BC EST #D360/99
Reconsideration of BC EST #D036/99

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 -

Tapani J. Leivo
("Leivo")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATORS: David Stevenson

FILE NO.: 1999/422

DATE OF DECISION: August 26, 1999

DECISION

OVERVIEW

This is an application pursuant to Section 116 of the *Employment Standards Act* (the "*Act*") by Tapani J. Leivo ("Leivo") for reconsideration of a decision of the Tribunal, BC EST #D036/99, which was issued on February 10, 1999 (the "original decision"). The original decision confirmed a Determination by a delegate of the Director of Employment Standards (the "Director") dated October 8, 1998.

Leivo says the original decision was wrong when it confirmed the conclusion made in the Determination with respect to his hourly wage and the number of hours he worked. He says this error:

> . . . stems from the poor investigative work of both the Employment Standards Branch and the Tribunal in their failure to procure the evidence necessary to prove my claim, even though I informed them verbally and in writing several times where the evidence was and the logical importance of it.

The Director had considered the issues of the hourly wage and the hours worked in the Determination and concluded, in respect of the hourly wage, that there was insufficient evidence to establish the rate Leivo alleged the employer agreed to pay him and, in respect of the hours worked, that the records available, including 40-80 separate pieces of information such as delivery slips, purchase orders, invoices and bills of lading, did not indicate or establish hours of work.

In the original decision, the Adjudicator confirmed the conclusion of the Director in respect of both the hourly wage and the hours worked, stating:

> All considered, I, like the delegate, find that the evidence does not clearly indicate a rate of pay which is greater than the minimum wage.
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> . . .
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> As matters were presented to me, there is nothing to show that the delegate erred in deciding that Leivo's work was the four hour daily minimum of the *Act*. Indeed, from what I can see, the delegate has reached what is the only reasonable conclusion on the extent of the work.

In reaching this conclusion , the Adjudicator heard evidence and received and considered documents and statements filed by Leivo, including a letter from Doug Mackie, who said in the letter that he had worked for the employer in Leivo's absence, generally from 8 am or earlier to 6 pm or later, and was promised $10.00 an hour. He says he recorded three hundred hours, "mostly unpaid" before he left. The Adjudicator of the original decision did not place much weight on this letter in confirming the Determination. In this reconsideration application, Leivo says:

> Capt. Mackie did the same job as I, worked the same hours and is, a credible person, it defies all logic that the Tribunal could award me merely 4 hours a day and only minimum wage when the person filling in at my job testifies the amount of hours and wage are greater. I believe this constitutes an err in finding of fact by the Tribunal.

The Tribunal has decided an oral hearing is not necessary in order to address the issues raised in this application.

ISSUES

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 we are satisfied the case is appropriate for reconsideration, the substantive issue is whether Leivo has shown any 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.

An application under Section 116 is not a second appeal of the Determination. It is a request that the Tribunal reconsider its own decision or order. It is the Tribunal's decision that is the focus of an application for reconsideration, not the Determination or the investigation of the Director.

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:
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> (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).
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> (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).
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> (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.
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> 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 decisions 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, we will first assess whether the applicant has established any matters that warrant reconsideration. We will say at the outset that in doing so we are not bound by the characterization of the legal issues as counsel for the applicant has framed them. In considering each aspect of the application for reconsideration, we are attempting to identify the essential character of the grounds for reconsideration and of the arguments made in support.

In my opinion, this is not an appropriate case for reconsideration.

The allegation concerning the adequacy of the Director's investigation was a key aspect of the appeal of the Determination. In the reasons for appeal, Leivo stated:

> Mr. Superle erred in finding of fact with respect to both the hourly wage and the hours I worked perhaps due to he [sic] being not thorough enough in his investigation; which I appreciate may have been difficult under his workload and other mitigating factors. Nonetheless I believe Mr. Superle would not have determined as he did, had he (1) conducted more extensive interviews of witnesses and (2) subpoenaed, as I asked him to do, the Granville Island Seafood Company Ltd. purchase invoices which were all signed by me during the term of my employment. I am also requesting the Tribunal to do this if the new evidence given here requires any more collaboration [sic].

