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 -

The Director of Employment Standards
("the Director")

- of a Determination issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 96/108; 96/109

DATE OF DECISION: **December 4, 1996**

DECISION

OVERVIEW

The Director of Employment Standards filed an application, pursuant to Section 116 of the *Act*, for reconsideration of a Decision (BC EST # D224/96). That Decision dealt with two appeals, one by Thomas L. Harrison and one by Martha Lander, against Determinations No CDET 000678 and No CDET 00680, both of which were issued by a delegate of the Director of Employment Standards on January 17, 1996.

The two determinations dismissed complaints by Harrison and Lander that Equitable Real Estate Corporation Ltd. had contravened two sections of the *Act*- Section 36 (Hours free from work) and Section 45 (Statutory Holiday Pay).

The Decision, dated 21 August 1996, ordered that the two determinations be canceled and referred back to the Director to recalculate the amounts owing to Harrison and Lander.

On 17 September 1996, the Director submitted an application to the Tribunal seeking a reconsideration of the Decision because she disagreed with the adjudicator's findings that "...the Director can exercise discretion to the point of speculation."

I have reviewed and considered the several, lengthy written submissions and arguments which have been made by the parties to this application and have made this decision without an oral hearing.

ANALYSIS

The Tribunal has issued several decisions regarding the permissible scope of review under section 116 of the *Act*: see *Zoltan T. Kiss* (BCEST # D122/96). 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 in law. The reconsideration provision of the *Act* should not be a second opportunity to challenge findings of fact made by the adjudicator, especially when such findings follow an oral hearing, unless such findings can be shown to be as lacking in evidentiary foundation.

Did the Adjudicator make the Decision by Speculation?

The Director argues that the Adjudicator erred when he made his decision on quantum based on "speculation" rather than evidence. The Director submits that the Adjudicator speculated "without having the aid of employee records, employer records or verbal evidence" that each resident caretaker worked one hour during a 32-hour period and on each statutory holiday. The Director will be called on to *speculate* rather than insist upon objective proof, when assessing claims under the *Act*.

The Adjudicator's use of the term "speculate" has given rise to a concern which, on a sympathetic reading of the Decision, is not warranted. Contrary to the Director's submission, the Adjudicator did not proceed to make his decision on quantum "without the aid of employee records, employer records or verbal evidence." The Adjudicator heard oral evidence and accepted that evidence in making the essential findings that Harrison and Lander had in fact worked during the material times:

> "The evidence indicates Harrison and Lander performed work during the required rest period and on statutory holidays. They regularly performed some activity relating to the requirements of the job during the required rest period and on statutory holidays. They did so with the knowledge of Equitable and it's tacit approval."

Having made these findings, the Adjudicator was then faced with the issue of quantifying the loss. Harrison and Lander had not kept records of their hours during the material times. Having found that Equitable had breached the *Act* and that the claimants had performed work without compensation during this period, the Adjudicator fashioned a remedy which was based on the evidence before him. As counsel for Harrison and Lander pointed out in his submissions, this was within the Adjudicator's mandate in determining the amount payable in the absence of an ability to assess compensation "with mathematical accuracy": see *Haack v. Martin* [1927] S.C.R. 413 (at page 419); approved in *Cloverlawn Investments Ltd. v. MacPherson* [1975], 58 D.L.R. (3d) 212 (B.C.S.C.) at pages 226-7.

The Decision does not call for any change in the manner in which the Director processes claims. In the particular case before the Adjudicator, the evidence, while verbal, was clear that Harrison and Lander had worked during the material times with the knowledge of Equitable. This kind of certainty in the absence of "objective records" is not common. It is difficult to see how Harrison and Lander (who seek a remedy without having maintained objective, believable records) are in any better position as a result of the Decision than they were before.

This ground for reconsideration is without merit and is dismissed.

Definition of Caretaker

Harrison and Lander argue that the Adjudicator erred when he found them to be "resident caretakers." To paraphrase, the definition of "resident caretaker" in the *Act* (whether the current *Act* or previous one) speaks of a resident caretaker as being a person who lives in a building and is employed as a caretaker of that same building. Harrison and Lander argue that, on a literal reading of the *Act*, they could not be resident caretakers because they were employed not only for the building in which they lived, but also for other buildings managed by Equitable. This being so, they argue that they are entitled to be treated for all purposes as "employees" without being limited to the benefits set out in the *Act* which are applicable to resident caretakers. The *Act* they say, must be given a "fair and liberal" interpretation which accords with the purpose of the *Act*: see *Machtinger v. Hoj Industries Ltd.* [(1992), 40 CCEL 1 (S.C.C.)].

Equitable replies by arguing that if Harrison and Lander's argument were accepted, it would mean that they were resident caretakers for the purposes of the work done in the building where they lived and something else when working in other buildings. Equitable says that to interpret the law in that manner would be to apply a literal rather than reasonable interpretation to the *Act.* It is clear, Equitable says, that the intent and purposes of the *Act* are met, to the benefit of employer and employees, when a resident caretaker is employed to caretake in two or more contiguous or nearby buildings in the same family of buildings.

On a review of the very helpful submissions of the parties, it is my conclusion that this ground of reconsideration must be rejected. The work of caretakers occurs in a specific milieu which is quite different from that of employees who are not caretakers. A "literal" reading of the *Act* would have the following result: Harrison and Lander would be "resident caretakers" for the purposes of the work done in the building in which they lived, but not when they perform the same work under the same circumstances in the adjoining building. Both the employer and employee in that circumstance would be compelled to address their relationship within two very different legal regimes.

I am required to give the *Act* a fair and liberal reading but not one which confounds common sense and reasonableness. As it was put by Mr. Justice Esson of the British Columbia Court of Appeal:

> "literal effect should not be given to words of a statute if the result would be absurd or unreasonable and, specifically, if they would be productive of disruption in the financial life of the community."

see: *Mountain Village Developments Ltd. v. Engineered Homes Ltd.* (1985) 64 B.C.L.R. 195 at 213; approved in Cowichan Valley (Regional District) v. Little [1987] B.C.J. No. 412 (Gow Co. Ct. J.).

It is my view that the intention of the *Act* is met in the finding that Harrison and Lander were "resident caretakers." There is no basis for reconsideration on this ground.

Retroactivity

Based on the Tribunal's previous decision in *Burnaby Select Taxi Ltd. and Zoltan Kiss* (1996), **BCEST # 091/096**, the Adjudicator in this case used the definition of "work" in the current *Act* rather than in the previous *Act*. Although the parties made extensive arguments about this matter, neither the submissions nor a review of the Decision itself establishes what turns on its outcome in this case. This is not a proper ground for reconsideration of the Decision.

Costs and Stay of Proceedings

Harrison and Lander argued for costs to be awarded against the Director for having filed the application for reconsideration and holding funds without having received an order for a stay of proceedings from the Tribunal.

The Director is entitled to file an application for reconsideration of a Tribunal decision. The allegations of bad faith against the Director on this ground are made without evidence and, therefore , are rejected.

On the question of the stay of proceedings, this is a case of first instance. In a submission dated 5 November 1996, the Director acknowledged that it would have been appropriate for her to apply to the Tribunal for a stay of payment of the funds. For that reason, it is clear that in any future case in which the Director's own application for reconsideration is the basis for a delay in payment out of funds, the Director will disperse funds or apply or a stay of proceedings.

Adjudication of the stay application in this application is unnecessary as the Tribunal is issuing this decision and order now.

ORDER

Pursuant to Section 116(1) of the *Act*, I dismiss the Director's application for reconsideration and order the Director to release the funds forthwith to Harrison and Lander.

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Geoffrey Crampton
Chair
Employment Standards Tribunal

GC:nc