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 -

The Director of Employment Standards
(the "Director")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

PANEL OF ADJUDICATORS: Mark Thompson
John Orr
Fern Jeffries

FILE NO.: 2000/352

DATE OF DECISION: September 15, 2000

DECISION

OVERVIEW

This is an application by the Director of Employment Standards (the "Director") under Section 116(2) of the *Employment Standards Act* (the "*Act*") for Reconsideration of a Decision BC EST #D436/99 (the "original decision") issued by the Employment Standards Tribunal (the "Tribunal") on October 28, 1999. The original decision cancelled a determination issued by a delegate of the Director on June 3, 1999. The determination found that Mike Renaud ("Renaud") owed Candice Spivey ("Spivey") $27,566.07 for unpaid overtime wages, statutory holiday and compensation for length of service. Renaud had employed Spivey as a personal care attendant. The adjudicator in the original decision concluded that Spivey was a "sitter" under the *Employment Standards Act Regulation* (the *Regulation*") and consequently excluded from the minimum standards provisions of the *Act*.

The Director applied for reconsideration of the original decision on May 15, 2000. She argued that the decision in question had misinterpreted the *Regulation* as it defines a "sitter." Anticipating an argument from Renaud's counsel, the Director also argued that the Tribunal could not reject her application for reconsideration based on timeliness without finding that the delay had caused prejudice to one of the parties.

Renaud's counsel argued that the application should be dismissed on the grounds of undue delay. He cited numerous decisions of the Tribunal that have concluded that applications for reconsideration filed six months or more after a Tribunal decision will be rejected unless "good cause" for the delay exists. Counsel further argued that the original decision was correct on its merits.

ISSUES TO BE DECIDED

The first issue to be decided in this case is whether the Tribunal should exercise its discretion under Section 116 of the *Act* to accept the application for reconsideration.

If the Tribunal does accept the application for reconsideration, then the substantive issue to be decided is whether Spivey was a sitter as defined by the *Regulation*.

FACTS

The first issue in this case does not turn on the facts. Renaud is a ventilator dependent quadriplegic who requires continual personal care or attendance. His condition was the result of an automobile accident, and he received a financial settlement from the Insurance Corporation of British Columbia. Spivey worked for Renaud three days a week from September 30, 1998 to February 28, 1999. Renaud paid Spivey for 13 hours each

day, although she attended him 24 hours each day. After Renaud terminated her employment, Spivey filed a claim under the *Act* for unpaid overtime wages, statutory holiday pay and compensation for length of service. The delegate of the Director found that Spivey was an "employee" under the *Act* without any exemption. Thus, Spivey was entitled to be paid for each hour of each day of her employment. The determination found that Spivey was entitled to $27,566.70, although the amount later was reduced somewhat by mutual agreement of the parties. Renaud appealed the determination. In *Re Mike Renaud*, BC EST #D436/99, the original decision, the adjudicator found that Spivey was a sitter as defined by the *Regulation* and thus excluded from the minimum standards contained in the *Act*. Consequently, the adjudicator cancelled the determination. The original decision was issued on October 28, 1999.

The Director filed a request for reconsideration of the original decision on May 15, 2000, arguing that the decision contained a serious error of law in its interpretation of "sitter" in the *Regulation*. The Director's counsel offered no reason for the delay in filing the application.

ANALYSIS

In support of the Director's application for reconsideration, counsel presented several arguments. She stated that the *Act* does not grant the tribunal the authority to reject an application for reconsideration based solely on delay in filing the application. The *Act* contains no time limits for such requests, although other provisions do establish time limits for actions under the *Act*. Instead, the Director's position was that the Tribunal can only reject a application for reconsideration based on timeliness if one party would be prejudiced by the delay in deciding the case on its merits. The Tribunal should not consider the cause of any delay. The threshold issue is whether the delay constituted a breach of natural justice. In the present case, the Director argued, reconsideration would not breach the principles of natural justice, as Renaud did not suffer any prejudice.

Renaud's counsel pointed to a number of previous Tribunal decisions, which held that the Tribunal had the authority to reject an application for reconsideration where a long delay has occurred. The Tribunal has stated that it would exercise its discretion to reconsider only if "good cause" can be shown for the long delay. The length of a "long delay" typically has been six months or more. The most recent of the decisions on this point was *Re British Columbia (Director of Employment Standards*), BC EST #D179/00, which cited a number of previous Tribunal decisions.

The statutory framework for deciding this case begins with Section 2, which contains the purposes of the *Act*. The relevant language is:

> *2. The purposes of this Act are to*
>
> *(a) ensure that employees in British Columbia receive at least basic standards of compensation and conditions of employment,*

. . . . . .

> *(d) provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act, ...*

Paragraph (a) emphasizes the need to give broad coverage to the protections of the *Act*. Paragraph (d) is the basis for establishing procedures for relatively rapid resolution of disputes arising under the *Act*.

As the Director's counsel pointed out, time limits for filing complaints (Section 74), filing appeals (Section 112) and the two-year limitation for the recovery of wages (Section 80), all require the parties to act quickly to assert their rights under the *Act*. Section 110, which states that orders of this Tribunal are "final and conclusive" and not open to review in a court, reinforces the goal of the statute to provide efficient resolution of disputes, avoiding multiple proceedings to determine any issue, with due consideration to the principles of natural justice. Section 115 of the *Act* gives the Tribunal the power to "vary, confirm or cancel" a determination. Our reading of these provisions is that this statute has a presumption that complaints and appeals should be decided quickly. Further to that goal, one hearing normally should finally and conclusively resolve a dispute, unless a strong rationale for a second proceeding exists. See *Re The Director of Employment Standards* BC EST #D122/98, Reconsideration of BC EST #D172/97.

Against this background, Section 116 of the *Act* states the reconsideration powers of the Tribunal as follows:

> *(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 can be made only once with respect to the same order or decision.*

Section 116 clearly is discretionary. The plain language of the section allows discretion to the Tribunal. In addition, Section 107 of the *Act* authorizes the Tribunal to "conduct an appeal or other proceeding in the manner it considers necessary," subject to any rules made under Section 109(1)(c). We agree that "the Tribunal has the power to determine its own procedure, including the timeliness of applications for reconsideration, subject to the rules of natural justice," *Re Director of Employment Standards*, BC EST #D122/98, *supra*, at p. 6.

Acting on this authority, the Tribunal has frequently held that it will exercise its power to reconsider cautiously, so that Tribunal decisions will be final and that the appeal system will operate efficiently and fairly. *Re Zoltan Kiss*, BC EST #D122/96. This reasoning was extended in *Re Milan Holdings Ltd.,* BC EST #D313/98 (Reconsideration of BC EST #D559/97), which established a two stage analysis as follows:

> At 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 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.
>
> 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 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 language of the statute establishes a framework that deliberately discourages parties from appealing decisions of the Tribunal without a compelling reason. The logical conclusion of the Director's argument, that the Tribunal can only refuse an application for reconsideration where prejudice is found, is that a party to a decision could wait an indefinite period before filing an application. Such a rule would work in favour of the Director, who does not have a financial stake in the outcome of a case, and large employers especially, whose resources are far greater than those of an individual complainant. Our reading of the *Act*, supported by numerous authorities cited above does not accept that position. Moreover, the Director asks this panel to overturn earlier decisions of the Tribunal, especially *Re The Director of Employment Standards*, BC EST #D122/98, *supra*, decided more than two years before the application before us. If the Director wished to challenge the decision of the panel in that case, the appropriate procedure was to seek judicial review.

We rely on *Milan Holdings, supra*, to provide the basic principles for the exercise of the Tribunal's authority to reconsider a previous decision.

Applying that analysis to the case at hand, we find that the first principle in *Milan Holdings* militates strongly against granting the application for reconsideration. The Director argued that prejudice must proven in order to reject an application for reconsideration. In fact, excessive delay in an administrative proceeding itself creates prejudice for the parties. The application was filed more than six months after the original decision. The Director presented no reason for the delay. The employer, Renaud, is a disabled individual dependent upon a financial settlement from the Insurance Corporation. The Tribunal has applied a principled analysis of the facts surrounding previous applications for reconsideration and generally denied applications for reconsideration where the delay has been six months or more. The Director has not provided a reason for deviating from the line of decisions on this point.

The second principle in *Milan Holdings* holds that a reconsideration should not be granted if the application seeks to "re-weigh" the evidence heard by the adjudicator in the first decision. Without going into the details of the original decision, the Director's argument in support of the application on the merits of the case essentially repeats the issue before the adjudicator in that decision. No new evidence was offered. The adjudicator in the original decision found as a matter of fact that Spivey was a "sitter" under the *Regulation*. The application before us seeks to revisit that issue. The Director had ample opportunity to argue that point before the adjudicator in the original decision.

We make no comment on the merits of the original decision, although we note that the Director has the option of seeking an amendment to the *Regulation* if the definition of "sitter" is inadequate.

The third principle in *Milan Holdings* refers to preliminary rulings and is not relevant to this case.

It is not necessary to engage in the second stage of analysis under *Milan Holdings*.

ORDER

For these reasons, the application is denied, pursuant to Section 116 of the *Act*.

Mark Thompson
Adjudicator, Panel Chair
Employment Standards Tribunal

John M. Orr
Adjudicator
Employment Standards Tribunal

Fern Jeffries
Chair
Employment Standards Tribunal