As indicated above, this application is not a second appeal of the Determination. The focus of the reconsideration is the original decision. The Adjudicator did consider the challenge by Leivo to the conclusions made by the Director on the hourly wage and the hours worked. The Adjudicator concluded on the evidence, or perhaps the lack of evidence, that both conclusions were reasonable.

Except that Leivo has raised an issue about the "poor investigative work" of the Tribunal and the Tribunal's "failure to procure the evidence necessary to prove [his] claim", the application does no more than ask the tribunal to re-examine evidence and information that was before the Adjudicator of the original decision and reach a different conclusion about that evidence than was made by that Adjudicator. That is not an appropriate use of the Tribunal's reconsideration power.

In respect of the assertion about the Tribunal's "poor investigative work" and "failure to procure the necessary evidence to prove the claim", Leivo has either misconstrued the jurisdiction and authority of the Tribunal or misjudged the basis upon which the Tribunal will exercise its power to inspect documents or to compel production of records.

If Leivo is suggesting the Tribunal had some responsibility to investigate any aspect of his complaint, he is wrong. The Tribunal has no jurisdiction under the *Act* to do so. The authority to receive and investigate complaints is vested in the Director by Section 76 of the *Act*. No corresponding authority is given to the Tribunal and there are sound policy reasons for that.

If Leivo is asserting that the original decision is flawed because the Tribunal failed to procure the records he believed were important to his appeal, I can find no basis for such an assertion.

The Tribunal does have authority under Section 108 and subsection 109(1) of the *Act* to, among other things, require the attendance of witnesses, which may include requiring those witnesses to produce documents under their care and control that are related to the proceeding, inspect records and order the

production and delivery of those records at a specific location for inspection. Specifically, subsection 109(1)(e) says:

109. (1) In addition to its powers under section 108 and Part 13, the tribunal may

(e) inspect any records that may be relevant to an appeal, reconsideration or recommendation,

There are, however, two things to note about that provision: first, it is discretionary and second, the records must be have some relevance to an appeal. Where a party to an appeal requests the Tribunal to exercise this power, they bear the burden of showing that the records the Tribunal is being asked to inspect are at least potentially relevant to the appeal. In this case, Leivo's obligation to establish the potential relevance of the records is even more pronounced in light of the conclusion in the Determination that 40 - 80 such documents, including delivery slips, purchase orders, invoices and bills of lading, had been examined and did not indicate or establish hours of work. It is not sufficient to state, as Leivo has done in both the appeal and in this application, that there is a belief that the records sought are relevant. He has never indicated the basis for his request that the purchase orders be inspected and/or produced. If there is no basis upon which the Tribunal might exercise its jurisdiction, there is no basis for saying the Tribunal erred in not doing so.

In any event, there is no indication in the original decision that any request was made to the Adjudicator for the employer to produce records. In addition to the concern expressed above, it is not appropriate for Leivo to have remained silent during the hearing about his opinion that these records should be inspected or produced and then, upon receiving what he feels is an unsatisfactory result, claim the Tribunal should have assumed some independent responsible for acquiring the records or ordering their production. It cannot be ignored that a key aspect of his appeal of the Determination was an alleged failure by the Director to "subpoena" these records. His own failure to pursue this aspect of his appeal is not the responsibility of the Tribunal. If he considered that the records were important to his appeal, he should have raised the matter with the Adjudicator, giving the Adjudicator an opportunity to consider the position of all the parties and decide whether there was some basis to exercise his power and require their production.

ORDER

Pursuant to Section 116 of the *Act*, I reject the application for reconsideration of the Tribunal's decision of May 3, 1999.

David Stevenson
Adjudicator
Employment Standards Tribunal