**BC EST #D361/99**
**Reconsideration of BC EST #D123/99**

**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 -

Victoria Street Community Association
("VSCA")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

**ADJUDICATORS:** David Stevenson
Paul Love
Cindy Lombard

**FILE NO.:** 1999/286

**DATE OF DECISION:** August 26, 1999

## OVERVIEW

Victoria Street Community Association ("VSCA") seeks a reconsideration under Section 116 of the *Employment Standards Act* (the "*Act*") of a decision of the Employment Standards Tribunal (the "original decision"), BC EST #D123/99, dated March 23, 1999. The original decision substantially reversed a Determination made by a delegate of the Director of Employment Standards (the "Director") on November 3, 1998 in respect of a complaint by Wanda Card ("Card") and ordered the Determination be referred back to the Director to calculate the amount of wages owed as a result of the conclusions reached by the Adjudicator of the original decision.

The basis upon which the reconsideration is sought is summarized in the following paragraph from the reconsideration application:

> It is the Board's belief that the decision of the Adjudicator cannot stand on the basis that the Adjudicator failed to comply with the principles of natural justice by refusing to take into consideration any of the submissions made on behalf of VSCA and by relying solely upon the submissions of Wanda Card. The Board also submits the Adjudicator has erred in law by basing findings of fact on mistakes of fact. He has also erred by making an inconsistent decision with prior decisions indistinguishable on their facts. The Board has significant new evidence which could not have been presented to the Adjudicator because at the time of the hearing before the Adjudicator, the Board did not have legal representation and did not appreciate the legal significance of this evidence. The Adjudicator misunderstood or failed to deal with serious issues, namely the credibility of Wanda Card and the fact the Constitution of the VSCA prohibits paying any wages to any Director of the Board.

### ISSUES TO BE DECIDED

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 issues, which are framed by the above paragraph, are whether the applicant is able to show:

(1) the Adjudicator failed to comply with principles of natural justice by refusing to consider any of the submissions of VSCA;

(2) the Adjudicator committed an error of law by basing findings of fact on mistakes of fact;

(3) the decision is inconsistent with prior decisions of the Tribunal that are indistinguishable on their facts;

(4) there is relevant new evidence that was not reasonably available to VSCA; and

(5) the Adjudicator misunderstood or failed to deal with serious issues, the credibility of Wanda Card and that the Constitution of the VSCA prohibits directors from receiving wages.

## 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.*

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
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> 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:

(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).

(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).

(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.

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.

In light of the above list, it is not surprising to find this application for reconsideration framed in terms that allege a denial of natural justice, a mistake of law and fact, the existence of "significant new facts", inconsistency with previous decisions indistinguishable on their facts, significant new evidence and a misunderstanding or failure to deal with a serious issue.

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.

**Natural Justice Arguments**

Counsel for the VSCA says the Adjudicator failed to comply with principles of natural justice by failing to accept or consider any of the evidence and submissions made on behalf of VSCA at the hearing. Counsel for VSCA, who was not present at the appeal hearing, alleges that the VSCA representative at the hearing felt he was not being listened to, had his words "turned around" by the Adjudicator and a new meaning attached to them and that "one of the most important facts" in the case does not appear in the original decision, even though the VSCA representative tried to raise it. The test for determining whether there has been a denial of natural justice in the context of the allegations made is an objective one and requires an evidentiary foundation. The allegations made here are entirely subjective, appearing to reflect nothing more than disagreement with the conclusion of the Adjudicator. Without an evidentiary foundation we do not consider this matter warrants reconsideration.

**Error in Law Resulting From Mistakes of Fact**

Counsel for VSCA's second ground for reconsideration is that the Adjudicator erred in law by basing findings of fact on mistakes of fact. This ground is nothing more than a request to re-visit findings of fact made by the Adjudicator in the original decision. After reviewing the submissions made and the material on file, we find there is a rational basis for the findings of fact made by the Adjudicator in the original decision. In the absence of some indication that the findings of fact in the original decision were perverse, in the sense that they had no evidentiary basis, were inconsistent with other conclusions of fact in the decision or inconsistent with reasonable inferences drawn from the conclusions of fact made in the decision, this is not a matter that warrants reconsideration.

**Inconsistency With Previous Decisions**

The third ground for reconsideration is that the Adjudicator erred by making a decision which was inconsistent with prior decisions of the Tribunal indistinguishable on their facts. However, counsel for VSCA fails to identify any "precedents" that would bind the Adjudicator to the result suggested in the submission. The Tribunal addressed a similar circumstance in *Director of Employment Standards (Re Park Hotel (Edmonton), operating the Dominion Hotel, and Hunter's Grill Ltd., Associated Corporations),* BC EST #D257/99 (Reconsideration of BC EST #D539/98 and BC EST #D557/98), and made the following comments:

> The submission of the Director has not identified any Tribunal decisions that are indistinguishable on their facts in the manner contemplated by this ground for reconsideration. It is not sufficient to simply say there are sixty-seven cases that have considered Section 21 of the *Act* and to suggest that other adjudicators have been concerned only with whether an employee has "borne part of the cost of doing business". At a minimum, the burden on the Director under this ground for reconsideration is to identify the cases which are asserted to be "indistinguishable", establish that they are not distinguishable on their essential facts and show that the interpretive issue was addressed in some meaningful way. None of this has been done and, as a result, we conclude that no error on this ground has been established.

The applicant's submission in this case suffers from the same deficiency.

We also note that the Adjudicator made reference in the original decision to the Tribunal's reconsideration decision, *Director of Employment Standards (Re Mark Annable)*, BC EST #D559/98 (Reconsideration of BC EST #D342/98). That decision specifically considered the question of whether a corporate director and officer was entitled to be treated as an "employee"under the *Act* in respect of a claim for unpaid wages. The Tribunal concluded that the policy of the Director not to pursue such claims was inconsistent with the *Act* and was an improper exercise of the discretion given to the Director under Section 76 of the *Act*. In the reconsideration, the Tribunal dealt with the Director's argument that the decision from which the reconsideration was being sought was inconsistent with three prior decisions of the Tribunal: *Barry McPhee*, BC EST #D183/97, *Caba Mexican Restaurant*, BC EST #D370/96 and *Nicole O'Brien*, BC EST #D412/98. The Tribunal found no inconsistency between the case under reconsideration and the three cases referred to, noting that each such case must be considered in the context in which the director or officer is claiming employee rights under the *Act*. That is exactly what the Adjudicator did in this case and we can find no error in that regard. This ground does not warrant reconsideration.

**Error of Law/New Facts**

Counsel for VSCA says the Adjudicator erred in law by not concluding Card's position as a director of VSCA, when considered in the context of the *Society Act*, R.S.B.C. 1996, c. 433, the Constitution and By-laws of the VSCA and the VSCA Personnel Policies and Procedures Manual, disentitled Card from claiming unpaid wages under the *Act*. Counsel's argument is framed in this way:

> The Society Act, R.S.B.C., 1996, c. 433 ("the Act") was the instrument under which the VSCA was created and remains the authority under which the VSCA, including the Board of Directors, continues to operate. It is submitted that when an Adjudicator is dealing with a society created under the Act and the claimant is a director of that society, the Adjudicator has a duty to turn his mind to the rules established under the Act as they may apply to the facts before him. The Adjudicator in the case at bar failed to consider not only the Act but also the facts.

The essential character of this entire ground for reconsideration is simply a challenge to the conclusion of the Adjudicator that Card was an employee for the purposes of the *Act*. As indicated above, the question of whether a director or officer should be considered an employee for the purposes of the *Act* is essentially a factual consideration to be decided in the context in which the director or officer is claiming employee rights under the *Act*. In our opinion, the Adjudicator fully considered the context in which Card was claiming employee status. The context is found in the following two excerpts from the findings of fact:

> Ms. Card was hired as a bookkeeper for the association. She did the books for the main association and for a number of separately funded sub-projects. Her duties also included a number of general office duties and "gopher" work.

