BC EST #D373/99
Reconsideration of BC EST #D051/99
and BC EST #D249/99

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 -

Premier Auto Transmission Ltd

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: John M. Orr

FILE No: 1999/435

DATE OF DECISION: September 14, 1999

BC EST #D373/99
Reconsideration of BC EST #D051/99
and BC EST #D249/99

DECISION

OVERVIEW

This is an application by Premier Auto Transmission Ltd ("Premier") under Section 116 (2) of *the Employment Standards Act* (the "Act") for a reconsideration of Decision #D051/99 (the "Original Decision") which was issued by the Tribunal on February 11, 1999 and Decision #D249/99 (the "quantum decision") issued June 23, 1999.

This case involved a finding in the original decision that Premier had failed to pay overtime to an employee Greg Watson ("Watson"). The original decision disagreed with the findings of the Director's delegate in the determination (the "original determination") on this point and referred the matter back to the Director to calculate the wages owing. The quantum determination was also appealed but essentially on the same grounds as decided in the original decision and the quantum determination was confirmed (#D249/99) in the amount of $3,729.06 plus any accruing interest.

After quantum was determined on the basis of the original decision, Premier applied, on July 07, 1999, for a reconsideration of the finding of the Adjudicator in the original decision and, for the same reasons, the quantum determination and the quantum decision.

Premier submits several grounds as the basis for reconsideration which, in essence, can be summarised that the Adjudicator failed to apply the proper test for balancing evidence and failed to apply the proper burden of proof as applied in previous decisions of the *Tribunal*.

ANALYSIS

The current suggested approach to the exercise of the reconsideration discretion under section 116 of the *Act* was set out by the Tribunal in *Milan Holdings Ltd.,* BCEST #D313/98 (applied in decisions BCEST #D497/98 and #D498/98). In *Milan* the Tribunal sets out a two stage analysis in the reconsideration process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. In deciding this question the Tribunal should consider and weigh a number of factors such as whether the application is timely, whether it is an interlocutory matter, and whether its primary focus is to have the reconsideration panel effectively "re-weigh" evidence tendered before the adjudicator.

The Tribunal in *Milan* went on to state that the primary factor weighing in favour of reconsideration is whether the applicant has raised significant questions of law, fact, principle or procedure of sufficient merit to warrant the reconsideration. The decision states that "at this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general". Although most decisions would be seen as serious to the parties this latter consideration will not be used to allow for a "re-weighing" of evidence or the seeking of a "second opinion" when a party simply does not agree with the original decision.

It is one of the defined purposes of the *Act* to provide a fair and efficient procedure for resolving disputes and it is consistent with such purposes that the Tribunal's decisions should not be open to reconsideration unless there are compelling reasons: *Khalsa Diwan Society* BCEST #D199/96.

The circumstances in which an application for reconsideration will be successful will be limited. In a reconsideration decision dated October 23, 1998, *The Director of Employment Standards*, BCEST #D475/98, the Adjudicator sets out those limits as follows:

Those circumstances have been identified in several decisions of the Tribunal, commencing with Zoltan Kiss*,BCEST #D122/96, and include:*

- *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 this case the grounds for the application for reconsideration are that there is a mistake in law in that it is submitted that the Adjudicator failed to apply the appropriate burden of proof and tests for the weighing of evidence. I am satisfied that the applicant has passed the first hurdle of the process as set out in *Milan.* The application was timely, raises a significant point of law, and is a significant matter to the parties.

Without reviewing all of the facts in this case it is sufficient to say that the dispute is that Watson claims that his working day was from 8:30 am to 5:30 pm with an unpaid half hour for lunch amounting to an 8 1/2 hour day or 42 1/2 hours per week. Premier maintains that the working day was from 9:00 am to 5:30 pm with the unpaid 1/2 hour for lunch amounting to an 8 hour day or 40 hours per week. This whole case turned upon whether the working day started at 8:30 am or 9:00 am. The Director's delegate investigated Watson's claim and found that he was satisfied that the working day started at 9:00 am.

The delegate based his decision on the following evidence:

1. Watson applied for Unemployment insurance benefits and solemnly declared that he worked 40 hours per week;

2. In a letter to *Human Resources Development Canada* (HRDC) Watson stated that he worked 8 1/2 hours per day including a 1/2 hour unpaid lunch. He found that this confirmed the 8 hour day;

3. The delegate made a personal visit to the work site to observe the start-up and opening procedures;

4. He noted that neither the employer nor the employee kept daily time records;

5. He refers to Watson's inclusion of two 15 minute coffee breaks as a prime focus of Watson's claim for the extra 1/2 hour;

6. He notes that the *Board of Referees* found much of the testimony and evidence to be contradictory;

7. He refers to the evidence of several employees, submitted by Watson, although not identifying them by name. He also records the evidence of a 10 year employee who disagreed with Watson's evidence;

8. He found that there was contradictory evidence between employees and found that within Watson's own evidence there was considerable contradiction.

9. He concluded after a thorough investigation that Watson started work at 9:00 am and was paid accordingly and no overtime was due.

Watson appealed and the Adjudicator reversed the conclusion of the Director's delegate. The Adjudicator held a three hour hearing and heard evidence under oath. In reversing the delegate's conclusion the Adjudicator said that he did so based on "three considerations" which I find actually to have more than three components. The Adjudicator's reasons can be broken-out as follows:

1. He finds all witnesses testified in a forthright manner;

2. That the employees, who testified for Watson, had little to gain but the employer's witnesses had an interest in the outcome;

3. That the Determination relied in part on the findings of the *Board of Referees* but the Adjudicator found that Watson's appeal to the *Board of Referees* was credible;

4. He finds the "internal logic of the evidence favoured Watson's position". He says "It is more probable that employees were expected to arrive before customers";

5. Premier kept no daily record of the hours worked;

The Tribunal has discussed in a number of decisions the nature of the appeal process and the burden of proof where an appeal is based on evidence and the credibility of witnesses. In *Re: World Project Management Inc.* [1997] BCEST #D134/97 on reconsideration the Tribunal held that the burden of proof is on the appellant to show on the balance of probabilities that the determination under appeal ought to be varied or cancelled. Adjudicator Thompson also noted this onus in *Re: Gasper* [1997] BCEST #D372/97. In *Re: Webber* [1997] BCEST #D470/97 the adjudicator held that "*When the appeal is based exclusively on a dispute relating to the factual underpinnings of the determination, the appellant must call compelling evidence in support of his assertion that the factual conclusions in the determination were wrong or the appeal will be dismissed"*. The former Chair of the *Tribunal* made the point that Section 112 of the *Act* does not create a right to have a complaint investigated for a second time: *Re: Deveraux* [1997] BCEST #D272/97. More recently the onus has been stated in terms that the real question in an appeal is whether the appellant can establish conclusively that the determination is wrong in its conclusion and must be varied or cancelled: *Re: Benecken* [1999] BCEST #D101/99.

Between these decisions, referred to above, there are many that incorporate the same principles which have become the accepted approach to evidentiary appeals.

As one of the essential purposes of the *Act* is to provide fair and efficient procedures for resolving disputes in the workplace, it is important that the Tribunal does not become an avenue for disputants to simply try to get a more favourable decision based on the same evidence as investigated by the Director's delegate.

The Adjudicator agreed that all witnesses gave their evidence in a forthright manner but he seemed to prefer the employees' evidence over the employer because he felt that one had more interest in the outcome than another but there was no analysis of the basis for such a conclusion in his decision. Although the Adjudicator seemed to disagree with the *Board of Referees* decision he does not deal with the clearly conflicting sworn evidence of Watson given to HRDC, UIC, and at the hearing. The Director's delegate did deal with these conflicts. The Adjudicator says it is more probable that employees arrived before 9:00 am but no evidentiary basis is cited for this conclusion. Finally the point that is made about the keeping of daily time records is essentially neutral if there is a regular workday and neither the employer nor the employee have noted otherwise.

It is not a function of this reconsideration to re-weigh the evidence but to consider if the proper legal principles were applied in the original decision. In this case it appears to me that the adjudicator has simply substituted his view of the evidence for that of the delegate and has not applied the principles set-out above in terms of the onus being on the appellant to establish conclusively that the determination was wrong. The Tribunal must be cognizant of the fact that the investigation in first instance has access to, and considers, much information that is not necessarily recorded in full detail in the determination. We must be cautious that the Tribunal does not become an avenue for simply re-investigating every complaint. The Tribunal has attempted to establish the principle that the appellant must bring to the appeal substantial evidence that the determination is wrong and the Tribunal should not simply substitute our opinion for that of the Director's delegate unless there is clear and persuasive evidence that an error has been made. Based on the Adjudicator's analysis and reasons, as discussed above, for disagreeing with the determination there is no clear and persuasive evidence that could establish conclusively that the determination was wrong. In such circumstances the original determination should be confirmed and the quantum determination cancelled.

ORDER

This Tribunal orders, pursuant to section 116 (1)(b), that Decisions #D051/99 and #D249/99 are cancelled, as is the quantum determination dated March 18, 1999, and the original Determination is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal