

September 5, 2002

Tribunal Decision Number: BC EST # RD394/02

TO INTERESTED PARTIES

**Re: Employment Standards Act – Part 13
Request for Reconsideration of Tribunal Decision Number BC EST # D119/02
Tribunal File Number 2002/388**

Penguin Contracting Inc. - and - Ian Foster

On July 9, 2002 the Tribunal received a request from Penguin Contracting Inc. (“Penguin”) for reconsideration of Tribunal Decision BC EST #D119/02. That Decision rendered on April 8, 2002 by Adjudicator Lorne D. Collingwood addressed only the issue of the number of overtime hours worked by the employee Ian Foster (“Foster”).

An earlier Decision, BC EST #D616/01 rendered by Adjudicator Paul E. Love on November 14, 2001, addressed the issue raised by the failure of Penguin to file its appeal within the time limits set by section 112 of the *Employment Standards Act* (the “Act”). This Decision by Adjudicator Love granted an extension of the deadline for filing an appeal, however the extension was granted only with respect to the issue of an alleged error in the calculation of overtime, specifically the question of whether overtime should be calculated on the basis of 44 hours or 52.5 hours. In making his Decision Adjudicator Love examined the merits of the other issues raised by Penguin. He specifically rejected them, refusing to grant an extension of the deadline for appeal with respect to the “flexible work schedule” issue. He noted also that some of the arguments of Penguin seemed to relate more to what the *Act should* allow, rather than to what it *did* provide.

Following publication of Adjudicator Love’s Decision (BC EST #D616/01) on November 14, 2001 further proceedings ensued, including the holding of an oral hearing on March 25, 2002. Subsequently Adjudicator Collingwood issued Decision BC EST #D119/02 on April 8, 2002.

The *Act* intends that Adjudicator’s Appeal Decisions are “final and binding”. Therefore, the Tribunal only agrees to reconsider a Decision in exceptional circumstances. Reconsideration is not a right to which a party is automatically entitled, rather it is undertaken at the discretion of the Tribunal. The Tribunal uses its discretion with caution in order to ensure: finality of its decisions; efficiency and fairness of the appeal system and fair treatment of employers and employees.

The Tribunal will not normally agree to reconsider a Decision if the intent is simply to have the Tribunal “re-weigh” evidence previously considered or dismissed by the Adjudicator or to seek a “second opinion” when a party simply does not agree with the Adjudicator’s Decision. The Reconsideration process was not meant to allow parties another opportunity to re-argue their case.

Some of the reasons why the Tribunal might agree to reconsider an Order or Decision are:

- The Adjudicator failed to comply with the principles of natural justice;
- There is some mistake in stating the facts;

- The Decision is not consistent with other Decisions based on similar facts;
- Some significant and serious new evidence has become available that would have led the Adjudicator to a different decision;
- Some serious mistake was made in applying the law;
- Some significant issue in the appeal was misunderstood or overlooked; and
- The Decision contains some serious clerical error.

In its request for reconsideration Penguin addresses the “flexible work schedule” issue that had been specifically ruled to be out-of-time by Adjudicator Love. It also addresses the alleged deficiencies of the *Act*. The “rigid, inflexible” nature of the *Act* is also referred to in Penguin’s final submission to the Tribunal dated August 27, 2002. A copy of that final submission is attached. The final submission also comments on the supposedly ungrateful character of Foster in making his original complaint.

Nothing in the request or submissions from Penguin address any of the seven reasons noted above as factors in deciding whether to reconsider a Tribunal decision. It is apparent that Penguin wishes to revisit issues that have already been decided, to re-argue its case and to elicit a second opinion on the merits of its contention that the *Act* is rigid and inflexible. For these reasons the request for reconsideration cannot succeed.

The issue of the calculation of overtime that was referred back to the Delegate of the Director of Employment Standards is still before the Tribunal. A referral back report has been received by the Tribunal. It will be copied to the parties shortly, along with information on the referral back process, and will eventually be the subject of a final decision by the Tribunal.

ORDER

Pursuant to section 116 of the *Act*, and for the reasons given above, the request for reconsideration of Tribunal Decision BC EST #D119/02 is refused.

Sincerely yours,

William Reeve

William Reeve, Adjudicator
Employment Standards Tribunal

Enclosure: submission of Michael Rogge for Penguin dated August 27, 2002.

Interested Parties

Penguin Contracting Inc.
Ian Foster
Director of Employment Standards (Delegate: Victor Lee)