand.

In the Adjudicator's opinion " ... any decision to allow this material after the employer has failed to comply with the Demand for Employer Records effectively condones the employer's breach of its statutory obligation under Section 46 of the *Regulations*." He further notes as follows:

> "This appeal demonstrates the mischief that the Tribunal has sought to avoid by adopting an approach that forecloses an appellant who has failed or refused to participate in the investigation from introducing and relying on evidence in the appeal to challenge the factual conclusions in the Determination."

The company has once again asked for a reconsideration of the decision of the Adjudicator on the re-hearing. The company's application for reconsideration is "wordy" but essentially complains about the Adjudicator's decision not to hear some of the new evidence. Toward the end of the request for reconsideration the company states: "Accordingly, I hereby request:...".

There are three points covered in this "request". The first deals with some additional information to show that Mr Merry had requested the diversion of some of his pay to Mrs Merry. However, I note on a full review of the file that this diversion of funds was an issue clearly before the adjudicator even without the admissibility of the letter referred to by the company.

The second request also deals with the consequences of this diversion of funds. The third request refers to several cancelled cheques which were the subject of the Adjudicator's decision referred to above.

ANALYSIS

The current suggested approach to the exercise of the reconsideration discretion under section 116 of the *Act* was set out by the Tribunal in *Milan Holdings Ltd.,* BCEST #D313/98 (applied in decisions BCEST #D497/98, #D498/98, et al). In *Milan* the Tribunal sets out a two stage analysis in the reconsideration process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. In deciding this question the Tribunal should consider and weigh a number of factors such as whether the

application is timely, whether it is an interlocutory matter, and whether its primary focus is to have the reconsideration panel effectively "re-weigh" evidence tendered before the adjudicator.

The Tribunal in *Milan* went on to state that the primary factor weighing in favour of reconsideration is whether the applicant has raised significant questions of law, fact, principle or procedure of sufficient merit to warrant the reconsideration. But this consideration will not be used to allow for a "re-weighing" of evidence or the seeking of a "second opinion" when a party simply does not agree with the original decision.

It is one of the defined purposes of the *Act* to provide a fair and efficient procedure for resolving disputes and it is consistent with such purposes that Tribunal's decisions should not be open to reconsideration unless there are compelling reasons: *Khalsa Diwan Society*, BCEST #D199/96.

The circumstances in which an application for reconsideration will be successful will be limited. In a Reconsideration decision dated October 23, 1998, *The Director of Employment Standards*, BCEST #D475/98, the Adjudicator sets out those limits as follows:

> Those circumstances have been identified in several decisions of the Tribunal, commencing with *Zoltan Kiss*, BCEST #D122/96, and include:
>
> - 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

In my opinion this is not a case which warrants the exercise of the reconsideration discretion. The request raises no new issue that has not been extensively reviewed before two Tribunal panels and a previous reconsideration panel. The employer company has had substantial opportunity to present its case. There is no indication in the file or in the submissions made that persuades me that there has been any failure to comply with the principles of natural justice. The company is essentially seeking a fourth opinion on the issues. The company asks for "reasonableness and equity" which in my opinion it has received in abundance in this case.

ORDER

This Tribunal declines to reconsider the original adjudication and therefore it is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal