BC EST #D422/99
Reconsideration of BC EST #D267/99

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 -

The Parents Auxiliary to the Nanaimo Gymnastics School

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: John M. Orr

FILE No: 1999/461

DATE OF DECISION: September 30, 1999

DECISION

OVERVIEW

This is an application by The Parents Auxiliary to the Nanaimo Gymnastics School ("PANGS") under Section 116 (2) of *the Employment Standards Act* (the "Act") for a reconsideration of Decision #D267/99 (the "Original Decision") which was issued by the Tribunal on June 29, 1999.

PANGS operated a gymnastics school in Nanaimo and employed some instructors on a part-time basis in which some instructors taught classes that were shorter than 4 hours. They were not paid the minimum 4 hours as prescribed by the legislation. After termination of their employment two instructors made claims under the *Act*. PANGS submitted several objections to these claims including that the employees were excluded from Part 4 of the *Act* (hours of work and overtime) under either, or both, subsection 34(1)(c) and subsection 34(1)(e) of the *Regulations*. PANGS also raised the issue that the instructors refused to work more than the shorter shift and that they declined longer hours.

The Director's delegate determined that neither of the exclusions applied and that the explanation given by PANGS relating to the employees' refusal to work longer hours was not a recognised reason for not paying the minimum daily guaranteed hours.

PANGS appealed and the adjudicator in the original decision considered carefully the submissions in relation to subsection 34(1) and a further "*Charter"* argument. However PANGS now asks for a reconsideration of the original decision because, they submit, the adjudicator did not review their appeal "in its entirety".

PANGS submits that the main ground of appeal was based on the facts that the complainants wilfully and knowingly accepted hours of work designed to suit their lifestyles and refused to work hours available to them.

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.*, BC EST #D313/98 (applied in decisions BC EST #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,*BC EST #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 reason for the application for reconsideration is that the adjudicator did not address one of the grounds of appeal raised by the appellant. 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 serious matter relating to substantial liability.

Reconsideration where no Decision made on point:

PANGS concedes that the adjudicator in the original decision has decided the issues in relation to section 34(1) and the *Charter* and they do not re-argue those issues at this reconsideration. However they submit that the adjudicator did not deal with the "main appeal" which is that the complainants wilfully and knowingly accepted hours of work designed to suit their lifestyles and refused or declined longer hours offered or assigned to them. I have read the original decision and it is apparent that the adjudicator did not address this point.

Pursuant to section 116 of the *Act* 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.

In this case the issue was dealt with by the Director's delegate in the determination but was not addressed by the original panel. The question arises as to whether I can deal with the issue on reconsideration as there is no order or decision of the tribunal on this point to cancel or vary. It is arguable that the only option available is to refer the matter back to the original panel for decision but I have received no submissions on the appropriate remedy.

It is the stated intent of the legislation to provide an efficient means of resolving disputes and I intend to address the point raised by the appellant in this case in order to bring some finality to this dispute. I leave open the question as to whether the Tribunal should normally reconsider an issue that was not addressed in the original decision.

The Four Hour Minimum

The only issue before me is whether PANGS, the employer, is liable to pay the 4 hour minimum wage to employees who refuse to work 4 hours or who decline the additional hours.

I want to make it clear that I am accepting that the employees refused or declined hours of work offered to them for the purpose of this argument only but this is completely without prejudice to the employees and should not be taken as a finding that those facts are established. There is evidence submitted on this point which is contradictory and it is not the role of the Tribunal on reconsideration to decide issues of fact that require investigation and findings of credibility. Therefore for the purpose of this reconsideration only I shall assume that the employees declined work or refused hours offered to them.

The relevant sections of the *Act* are as follows:

> Minimum daily hours
>
> 34 (1) If an employee reports for work on any day as required by an employer, the employer must pay the employee for
> (a) at least the minimum hours for which the employee is entitled to be paid under this section
> * * *
> (2) An employee is entitled to be paid for a minimum of
> (a) 4 hours at the regular wage, if the employee starts work unless the work is suspended for a reason completely beyond the employer's control, including unsuitable weather conditions ...

It is also relevant to note that section 4 of the *Act* provides:

> 4. The requirements of this Act or the regulations are minimum requirements, and an agreement to waive any of those requirements is of no effect ...

Employers and their employees may apply to the Director under Part 9 of the *Act* for a variance of the minimum daily hours of work provisions in section 34, above, and I note from the materials filed in this case that ***subsequent*** to the time during which the complainants were employed by PANGS that a number of gymnastic schools have applied for and been granted a variance for their instructors. However, no such variance was in place during the time that the complainants in this case were employed by PANGS and therefore the whole issue of variance is irrelevant to this case.

There is no exception in the legislation that allows an employer to pay an employee less than the four hour minimum simply because the parties agree that the employee will work less than 4 hours. This is true even where the employee is unavailable, or refuses to work, for the full four hours. Any agreement between the parties, even if made with the best of intentions, is of no effect in accordance with section 4 of the *Act*.

The employer controls the work place and has the option to employ whoever is most suited for the position. If the employer decides to employ someone who is only willing to work one or two hours at a time then it is the employer's choice to pay that person the 4 hour minimum, despite the fact that they only work 1 or 2 hours, or to employ a different instructor who is available to work the full 4 hours. This situation often happens in the food service business where an employer only requires an employee over the lunch hour but must pay for the 4 hour minimum unless there is a variance in place or it is part of a split shift which includes the evening as well.

If the employee is refusing to work a full scheduled 4 hour shift then the employer must decide whether to continue to employ that employee or to pay the minimum 4 hours regardless of the actual hours worked.

The argument raised by PANGS in this reconsideration, even if it was factually correct, has no merit in law and must be rejected. Therefore I decline to cancel or vary the original decision and in effect both the original decision and the determination are confirmed.

ORDER

This Tribunal orders, pursuant to section 116 (1)(b), that Decision BC EST #D267/99 is confirmed.

John M. Orr
Adjudicator
Employment Standards Tribunal