On those simple facts, it is virtually incomprehensible how anyone could suggest she ought not to be treated as an "employee" for the purposes of the *Act*. The original decision continues:

> At an Annual General Meeting of the Association it was resolved to augment the board with directors selected from amongst and by the staff. Ms. Card was chosen to be a staff representative on the board. . . . [S]he performed all the functions of a director of the board including the election of officers. She was one of 13 board members.

The Adjudicator in the original decision reached his conclusion that Card was an employee and was entitled to claim unpaid wages under the *Act* against the backdrop of the above factual context.

We have considered the *Society Act*, the Constitution and By-laws of the Society and the personnel policy manual for the purpose of determining whether there is any merit to this submission of counsel for VSCA. We do not agree they are relevant or determinative to the question before the Adjudicator, which was whether Card was an employee within the meaning of the *Act*. Even if we accept this material was not reasonably available at the appeal hearing, this "new evidence" does not assist in determining the status of Card under the *Act*.
An elaborate analysis of the provisions of the *Society Act* referred to by counsel for VSCA is unnecessary. No provision in the *Society Act* overrides the fundamental statutory obligation in the *Act* to pay an employee wages for work performed for the employer.

The question of whether Card was entitled to overtime wages is a factual determination that depends substantially on an evidentiary assessment of whether the employer either expressly or implicitly authorized the overtime or knowingly allowed the employee to work overtime. If the facts support a conclusion that the employer did authorize or allow overtime, the *Act* requires an employee to be paid overtime wages, regardless of what the personnel policy may contain. There is a sufficient evidentiary basis to conclude that the VSCA knew Card was working extra hours on the tasks assigned to her. In fact, one of the documents attached the application for reconsideration was a "Job Performance and Professional Conduct" analysis of Card for a VSCA Board meeting on May 20, 1998. Included in that analysis is the comment: "she insisted on working out of her home and claiming a great deal of overtime". To argue against this conclusion is simply asking this panel to re-examine and re-weigh the evidence. That is not an appropriate application of the Tribunal's authority under Section 116 in the absence of some basis for concluding the findings of fact made in the original decision have no rational basis.

In respect of the Constitution and By-laws, they have no bearing on Card's entitlement to unpaid wages and overtime under the *Act*. Quite apart from the fact we disagree that the Constitution and By-laws can be read in the manner proposed by counsel for VSCA, the Constitution and By-laws are, as a matter of law, simply an agreement amongst and between the members of VSCA. Under Section 4 of the *Act*, agreements that do not conform with the minimum requirements of the *Act* are given no effect:

> *4. The requirements of the Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect, subject to sections 43, 49, 61 and 69.*

**Failure To Deal With a Serious Issue**

Finally, counsel for VSCA says the Adjudicator in the original decision misunderstood or failed to deal with a serious issue. He says the credibility of Card was not given consideration. We disagree. It is apparent on the face of the decision that the Adjudicator was alert to the conflicts in the evidence and to the need to resolve them in a judicious manner. The Adjudicator states:

> The facts were in dispute and I heard evidence from Ms. Card, Michael Walker (a former director and officer of the Association) and Paul Hurst. I carefully weighed the evidence and was cognizant of the need to asses it in terms of the test recommended in *Faryna v. Chorny*, [1952] 2 D.L.R., 354 (B.C.C.A.). The following facts are as I find them after hearing and weighing all the evidence.

Counsel for VSCA makes much of Card's statement in her appeal, dated November 13, 1998, that she was not a director, only a staff representative. There are other selective references from submissions and documents, while he fails to note the following statement from a submission of December 29, 1998 in reply to VSCA's response to the appeal:

> My response is that I have never denied being a staff representative, and hence 'member' of the Board of Victoria Street Community Association; the question is whether or not I was a director in both the common-sense and legal definitions of that term.

We can find no basis that warrants exercising our discretion to reconsider the original decision.

**ORDER**

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

**David Stevenson**
**Adjudicator**
**Employment Standards Tribunal**

**Paul Love**
**Adjudicator**
**Employment Standards Tribunal**

**Cindy Lombard**
**Adjudicator**
**Employment Standards Tribunal**