**BC EST #D398/99**
**Reconsideration of BC EST #D176/99**

**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 -

Raymond Kwan and Saka Atmadjaja operating as The
Wilson Apartments
("Wilson Apartments")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

**ADJUDICATOR:** David Stevenson

**FILE NO.:** 1999/417

**DATE OF DECISION:** September 14, 1999

**DECISION**

## OVERVIEW

Raymond Kwan and Saka Atmadjaja operating as The Wilson Apartments ("Wilson Apartments") seek 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 #D176/99, dated May 19, 1999. The original decision addressed two appeals from a Determination made by a delegate of the Director of Employment Standards (the "Director") on February 5, 1999, one by Wilson Apartments and the other by their former employee, Catherine Nelson ("Nelson").

Wilson Apartments appealed, among other things, the conclusion of the Director that Nelson was an employee and that she was entitled to length of service compensation. Nelson appealed the conclusion of the Director that she was not a "resident caretaker" as defined in Section 1 of the *Employment Standards Regulations* (the *"Regulations"*). For the purposes of this application, the original decision dismissed the above two grounds of appeal of Wilson Apartments, agreeing with the conclusion that Nelson was an employee of Wilson Apartments for the purposes of the *Act* and that in the circumstances she was entitled to length of service compensation equivalent to three weeks wages. The original decision dismissed the appeal by Wilson Apartments as it related to whether Nelson was an employee and whether she was entitled to length of service compensation and accepted the appeal made by Nelson, concluding that she was a "resident caretaker" under the *Act* and *Regulations*.

Wilson Apartments seeks reconsideration of the conclusion that Nelson was a "resident caretaker" and the conclusion that she was entitled to length of service compensation. Initially, Wilson Apartments sought reconsideration of the conclusion that Nelson was an employee of Wilson Apartments, but that conclusion was conceded in a submission made by their Counsel.

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

### 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 satisfied the case is appropriate for reconsideration, the issues, which are framed above, are whether the applicant is able to show any reviewable 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.*

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:
>
> (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.

Consistent with the approach outlined above, I will first assess whether the applicant has established any matters that warrant reconsideration.

Counsel for Wilson Apartments says there are three circumstances that make this an appropriate case for reconsideration. First, he says there is important new evidence that must be considered. Second, he says the Adjudicator construed the definition of "resident caretaker" in a manner that made his decision inconsistent with other decisions of the Tribunal that are indistinguishable on their facts. Finally, he says the Adjudicator made a serious error on the evidence.

There are no matters raised in this application that warrant reconsideration.

First, the "new evidence" that Counsel for Wilson Apartments says should be considered is not "new" at all. All of this material and information was reasonably available to Wilson Apartments at the time of the appeal. That is not an appropriate basis on which to ground an application for reconsideration.

In any event, this "new" evidence simply goes to support the argument that before a person satisfies the definition of "resident caretaker" a minimum level of function and time input must be established and I do not agree with that proposition. The definition of "resident caretaker" in the *Regulations* is not qualified by any requirement that a person perform a minimum level of function or work a minimum number of hours. Counsel for Wilson Apartments relies on *Charles Hudson operating as Capri Apartments*, BC EST #D179/97 for the proposition that there must be "sufficient work (in the context of both time and content) to justify" a finding that a person satisfies the definition of "resident caretaker". I do not read the *Hudson* case as standing for the proposition urged on me by Counsel. The Adjudicator in *Hudson* was addressing the following argument:

> The appeal argues that Collins is not a resident caretaker as she was not employed as a caretaker, custodian, janitor or manager, and much is made of the fact that Collins was not required to work or be on call during specific hours.

In reply, the Adjudicator stated:

> . . . the *Act* and the *Employment Standards Regulation* do not require that. The Director may find an employee a "resident caretaker" in the absence of the setting of an employee's hours by the employer. It is necessary only that there be sufficient work to justify such a finding, . . .

There is no reference in that comment to any minimum amount of time that must be involved in performing those functions that identify a resident caretaker under the *Act* and *Regulations*. In my opinion, the Adjudicator in *Hudson* was simply commenting on the need to identify that the *work* being performed was caretaking, janitorial, custodial or managerial work as a matter of *content* only. It is also clear that the Adjudicator in the original decision did find "sufficient work" to bring Nelson within the definition of "resident caretaker". The Adjudicator stated:

> . . . while Nelson may not have been the building's "manager" she certainly had some managerial duties and, in any event, her janitorial duties, standing alone, bring her within the above-quoted definition [of "resident caretaker"].

In respect of the application concerning the length of service compensation, I am simply being asked to re-visit conclusions of fact made in the original decision. Counsel for Wilson Apartments notes that the evidence he wishes me to reconsider was before the Adjudicator in the original decision. He also notes it was disputed by Nelson. To the extent the Adjudicator did not accept the evidence of Wilson Place, that is a conclusion he was entitled to reach. I see nothing in the application or the accompanying material indicating he made a serious error. To the extent that he found the evidence, even if accepted, did not affect Nelson's entitlement to length of service compensation, he was correct. In either case, there is nothing in this ground that warrants reconsideration.

In sum, no basis for reconsideration has been established.

**ORDER**

Pursuant to Section 116 of the *Act*, I deny the application for reconsideration of the Tribunal's decision of May 19, 1999.

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