BC EST #D356/00
Reconsideration of BC EST #D411/98

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 -

Jennifer Bjarnason
(" Bjarnason ")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Kenneth Wm. Thornicroft
Fern Jeffries
Ib S. Petersen

FILE No.: 2000/347

DATE OF DECISION: September 8, 2000

DECISION

THE APPLICATION

This is an application filed by Jennifer Bjarnason ("Bjarnason") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of an adjudicator's decision to cancel a Determination that was issued by a delegate of the Director of Employment Standards on May 14th, 1998 under file number 44653 (the "Determination"). The Director's delegate held that Nove-Isle Foods Inc. ("Nove-Isle" or the "employer"), which operates a "Subway" sandwich restaurant franchise in an area known as "Woodgrove" near the northern outskirts of Nanaimo, was obliged to pay three former employees (including Bjarnason) the sum of $3,299.18 on account of unpaid wages and interest. Bjarnason was awarded the sum of $877.50.

The adjudicator's decision, filed as BC EST #D411/98, was issued on September 21st, 1998 and, as noted, cancelled the Determination outright.

Bjarnason's application for reconsideration is contained in a lengthy brief dated April 27th, 2000 and filed with the Tribunal on May 5th, 2000; we have also considered Bjarnason's further submission filed with the Tribunal on July 4th, 2000. For the most part, Bjarnason's submissions question the adjudicator's findings of fact and the inferences drawn from such facts. Further, and largely based on Bjarnason's view that the adjudicator misconstrued the evidence before him, Bjarnason also alleges that the adjudicator was biased against the three complainant employees (who were the respondents to the employer's appeal).

Upon receipt of the reconsideration application, all interested parties were advised by letter dated May 17th, 2000 to file written submissions with the Tribunal with respect to Bjarnason's application. The only additional submissions filed with the Tribunal were those of Nove-Isle (through its legal counsel), filed on June 9th, 2000, and by counsel for the Director, filed on August 15th, 2000. Nove-Isle takes the position that "the Tribunal should not exercise its discretion to reconsider this matter as there has been undue delay". In addition, and apart from the timeliness issue, Nove-Isle submits that the reconsideration request lacks merit inasmuch as the adjudicator's decision was not unreasonable, the applicant has not presented any new evidence nor has she shown that the adjudicator erred in fact or in law.

By way of response to the position taken by Nove-Isle, both Bjarnason and the Director take the position that the reconsideration request ought to be considered on its merits. The Director, in her submission, specifically did not address the actual merits of Bjarnason's application.

In our view, the instant application is untimely and we are *not* satisfied that Bjarnason has provided a reasonable explanation for her considerable delay in making application for reconsideration. Additionally, and quite apart from the timeliness question, the within application seemingly has doubtful prospects for success in any event because it does not appear to meet the first step of the two-part test enunciated by the Tribunal in *Milan Holdings Ltd.*, BC EST #D313/98.

PREVIOUS PROCEEDINGS

The Determination and the ensuing adjudicator's decision both addressed section 32 of the *Act* and particularly, subsection 32(2). Section 32 provides as follows:

> *Meal Breaks*
>
> *32. (1) An employer must ensure*
>
> *(a) that no employee works more than 5 consecutive hours without a meal break, and*
>
> *(b) that each meal break lasts at least a ½ hour.*
>
> *(2) An employer who requires an employee to be available for work during a meal break must count the meal break as time worked by the employee.*

The delegate determined that Nove-Isle, through its store manager, "indirectly" or "impliedly" indicated to store employees that they were not to leave the store during their half-hour meal breaks and, accordingly, "that they were required to be available for work during their lunch break and thus that break must count as time worked by the Employee" (Determination, p. 2).

Nove-Isle appealed the Determination to the Tribunal and following 1½ days of testimony and argument, the adjudicator allowed the employer's appeal and cancelled the Determination. The adjudicator concluded, in the face of conflicting evidence, that the employees in question had not been *required by their employer* to remain on-site during their meal breaks or to be available for work if they chose to remain in the restaurant during their breaks.

ANALYSIS

Applications for reconsideration do not proceed as a matter of statutory right. The Tribunal *may* reconsider a previous decision (see section 116 of the *Act*). In *Milan Holdings*, the Tribunal stated that it would exercise its discretion to reconsider a previous decision only if two criteria were satisfied. First, the issue(s) raised in the reconsideration request must be sufficiently significant to warrant further inquiry and, second, assuming the first threshold has been satisfied, the Tribunal will then examine the merits of the application and decide if the adjudicator's decision ought to be overturned (*e.g.*, where the adjudicator has made a significant error in interpreting the *Act* or where there has been a failure to comply with the principles of natural justice) or referred back to the original adjudicator. In order to meet the first branch of the test, the applicant must raise a serious question "of law, fact or principle or procedure [that is] so significant that [the adjudicator's decision] should be reviewed" (*Milan Holdings* at p. 7).

Furthermore, the Tribunal has also held that applications for reconsideration must be filed within a "reasonable time" in light of the particular complexities of the case at hand; a party who fails to request a reconsideration within a "reasonable time" must provide a cogent explanation for their

tardiness (see *Unisource Canada Inc.,* BC EST#D122/98 and *MacMillan Bloedel,* BC EST#D279/00). In the absence of a reasonable excuse for filing a tardy application, the Tribunal will exercise its discretion to simply refuse to reconsider the decision in question. In other words, the application will be dismissed without regard to the two-stage *Milan* inquiry.

In *Unisource*, the reconsideration application, filed some six months after the adjudicator's decision was issued, was dismissed by a three-person reconsideration panel as untimely. In *MacMillan Bloedel*, the reconsideration application—filed some 9 months after the issuance of the adjudicator's decision—was similarly dismissed by a three-person panel as untimely. In the instant case, Bjarnason's reconsideration application was filed nearly *19½ months* after the adjudicator's decision was issued. In other words, the delay in the instant application is *more than twice* that involved in *MacMillan Bloedel* and *more than three times* the delay involved in *Unisource.* Clearly, this is an untimely application. The question, then, is whether there are sufficiently compelling grounds to overlook the extraordinary delay involved in this case. In our view, the applicant not provided a reasonable explanation for her failure to file a timely application.

The issue to be decided was simple enough—did the employer *require* the employees to be available for work during their meal breaks? The adjudicator, after hearing the evidence of nine witnesses, concluded that the employer had not required the complainants to take their meal breaks on-site nor had it required that the complainants be available for work if they chose to remain on-site during their break times.

The adjudicator found that employees generally took their breaks on-site because: i) due to the location of this particular restaurant (on the 4-lane Island Highway) there were few available alternative locations where one might take a meal and ii) employees could avail themselves of a free meal but only if they ate their meal on-site. The adjudicator found that while employees often "[got] up and served customers during their break" (p. 11) such behaviour was motivated by the expectation that this sort of assistance would be reciprocated by their fellow employees so that no employee would have to deal with a sudden crush of customers all alone. The adjudicator noted that employees who worked throughout their entire meal break were paid in full for the time and that employees who worked for a portion of their meal break were allowed to extend their break time accordingly. Most importantly, however, the adjudicator concluded—after what appears to be careful review of the conflicting evidence before him—that the employer did not *require* any employee to work throughout their break without pay nor did it require any employee on an authorized meal break to remain available for work during their break.

Returning to the timeliness issue, as noted above, Bjarnason's application for reconsideration was not filed until some 19 ½ months after the adjudicator's decision was issued. Accordingly, it falls to Bjarnason to provide a reasonable explanation regarding why this application was filed so very long after the adjudicator's decision was issued. The *only* explanation advanced by Bjarnason is that her former legal counsel took a one-year sabbatical shortly after the adjudicator's decision was issued and that the Legal Services Society refused to provide any further funding for alternative legal counsel. Bjarnason says that she found it difficult to prepare her reconsideration application without the assistance of legal counsel. In a submission filed on July 4th, 2000, Bjarnason says that:

> "Upon receipt of [the adjudicator's] Decision, in October of 98 [*i.e.,* within a few weeks of issuance], I began writing my application [for reconsideration]...I contacted the Employment Standards Branch in March of 00, when I was almost finished, and asked if there was a time limitation."

We are unable to conclude, in the circumstances of this case, that Bjarnason's inability to obtain legal representation or advice constitutes a reasonable explanation for the extraordinary delay involved in making this application. We note that this case does not raise an intricate point of law; indeed, the principal issue raised in this appeal (and reconsideration) is, essentially, a question of fact: Did the employer require the complainant employees to be available for work during their meal breaks?

The Tribunal's rules and procedures are not complex and are designed to be accessible to lay individuals; in point of fact, the vast majority of parties appear before the Tribunal without legal representation. Although there may be cases where a party is significantly disadvantaged if they do not have legal representation, this is most certainly not such a case. Further, we find it odd that Bjarnason would not have contacted either the Employment Standards Branch, or the Tribunal itself, until March of this year—some 18 months after the adjudicator's decision was issued. If Bjarnason truly intended to diligently pursue her application for reconsideration, one would have expected her—especially since she apparently no longer had access to legal counsel—to have contacted either the Branch or the Tribunal sometime in October 1998 when, in her own words, she "began writing my application".

Quite apart from the untimeliness of the present application, we should also observe that even if the application had been filed in a timely manner, it would undoubtedly have failed in any event. Bjarnason's application alleges that the adjudicator was biased and that his bias tainted his findings of fact. There is absolutely no evidence before us to suggest that the adjudicator either was, or even appeared to be, predisposed against the complainant employees. Furthermore, although Bjarnason disagrees—and disagrees vehemently—with the adjudicator's findings of fact, our review of the material before us (which includes the entire appeal file) shows that each and every finding of fact made by the adjudicator was supported by a proper evidentiary foundation.

The Tribunal has repeatedly stressed that the reconsideration provision of the *Act* (section 116) is not to be used to simply re-argue the case on appeal. Applications for reconsideration will succeed only when there has been a demonstrable breach of the rules of natural justice (not applicable here), or where there is compelling new evidence (Bjarnason concedes there is none) that was not available at the time of the appeal hearing, or where the adjudicator has made a fundamental error of law (we find no such error). The reconsideration provision of the *Act* is not to be used as a second opportunity to challenge findings of fact made by the adjudicator, unless such findings can be characterized as lacking any evidentiary foundation whatsoever. A reconsideration request will not succeed unless it can be said that the adjudicator's decision was obviously incorrect.

In *Milan Holdings,* the Tribunal held that if an application for reconsideration does not disclose, on its face, at least an arguable case that there was a breach of the rules of natural justice or that

the adjudicator's decision ought not to stand by reason of some other compelling reason, the Tribunal will not examine the merits of the application but, rather, will dismiss the application without further review. Bjarnason's application, on its face, would not appear to meet the initial threshold of raising a *prima facie* case. However, we need not rest our decision on the deficiency of Bjarnason's application for reconsideration, since, due to its untimeliness, the application is not properly before us.

Finally, we wish to comment briefly on the submission filed by the Director's legal counsel. Counsel for the Director submits that "absent a finding of 'prejudice' to [the] opposing party, the Tribunal has no jurisdiction to reject an application [for reconsideration] because it is not timely". This latter position has been advanced by the Director in previous applications and has been unequivocally rejected by the Tribunal, most recently in *MacMillan Bloedel*. If the Director wishes to challenge the Tribunal's espoused position on this point, the appropriate mechanism is an application for judicial review (an approach that, apparently, the Director has not pursued).

Counsel for the Director also submits that the principles set out in *Unisource* regarding the timeliness of reconsideration applications constitutes unlawful "rule-making" by the Tribunal. We do not agree.

The Tribunal is not obliged to reconsider *any* decision—reconsideration involves the exercise of a *discretionary authority*. As noted by the panel in *Unisource*, by way of section 107 of the *Act*, the Legislature devolved some latitude to the Tribunal in the performance of its administrative and adjudicative functions. The *Unisource* decision simply explicates, in a principled way, the considerations that will govern the exercise of the Tribunal's discretion to reconsider a particular decision. We reject the Director's contention that the *Unisource/MacMillan Bloedel* principles regarding timeliness reflect a "strict rule". Indeed, we conceive the Tribunal's approach to be quite flexible—although applications for reconsideration are expected to be filed within a reasonable time (which itself will depend on the nature of the issues raised by, and the complexity of, the reconsideration application), a tardy application may still go forward if "good cause can be shown for a long delay" (*Unisource* at p. 7).

The *Unisource* decision was issued in late March 1998 and has been consistently applied ever since—the *Unisource* principles are thus neither new nor reflective of any recent change in Tribunal policy. If the Director is of the view that the principles set out in *Unisource* and subsequent related decisions are fundamentally flawed, those principles can be further examined in an application for judicial review.

ORDER

The application to vary or cancel the decision of the adjudicator in this matter is refused. Pursuant to section 116 of the Act, we hereby order that BC EST#D411/98, issued September 21st, 1998, be confirmed.

Kenneth Wm. Thornicroft, Adjudicator
Panel Chair
Employment Standards Tribunal

Fern Jeffries, Adjudicator
Tribunal Chair
Employment Standards Tribunal

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal