BC EST #D442/99
Reconsideration of BCEST #D313/99

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 Grand Lodge of British Columbia Independent Order of Odd Fellows
and
The Rebekah Assembly of British Columbia of Independent Order of Odd Fellows
operating as Newton I.O.O.F. Residence
("IOOF Residence")

- of Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Lorne D. Collingwood

FILE NOS.: 1999/488

DATE OF DECISION: November 10, 1999

DECISION

OVERVIEW

This application is for reconsideration of a decision by the Employment Standards Tribunal (the "Tribunal"), pursuant to section 116 of the *Employment Standards Act* (the "*Act*"), and by the Grand Lodge of British Columbia Independent Order of Odd Fellows and The Rebekah Assembly of British Columbia of Independent Order of Odd Fellows operating as Newton I.O.O.F. Residence ("IOOF Residence, also "the applicant"). IOOF Residence has applied for reconsideration of the decision, BCEST No. D313/99, a decision issued on July 23, 1999 (the "original decision").

The original decision pertains to a Determination by a delegate of the Director of Employment Standards dated January 20, 1999 ("the Determination"). The Determination is that Betty Poss is not entitled to compensation for length of service for reason of just cause but is owed $1,544.62 in wages and interest. On appeal, IOOF Residence argued that meal allowance moneys should have been taken into account and, at first, that Poss was a 'manager'. The employer later conceded that in fact Poss did not perform management functions and began to argue that Poss should have been designated as a 'residential care worker'. The original decision confirms the Determination. In that decision, it is pointed out that the *Act* requires that wages be in Canadian currency. And the Adjudicator goes on to find that a charge for meals may not properly be considered wages and that IOOF Residence failed to provide evidence which is sufficient to support a conclusion that Poss was a "residential care worker" in that it did nothing more than reiterate the definition of that term.

Immediately on receiving the original decision, IOOF Residence applied for reconsideration. It objects to the original decision because it confirms the Determination. IOOF Residence persists in claiming that a meal allowance is a form of wages but it does not object to the Adjudicator's decision that there was insufficient evidence to support the conclusion that Poss was a residential care worker. If there is a theme to the applicant's submissions, it is that the employee simply does not deserve any of the moneys which have been awarded to her for reason of her inability to perform the work expected of her, or to use the employer's own words, "her incompetence does not warrant additional funds when she was already paid for services NOT rendered!". But IOOF Residence has a long list of complaints. It reverts to claiming that Poss was a manager; that she was fairly treated; that she was not on call; that she was paid a salary; that her meal allowance is a form of wages; that IOOF Residence did nothing wrong; and that the Determination is contrary to an agreement which governs the employment. Somewhat more importantly, given that this is an application for reconsideration, IOOF Residence submits that the Adjudicator failed to consider its position and that the appeal hearing was one-sided. In regard

to the latter, it complains that Poss was not forced to attend the hearing, and employees of IOOF Residence were not "allowed to testify". The applicant wants the Tribunal to review its many submissions and hear from staff currently at the residence. IOOF Residence stresses, it does not want the "appeal revisited, just heard!! Just properly evaluated."

ANALYSIS

Under section 112 of the *Act*, a party may appeal a Determination to the Tribunal. Section 116 of the *Act* provides for reconsideration of the orders and decisions of the Tribunal, and is as follows:

> **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.* (my emphasis)

In that section 116 employs the use of the word "may" rather than "will" or "must", reconsideration is not automatic but clearly discretionary. The Tribunal has said that, for reasons of fairness and efficiency, both defined purposes of the *Act* (section 2), it will not reconsider a decision unless there is some compelling reason to do so [*Khalsa Diwan Society*, BCEST No. 199/96 (Reconsideration of BCEST No. D114/96)]. There must be an important question of fact, law, principle or fairness at stake [*Milan Holdings Ltd.* (BCEST No. 313/98, Reconsideration of BCEST No. 559/97)].

In *Milan*, a two stage analysis is employed for the purpose of assessing applications for reconsideration. I have decided to adopt that principled approach in this case. It is an approach which requires that I first decide whether the applicant has raised a matter which warrants reconsideration. Factors weighing against reconsideration are identified in the *Milan* decision as being the fact that the application is out of time; that it arises out of a preliminary or interlocutory ruling; and that its primary focus is to have what is in effect a 're-weighing' of the evidence which was tendered at the appeal stage. The primary factor weighing in favour of reconsideration is whether the application raises a significant question of law, fact, principle or procedure.

> 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 summarised in a previous Tribunal decision by requiring an applicant for reconsideration to raise " a serious mistake in applying the law": *Zoltan Kiss*, BCEST No. D122/96. "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*, BCEST No. 199/96 (Reconsideration of BCEST No. D114.96).

The circumstances in which the Tribunal has said that it will exercise its discretion were identified in *Zoltan Kiss*, BCEST No. D122/96. They 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.

ISSUES TO BE DECIDED

I must first decide whether the Tribunal's discretionary power to reconsider an order or decision should be exercised with respect to the original decision.

If satisfied that reconsideration is warranted, I must then decide whether IOOF Residence has shown an error which is fatal to the original decision.

ANALYSIS

The officers of IOOF Residence are not versed in the language of courts and administrative tribunals. That is to them a 'foreign' language and some allowance must be made for that. It is a part of being accessible, and therefore, fair. It is also consistent with the idea that the Tribunal would provide a forum in which employers and employees could, at least in most cases, represent

themselves. As Commissioner Thompson, in *Rights & Responsibilities in Changing Workplace, a Review of the Employment Standards in British Columbia*, said in regard to the new appeal process which became the Tribunal:

> "An appeals system should be relatively informal with a minimum possible reliance on lawyers. Cases should be decided quickly at the lowest possible cost to the parties and the Ministry. The process should not only be consistent with the principles of natural justice, but be seen to meet those standards" (page 134).

On reading the submissions of IOOF Residence, I am left with the impression that they in part believe that the appeal process was unfair, and that the original decision is flawed in that it fails to deal with serious issues. That is my perception of matters and those are my words, not theirs. But it is not an unfounded impression. As noted above, IOOF Residence in its written submissions complains of a one-side appeal process and that its position was not even considered by the Adjudicator of the original decision.

Are there grounds for reconsideration? IOOF Residence complains that there was unfairness in three respects. One, the Adjudicator did not consider what it had to say. Two, the employee was not forced to attend the appeal hearing. Three, residence employees were not "allowed to given testimony". Exactly what is meant by that latter comment is not explained. That would appear to indicate that the applicant is merely trying to say that persons should have been invited to the appeal hearing, or forced to attend, but were not. IOOF Residence makes no mention of an actual ruling by the Tribunal, against hearing from a witness, or requiring the presence of any witness. But even if there was such a ruling, it does necessarily follow that there was unfairness.

It is not the job of the Tribunal to assemble witnesses for the appeal hearing. And the Tribunal is not obligated to undertake its own investigation of the Complaint. Complaints are to be investigated by the Director and the Director's delegates. It is up to each party to arrange for the attendance of whatever witnesses they may want for the purposes of the appeal hearing.

The Tribunal has the power, under sections 108 and 109 of the *Act*, to require the attendance of a person or persons at hearings but it is discretionary. The presence of a person will be required only when it is shown that their testimony may be of potential importance to the appeal. But IOOF Residence does not make an arguable case that Poss or any one of the employees were important to the appeal and, accordingly, that the appeal process was unfair. IOOF Residence did not suggest that the delegate is wrong in her reporting of what was said during the course of the delegate's interviews. The appeal is one which goes to the *Act* and its application by the delegate, not the factual underpinnings of the Determination. Given that, the Adjudicator had no reason to hear from Poss, or any employee of the residence.

IOOF Residence claims that that the original decision fails to deal with serious issues. Indeed, it claims that there was unfairness in that its submissions were virtually ignored by the Adjudicator

on appeal. But again I find that there is nothing to the allegations. I have compared the original decision against the February 2, 1999 letter which sets out the appeal, and in doing so find that the Adjudicator has dealt with each and every one of the material issues raised by the appeal. The position of IOOF Residence went from being Poss was 'a manager' to Poss was 'a residential care worker'. The latter position was correctly identified by the Adjudicator as one of the two principle issues, the other being the matter of the meal allowance. Each is addressed in the original decision. The matter of what is work versus what is rest or a meal break is tackled in that section of the decision which is sub-titled "The Facts", though a restating of the *Act*. The matter of whether an employer may pay less than the minimum wage for reason of incompetence is handled in a similar way, the Adjudicator pointing out that, under the *Act*, an employer may not pay less than the minimum wage. It is not that the Adjudicator failed to consider an important issue, it is just that he was not persuaded by the employer's submissions.

There is one matter which was raised by IOOF Residence on appeal and which is not addressed by the Adjudicator in the original decision. It is the matter of the employment agreement, that overtime wages were not to be paid. But that was no longer a serious issue by the time of the appeal. The delegate, in the Determination, had already drawn attention to section 4 of the *Act* and pointed out that an agreement has no force and effect if it provides for less than the minimum standards of the *Act*. In that she did that in the Determination, it is nonsense to claim on appeal that the employment agreement may override the *Act*.

What remains of what the applicant puts forward as reasons for reconsideration is a series of complaints, all of which are with the Determination. Now that it has lost its appeal, the applicant reverts to claiming that Poss was a manager; that she was fairly treated; that she was not on call; that she was paid a salary; that her meal allowance is a form of wages; that IOOF Residence did nothing wrong; and that the Determination is contrary to an agreement which governs the employment. It goes on to suggest that the employee does not deserve the minimum wage for reason of her inability to perform the work expected of her. And it asks that "its submissions should be reviewed", "just heard" and "just properly evaluated". What IOOF Residence really seeks through the application for reconsideration is a second appeal hearing, a re-weighing of evidence tendered on appeal.

IOOF Residence does not make an arguable case that the appeal process was unfair or that the original decision fails to deal with serious issues. The applicant does not raise a significant question of law, fact, principle or procedure. What is the case here is that IOOF Residence believes that the Determination is wrong headed and, because the original decision confirms the Determination, that it must also be wrong. It for that reason asks for the appeal to be reheard or, at least, that a new panel of the Tribunal review both appeal submissions and the Determination. That is to ask for a re-weighing of evidence tendered at the appeal stage. There are not grounds for reconsideration in this case. In that IOOF Residence has not advanced a compelling reason to reconsider the original decision, it would be inappropriate to proceed further with its application.

ORDER

The application for reconsideration of the decision of the Tribunal, BC EST No. D313/99, is dismissed.

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Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal