BC EST #D426/00
Reconsideration of BC EST #457/99

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 Director of Employment Standards
(the " Director ")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

PANEL David B. Stevenson
Fern Jeffries
Carol Roberts

FILE No.: 2000/354

DATE OF DECISION: October 12, 2000

DECISION

OVERVIEW

The Director of Employment Standards (the "Director") seeks a reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision (the "original decision") of an Adjudicator of the Employment Standards Tribunal (the "Tribunal"), BC EST #D457/99, dated October 28, 1999. The original decision varied a Determination dated January 22, 1999, which had concluded that Labour Ready Temporary Services Ltd. ("Labour Ready") was liable to Cheryl Anita Lynn ("Lynn"), a former employee of Labour Ready, in the amount of $8,577.81 for unpaid wages, overtime and statutory holiday pay.

The Director contends that there is an error in the interpretation of subsection 34(2) of the *Act*, the provision of the *Act* dealing with minimum daily hours of work.

ISSUES TO BE DECIDED

The first issue is whether the Tribunal will exercise its discretion under Section 116 of the *Act* to accept the application.

If the Tribunal exercises its discretion to accept the application, the substantive issue raised by this application is whether the original panel correctly interpreted and applied subsection 34(2), of the *Act*, the minimum daily pay provisions.

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*
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> *(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 adopted a principled approach to the exercise of this discretion. The rationale for this approach is grounded in the language and the purposes of the *Act*, including the purposes found in subsections 2(b), *"to promote the fair treatment of employees and*

employers" and 2(d), *"to provide fair and efficient procedures for resolving disputes over the interpretation and application"* of the *Act* (see also, *Re Alnor Services Inc.*, BC EST #D495/99).

We also note, and adopt, the comments of the Tribunal in *Re Unisource Canada Ltd.*, BC EST #D122/98:

> "The purposes of the *Act* requires that the Tribunal avoid a multiplicity of proceedings and ensure that appeals are dealt with expeditiously, in a practical manner, and with due consideration of the principles of natural justice. In our view, this includes, generally, an expectation that one hearing will finally and conclusively resolve the dispute. Read in conjunction with Section 115, the power to "vary, confirm or cancel" a determination, imply a degree of finality, *i.e.*, a party should not be deprived of the benefit of a decision without a compelling reason.

The Tribunal has established a number of factors that will be considered when called upon to exercise its discretion under Section 116 of the *Act*. As the Tribunal has noted in several reconsideration applications, the accepted approach to such applications resolves into a two stage analysis. In *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97), the Tribunal outlined what is involved in the first stage of 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:
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> (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).
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> (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).
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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). . .

If satisfied the case warrants reconsideration, the Tribunal will proceed to the second stage of the analysis, addressing in a substantive way the issues raised.

The original decision was issued on October 28, 1999. This application was received by the Tribunal on May 19, 2000, almost seven months after the issuance of the original decision. On January 10, 2000, approximately 2½ months following the issuance of the original decision, the Director notified the Tribunal of its intention to seek reconsideration. More than four months passed before this application was filed. No explanation has been provided for the delay.

The Tribunal must consider how significantly the delay in bringing this application weighs against a reconsideration.

The Director has presented a complete argument on the relevance of the delay to the application. The same submissions have previously been made by the Director in applications for reconsideration of the Tribunal's decisions of *Re Mike Renaud and Candice D. Spivey*, BC EST #D436/99 and *Re Hewitt Rand Corporation*, BC EST #D271/99. Those arguments have been fully considered in the Reconsideration decisions relating to those applications. In *Re Hewitt Rand Corporation*, BC EST #D366/00, the Tribunal made the following comments:

> What the argument of the Director fails to appreciate is that the Tribunal's authority under Section 116 is discretionary. While the Tribunal has approached an exercise of this discretion in a principled manner, the Tribunal has determined, based on an assessment of the objectives and the purposes of the *Act*, that the failure to file an application for reconsideration in a timely way without a reasonable explanation for the delay will be a key factor in deciding whether or not that discretion will be exercised in favour of the application. In *The Director of Employment Standards (Re MacMillan Bloedel Limited)*, BC EST #D27/00 (Reconsideration of BC EST #D214/99), the Tribunal stated:

> We reaffirm the principles set out in *Unisource*. In our view, an application for reconsideration must be filed within a reasonable time. What constitutes a "reasonable time" depends on the circumstances of each case. While we agree that the Tribunal may be guided by the principles applied by the courts, we do not agree that we must follow the approach developed by the courts in judicial review applications. . . . We agree that the length of delay may not be determinative. If good cause can be shown for a long delay, the Tribunal may exercise its discretion to reconsider. . . .
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> In our opinion, the principles set out in *Unisource* are correct, and in keeping with the approach developed by the Tribunal on reconsideration applications as expressed in *Milan*, *above*, and other cases, we reaffirm those principles.

There has been a significant delay in bringing this application, for which no explanation has been provided. In the absence of some compelling reason weighing in favour of reconsideration, the delay in this case is sufficiently lengthy to deny the application. The Tribunal did note in *Re Hewitt Rand*, *supra*, that the length of the delay is not entirely determinative, but is ". . . one factor that is considered and whether the length of the delay results in a refusal to grant the application depends on a consideration of all the relevant circumstances, including the reason given for the delay and the prejudice to any party in proceeding with or refusing the reconsideration". In this application, the Director has asserted that the original decision contains a sufficiently serious error of law in its interpretation of subsection 34(2) of the *Act* to warrant reconsideration.

We have reviewed the arguments supporting the substantive issue raised in this application and find that the Director has not made out "an arguable case of sufficient merit" to override the delay and warrant reconsideration. The original decision contained an extensive and well-reasoned analysis of the respective merits of the parties' positions in the context of the relevant provisions of the *Act* and provided an equitable response to a unique set of circumstances. Such a decision would not be lightly disturbed on reconsideration.

ORDER

Pursuant to Section 116 of the *Act*, the application for reconsideration is denied.

David B. Stevenson

David B. Stevenson
Adjudicator, Panel Chair
Employment Standards Tribunal

Fern Jeffries

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Adjudicator, Tribunal Chair
Employment Standards Tribunal

C. L. Roberts

C. L. Roberts
Adjudicator
Employment Standards Tribunal