

An Application for Reconsideration

- by -

Whitehorn Publishing Ltd. operating the Valley Sentinel  
("Whitehorn")

- of a Decision issued by -

The Employment Standards Tribunal  
(the "Tribunal")

pursuant to Section 116 of the  
*Employment Standards Act* R.S.B.C. 1996, C.113

**ADJUDICATOR:** David B. Stevenson

**FILE No.:** 2002/381

**DATE OF DECISION:** September 25, 2002

## DECISION

### OVERVIEW

Whitehorn Publishing Ltd. operating the Valley Sentinel (“Whitehorn”) seeks reconsideration under Section 116 of the *Employment Standards Act* (the “Act”) of a decision of the Tribunal, BC EST #D272/02 (the “original decision”), dated June 17, 2002. The original decision considered an appeal of a Determination issued on January 23, 2002.

In the application, Whitehorn alleges the Adjudicator of the original decision, and the investigating officer, ignored the fact that the complainant, Dorothy Simpson (“Simpson”), had exaggerated her overtime hours.

This application for reconsideration has been filed in a timely way.

### ISSUE

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 substantive issues raised in this application is whether the original decision was correct in the application of Section 97 of the *Act*.

### ANALYSIS OF THRESHOLD ISSUE

The legislature has conferred an express reconsideration power on the Tribunal in Section 116, which provides:

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*”. The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. An assessment is also be made of the

merits of the Adjudicator's decision. Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration. 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.

If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration.

I do not find this application warrants the Tribunal exercising its discretion to reconsider the original decision.

## **ARGUMENT AND ANALYSIS**

A reconsideration is not simply another opportunity to re-argue the appeal, hoping the reconsideration panel will take a different view of the evidence than the Adjudicator of the original decision. It is not enough for an applicant to simply state there was an error, rather, an applicant must show the existence of an error through a reasoned analysis of the facts and/or applicable legislative provisions.

The issue in this application was one that was squarely before the Adjudicator of the original decision and does no more than seek to have the reconsideration panel second guess conclusions of fact made in the original decision by simply providing the same material provided to the original panel and alleging the Adjudicator 'ignored' the fact that Simpson had exaggerated her overtime claim. It is eminently clear from the original decision, however, that the Adjudicator did not 'ignore' this material, but gave consideration to it, among other evidence, in deciding whether there was any merit to the appeal:

The Appellant argued the credibility of the Respondent's records. Based on the Appellant's credible evidence I find the reason for maintaining the records was viable and conclude that the records are a reasonable reflection of the Respondent's work history.

The Appellant argued that the Director erred in calculating the hours worked based on the Respondent's records. It is clear from the Determination and the wage calculations affixed to the Determination and from a review of the diaries of the Respondent, that the Director made an honest and reasonable effort, based on the test of a balance of probabilities, to accurately determine the work history of the Respondent.

For the above reasons, the application is denied and the original decision is confirmed.

**ORDER**

Pursuant to Section 116 of the *Act*, I order that the application for reconsideration of Tribunal Decision BC EST # D272/02 be dismissed.

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**David B. Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**