BC EST #D347/98
Reconsideration of BC EST #D214/98

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 -

Eng Lee Chin
("The Employee")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Paul E. Love

FILE NO.: 98/386

DATE OF DECISION: August 14, 1998

DECISION

OVERVIEW

This is an application for reconsideration by Eng Lee Chin of a decision by an Adjudicator dated May 13, 1998 BC EST #D214/98). The Adjudicator decided that Mr. Chin had not established that the Director's delegate erred in his determination that Mr. Chin had been fully compensated by the employer for the length of service, and had not proven an entitlement to vacation pay. The issue on this reconsideration was whether there was fresh evidence on the issue of vacation pay. It was apparent that the production of the evidence would require a fresh investigation by the Director's delegate, and that it could have been produced had the employee participated in the investigation as he was invited to do so. There was no proper ground for a reconsideration and therefore the application for reconsideration was dismissed.

ISSUE TO BE DECIDED

Is there any grounds for a reconsideration?

FACTS

Mr. Chin was employed for 8 years with Bondar Clegg Co. Ltd. He was dismissed from that position on January 24, 1997 and paid compensation for length of service in the amount of 8 weeks pay. The only issue arising in this reconsideration application is whether the Tribunal was correct in affirming the Director's delegate finding that Mr. Chin was not entitled to vacation pay.

The Director's delegate found as follows:

> In your complaint you alleged that you had been unfairly treated by the management of the company and that you were being discriminated by reason of your age and race. You claimed that your employment was subsequently terminated on January 4, 1997. You also claimed that you were owed vacation pay for the year 1995 and 1996.
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> On termination of your employment, you were paid 8 week's wages as compensation for length of service for the 9 years you had been employed. This is the maximum that you are entitled to under the Employment Standards *Act*. The employer, therefore, does not owe you any more termination pay.
>
> As for your claim that you are owed vacation pay, the payroll and vacation records of the employer, a set of which was given to you, show that you had

> taken all your vacation entitlement for 1995 and 1996 and you had been paid all vacation pay due. In the circumstance, I find that there is no vacation pay owing to you.

During the course of the investigation, the employer produced to the Director's delegate documents which indicated Mr. Chin had taken his full vacation entitlement.

On April17, 1997 the Director's delegate wrote to Mr. Chin forwarding all documents produced by the employer. The Director's delegate asked Mr. Chin to examine the documents and advise of any discrepancies. No response was received by the Director's delegate from Mr. Chin.

The Adjudicator found that Mr. Chin did not address the vacation pay issue in his submission. I note that the submission was 20 pages in length. I agree with the Adjudicator that the submission of Mr. Chin does not address the issue of vacation pay. The submission focuses primarily on the lack of cause for the dismissal. The Adjudicator found as follows:

> The Appellant, Chin, in this appeal, hears the onus of proving that the Determination is in error. To have some prospect of meeting that onus Chin must submit some evidence or argument which challenges the material points in the Determination. When I review the Determination, Chin's appeal and the Bondar Clegg submission, I find that this appeal is devoid of merit. Chin has not made any submission or given any evidence to challenge or controvert the findings made by the Director's delegate in the Determination. The *Act* clearly states that an employer's maximum liability for compensation for length of service is 8 weeks' wages. Chin was paid this amount by Bondar Clegg. Further, there is no evidence that Chin is owed vacation pay. Finally, the Tribunal has no jurisdiction with respect to the harassment and discrimination issues raised by Chin. For these reasons I dismiss the appeal of Chin.

ANALYSIS

On a reconsideration application my jurisdiction is limited to a review of the decision and evidence to determine if there was a demonstrable breach of the rules of natural justice, compelling new evidence that was not available at the time of the original hearing or a fundamental error of law: Zoltan Kiss, BC EST #D122/96.

This reconsideration proceeded upon written submissions. The submission of both Mr. Chin and the Director were prepared by solicitors. The only grounds argued was whether there was any compelling new evidence that was not available at the time of the original hearing. Mr. Chin's solicitor made the argument in the following terms:

> Mr. Chin has advised that there is some significant and serious new evidence that should have been available to the Adjudicator and which would have lead the Adjudicator to a different decision.
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> Specifically, Mr. Chin has advised us that he disagrees with some of the information provided by the Employer in its payroll and vacation records which were before the delegate of the Director of Employment Standards who made the initial decision in this matter. Those vacation records indicate that Mr. Chin took five days of vacation on or about August 3, 1995 and another five days of vacation commencing on or about January 22, 1996. Mr. Chin maintains that he did not take either such vacation, but that he worked his regular full-time hours during each of those one week periods.
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> Unfortunately, Mr. Chin did not keep a log of his hours worked and so is not able to provide written documentation to support his position. However, written documentation to confirm or rebut Mr. Chin's position should be easily obtainable from the Employer, Bondar Clegg & Co. Ltd. Mr. Chin has informed us that in 1995 the Employer kept tract of employees' of employees' working hours by means of a time card system. He further advised that, by 1996, the system had been computerized and that the Employer should be able to provide computerized records that would confirm or deny whether Mr. Chin worked during the periods in question...
>
> We submit that the evidence referred to above is new in the sense that Mr. Chin was not in a position to provide it to the delegate or the Tribunal himself, and in the sense that Mr. Chin was not made aware of the potential relevance of this evidence until he had the opportunity to obtain legal advice following his receipt of the Employment Standards decision.

The position of the Director's delegate is:

1. The application does not meet any of the proper and necessary tests for reconsideration.

2. The appellant was given an opportunity to participate in the investigation and declined to do so, and therefore cannot be heard to complain if evidence which might have affected the outcome was not discovered by the Director's delegate.

3. It would be unfair to the employer to permit a re-opening of the investigation at this stage in the process. "Providing Mr. Chin with a 3rd opportunity to argue his complaint, because he did not deal with the employer's evidence, or present his evidence in the first or second instance, is entirely contrary to the requirement of the provision of fair and efficient procedures".

I disagree with the submission made on behalf of Mr. Chin. What is suggested is that the investigation was inadequate because there is further information available which might have altered the views of the Director's delegate had the information been made available. Mr. Chin was provided with the information produced by the Employer. Mr. Chin was invited to comment on that material. He failed to comment on that material. He neglected to argue the issue of vacation pay in his lengthy submission to the Tribunal. He is now suggesting that the result might have been different if the matter was fully investigated in the first instance.

The evidence discussed in Mr. Chin's submission is not new evidence, it is old evidence which he could have brought to the attention of the Director's delegate. The appropriate time for him to bring this evidence to the attention of the investigator was during the course of the investigation. In the circumstances of this case, I am not prepared to refer this matter back to the Director's delegate. The purpose of the legislation, in particular, s. 2 of the *Act* is to encourage timely participation in an investigation made by the Director's delegate and speedy resolution of claims. This Tribunal has regularly refused to consider evidence which an employer has refused or neglected to provide to the Director's delegate: Tri-West Tractor Ltd. (BC EST #D268/96). It would be unfair to the employer to permit an entirely new consideration of an employee's claims at this point in the process, given that he was given an opportunity to participate in the investigation by the Director's delegate and he neglected or declined to do so.

A reconsideration application is an appellate function, where the Tribunal considers whether an error has been made by the Adjudicator in the exercise of her appellate function,. It is not a first instance rights adjudication. In this case it is readily apparent that no error was made by the Director's delegate or the Adjudicator. As pointed out in the submission of the Director's delegate, this application does not meet any of the proper and necessary tests for reconsideration. I therefore dismiss the appeal.

ORDER

Pursuant to section 116 of the *Act*, I order that the Decision be confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal