# 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 -

Canadian Chopstick Manufacturing Co. Ltd.
(the " Appellant ")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

**ADJUDICATOR:** E. Casey McCabe
David Stevenson
Fern Jeffries

**FILE No:** 2000/369

**DATE OF DECISION:** November 23, 2000

## DECISION

### APPEARANCES

| | |
|---|---|
| Suzanne M. Kennedy | for Canadian Chopstick Manufacturing Co. Ltd. |
| Carol Pakkala | for Denise Carter |
| Heidi Hughes | for the Director of Employment Standards |

### OVERVIEW

On October 20, 1997 a Delegate of the Director of Employment Standards issued a Determination which found that Canadian Chopstick Manufacturing Co. Ltd. (the "employer" or "CCMC") had contravened Sections 63 and 64 of the *Employment Standards Act* (the "*Act*"). The Determination found the employer liable under those sections for severance pay to Denise Carter (the "complainant") in the amount of $10,176.84.

The employer appealed that decision pursuant to section 112 of the *Act*. A panel ("original panel") was constituted to hear and determine the appeal. A hearing was held on February 17, 1998 in Nelson, British Columbia. Evidence was given under oath by Denise Carter and Garry Verigin for the complainant. Tom Gilgan, Edward Shoji and Jirina Senko testified for the employer.

On August 25, 1998 the original panel rendered decision BC EST #D369/98 ("original decision") confirming the Determination dated October 20, 1997 in the amount of $10,176.84 plus interest.

The employer applied under Section 116 of the *Act* for reconsideration of the original decision. The request for reconsideration proceeded by way of written submissions. The Director did not make a submission in response to the employer's request for reconsideration. The Employment Standards Tribunal constituted a three person panel (the "reconsideration panel") to review the request.

The reconsideration panel, in BC EST #D079/99, cancelled the original decision and the Determination. The reconsideration panel noted that the original panel had set out the correct test for determining whether the complainant had voluntarily quit her employment. The reconsideration panel also noted that the test for a voluntary termination contains both a subjective and objective element and reviewed the original panel's application of the facts to the two branches of that test. The reconsideration panel disagreed with both the subjective conclusion and objective conclusion that the original panel had reached. The reconsideration panel therefore substituted its decision dated April 27, 2000 (BC EST #D079/99) for the original decision and the Determination.

On November 5, 1999 the complainant filed a petition for judicial review in the Cranbrook Registry of the Supreme Court of British Columbia. On May 15, 2000 the Court ordered that the decision of the Employment Standards Tribunal dated April 27, 1999 with the style of cause The Canadian Chopstick Manufacturing Co. Ltd. BC EST #D079/99 be set aside and quashed. The

Court further ordered that the matter be remitted back to the Employment Standards Tribunal with the following directions:

a) a new and differently constituted Panel of the Tribunal (the "Panel") will adjudicate the Employer's application for reconsideration dated January 20, 1999 (the "Employer's application");

b) prior to issuing a decision, the Panel will provide both the Respondent Director and the Petitioner an opportunity to respond to the Employer's application;

c) if the Panel receives a response to the Employer's application, the Employer will be provided with an opportunity to reply;

d) the Panel will then consider the Employer's application and any submissions it has received, and will issue a decision under Section 116 of the *Employment Standards Act*.

The Court further ordered that no costs be awarded in the matter.

Pursuant to the Court Order of May 15, 2000 the Employment Standards Tribunal has constituted this panel to reconsider the original decision dated August 25, 1998 pursuant to Section 116 of the *Act*.

## FACTS

The Employer's business was located in Fort Nelson, British Columbia. The employer manufactured chopsticks for sale in the Asian market. It ceased operations on April 1, 1997 due to falling demand for its product in the Pacific Rim economy. Approximately 200 employees were terminated at the closure.

The employer's head office was located in Vancouver where accounting and payroll were administered. The President of the Canadian Chopstick Manufacturing Company was Mr. Mike Sato who was located in Fort Nelson. The Senior Vice-President was Mr. Edward Shoji who was responsible for overall management of the company and who traveled regularly from Vancouver to Fort Nelson as part of his duties. Mr. Tom Gilgan was employed as Manager of Human Resources and was located in Fort Nelson.

The complainant was employed in the warehouse and stores operation as a purchasing clerk. She commenced working for the employer on November 13, 1990. In August 1996 the complainant went on short-term disability leave due to recurring back problems. Upon exhausting her 15 week entitlement to short-term disability benefits she qualified for long-term disability leave and benefits. The leave commenced on or about November 29, 1996.

In January of 1997 the complainant attempted a graduated return to work. However, she was not able to continue with those duties due to recurring back pain.

By letter dated March 19, 1997 Dr. M. Mostert, who was the complainant's consulting physician in Fort Nelson, wrote to the Victoria Pain Clinic to support the complainant's application for an assessment.

On or about March 23, 1997 the complainant, along with her common-law spouse Mr. Gary Verigin, left Fort Nelson to take up residence in Wasa, British Columbia where Mr. Verigin's parents lived. The complainant intended to travel from Wasa to the pain clinic in Victoria for an assessment.

On April 1, 1997 the employer closed its operations in Fort Nelson. The complainant did not learn this news directly from the employer but rather was informed by a friend that the plant had closed. The complainant then made attempts to contact Mr. Gilgan who remained as the Human Resources Manager.

By letter dated April 24, 1997 the complainant was informed by the insurance carrier that her long term disability benefits would cease on April 30, 1997.

By letter dated May 23, 1997 from Mr. Gilgan to the complainant the employer stated that, as requested, it had reviewed the complainant's employment status in order to determine whether she was an employee at the time of the permanent plant closure on April 1, 1997. Mr. Gilgan informed the complainant that she was not an employee at the time of the closure for two reasons. Firstly he stated that he drew that conclusion because the complainant and her spouse had relocated from Fort Nelson and had indicated that they did not intend to return to the area. Secondly, the employer stated that due to her extended absence from the work place another employee had filled the position and, even if the complainant had advised the employer of her availability, there would have been no work available for her. The employer stated that the complainant had advised that she was not capable of performing her duties in stores and no other vacancies were available to her.

On May 27, 1997 the employer issued a Record of Employment showing, as the reason for termination, that the complainant had "applied for long-term disability" rather than "quit".

On May 6, 1997, prior to the issuance of the aforementioned letter and Record of Employment, the complainant filed her complaint claiming entitlement to severance pay upon closure of the plant with the Employment Standards Branch.

It should be noted that Garry Verigin, who was the complainant's common law spouse, was a contractor who operated a log processor that was leased from the employer. We understand that the production from this log processor was solely for use by the employer.

## THE ORIGINAL DECISION

The original panel conducted a hearing in Nelson, British Columbia on February 17, 1998. At this hearing the complainant and Mr. Verigin testified on her behalf and Mr. Gilgan, Mr. Shoji and Mr. Senko testified for the employer. The original panel therefore had the opportunity to assess the credibility of the witnesses based upon the preponderance of the evidence and its

assessment of the circumstances surrounding that evidence. The evidence given by Mr. Gilgan, Mr. Shoji and Ms. Jirina Senko is set out on pages four through seven of the original decision.

The complainant's evidence is set out at the bottom of page seven and continues to the middle of page nine. The original panel noted that Mr. Verigin also testified at the hearing.

On page three the original panel set out the employer's position. It mentioned an attachment to the employer's appeal form which referred to "facts which are in dispute". We will quote from this portion of the award:

> "It is the company's position that Ms. Carter voluntarily terminated her employment by:
>
> a) Her statements during a farewell dinner held for her and her spouse on March 21, 1997 and her statements at P & T's Restaurant on the evening of March 18, 1997.
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> b) Her and her spouse's action of moving from the area in which Canadian Chopstick Manufacturing Company Ltd. conducts its operations. The reasons she gave the Ministry was she was pursuing medical assistance for her disability. She knew at the time she left Fort Nelson that an Independent Medical Examination had been scheduled with Dr. Hrudey and that her LTD benefit would be determined based on the outcome of the examination. Her LTD benefit was terminated effective April 30, 1997 as a result of the IME of April 7, 1997.
>
> c) Ms. Carter, at the time of her attempted graduated return to work in January 1997, advised CCMC that she would never be able to return to her pre-injury duties. At that time she was told that there was a probability that her skills set would not allow her to move to other duties within the company and she would likely have to seek employment elsewhere when her LTD benefits had expired. The extent and degree of Ms. Carter's disability were the subject of contention between a number of physicians.
>
> d) An interim ROE issued to Ms. Carter on May 27, 1997 stated she had applied for long term disability. This document was issued via out Vancouver office and was in error due to the large number of ROE's being processed as a result of the plant closure."

In its review of the complainant's evidence commencing on page seven of the original decision the original panel noted that the complainant had denied she was at the restaurant on March 18, 1997 and that she had testified that there had been no conversation between her and Mr. Gilgan where she said she would not be returning to her employment. The original panel also noted the complainant's evidence regarding the March 20, 1997 dinner at another local restaurant. The original panel noted that the complainant had testified that at no time during the dinner had she or Mr. Verigin mentioned that they would not return to Fort Nelson or that the complainant had quit her position. It is noted that Mr. Verigin had confirmed this in his testimony.

The original panel further noted that the complainant denied that she had said during her graduated return to work attempt that she would never be able to do her job.

The original panel acknowledged that the complainant had testified that taking a medical leave was the only thing that made sense and that she would not be able to attend the pain clinic without Mr. Verigin working. She testified that there would be up to a three month wait period after the assessment before treatment would begin if she was accepted. She testified that she would not be able to fly back and forth to the clinic and that she was not prepared to leave a nine year old daughter behind in Fort Nelson. She testified that Mr. Verigin's parents offered to care for the daughter at their home in Wasa, B.C. and that she would enroll her daughter for the last few months of the school year in Wasa. It was necessary for Mr. Verigin to work during this period to support the family.

After reviewing the positions of the parties and the evidence given the original panel commenced its analysis. It noted that the onus was on the appellant, the Canadian Chopstick Manufacturing Co. Ltd., to demonstrate an error or a basis for the original panel to cancel or vary the Determination and particularly the finding that the complainant was an employee on April 1, 1997. The original panel also set out the obligations of an employer who terminates the employment of fifty or more employees under Section 64 of the *Act*.

The original panel correctly noted that it was faced with the task of determining whether the complainant had terminated her employment. The original panel referred to *Wilson Place Management Ltd.* (BC EST #D047/96) and quoted the following passage:

> "The act of resigning, or "quitting", employment is a right that is personal to the employee and there must be clear and unequivocal evidence supporting a conclusion that this right has been voluntarily exercised by the employee involved. There is both a subjective and objective element to the act of quitting: subjectively, an employee must form an intention to quit; objectively, that employee must carry out an act that is inconsistent with further employment."

The original panel then went on to find that the appellant had not advanced "clear and unequivocal" evidence to support a conclusion that the complainant had voluntarily exercised a right to terminate her employment. The original panel found that the complainant's actions were entirely consistent with a genuine pursuit of medical assistance for her disability.

The original panel set forth findings that were crucial to its conclusion on page 11. We reproduce those paragraphs:

> "I find that Ms. Carter's actions were entirely consistent with her genuine pursuit of medical assistance for her disability. Ms. Carter was in regular contact with her supervisor and the Manager of Human Resources regarding her medical difficulties and her plans. While she was in Fort Nelson she attended their offices in person, she left a forwarding address and phone number, she continued to contact them by telephone. She was acting on her doctor's advice to attend the pain clinic despite the great expense and upheaval to herself, her spouse and her daughter. She contacted her insurance company to inform them of her plan.

> Everyone giving evidence agreed that both Ms. Carter and Mr. Verigin stated they were leaving to be near medical assistance.
>
> CCMC's Vice President felt it was sufficient to conclude that Ms. Carter had terminated her employment based on information from a manager of an entirely separate and unrelated department; information which was acquired outside the work place at a social gathering. Neither Ms. Carter's supervisor nor the Manager of Human Resources were apprised of this information. Mr. Gilgan himself testified that he had to chase down a "rumour" to arrive at the conclusion that Ms. Carter had resigned. I find from this testimony that whatever he claimed he was told by Ms. Carter at P & J's restaurant on March 18, 1997, he clearly did not consider it to have constituted termination. He also testified that normally the termination would have come through his office and through Mr. Bamford, her supervisor. Mr. Shoji testified that he "assumed" Mr. Gilgan know of the termination. Mr. Shoji did not confirm with the manager of human resources, Ms. Carter's supervisor or Ms. Carter herself that she had resigned. Given the structure of the Appellant's organization and given the knowledge on the part of everyone concerned that Ms. Carter was acting on her medical condition, it would not have been unreasonable for the Appellant to obtain confirmation from the appropriate individuals that she had terminated her employment. I find on balance that the Appellant's argument that any manager could accept any employee's resignation is not sufficient to substantiate a termination in this particular case where the employee has consistently kept her recognized supervisors informed of her actions and has been available for contact."

The original panel continued its analysis by applying its findings to the subjective and objective branches of the test. Under the subjective element the original panel found that the employer had not shown that the complainant intended to quit. Although the original panel does not forthrightly state that it preferred the complainant's evidence over that of the employer's witnesses it is an inference that is easily drawn from a reading of the original decision.

For example in the above quoted paragraphs the original panel noted that Mr. Gilgan had testified that ". . . he had to chase down a "rumour" to arrive at the conclusion the Ms. Carter had resigned. I find from this testimony that whatever he claimed he was told by Ms. Carter at P & J's restaurant on March 18, 1997 he clearly did not consider it to have constituted termination." The original panel noted that Mr. Shoji testified that he "assumed" that Mr. Gilgan knew of the termination. The original panel then went on to state that the appellant's argument that any manager could accept any employee's resignation is not sufficient to substantiate a termination especially in this particular case where the employee has consistently kept her recognized superiors informed of her actions and has been available for contact.

In the paragraph under the heading Subjective Element the original panel states:

> "[E]ven if Ms. Carter did make statements that she was not returning to Fort Nelson I find that these were made outside the work place, to people with whom she had socialised before, who had no authority over her at work and in

> circumstances where she could legitimately exercise the option to return or not if she desired at the later time."

The original panel then went on to state:

> "I find that these statements in and of themselves would not be sufficient to constitute the termination of her employment. There was no evidence that Ms. Carter stated that she quit or that she did not want her job any longer."

It is our view that the original panel preferred the evidence of the complainant on this point.

Having dealt with the subjective element of the test in which the original panel found that the intent to quit did not exist the original panel nonetheless turned its analysis to the objective element.

The original panel found that the complainant's actions were not inconsistent with continued employment. The original panel found that the complainant was acting on circumstances which were current in her life and that if the employer had not ceased operations it would have been open to the complainant to seek continuation of her employment if her circumstances had allowed it. The original panel stated:

> "That would have been an option for her to exercise later."

The original panel went on to state that the complainant could not predict what her circumstances would be at the time she made the arrangements to leave town in order to attend the pain clinic. The original panel noted that the appellant did not dispute that it had assisted the complainant in arranging for long term disability leave nor did it argue that being on this leave meant that she had ceased to be an employee. Rather, the original panel notes that the employer had argued that the complainant's job had been filled. The original panel then went on to find that if there was no job to offer the complainant when and if she returned to work the termination at that point would have been at the employer's initiative and not the complainant's.

The original panel found that the appellant employer had not satisfied the onus as appellant of proving that the Director erred in the Determination that the complainant was an employee on April 1, 1997 when the plant closed and that she was entitled to compensation for length of service.

## EMPLOYER'S POSITION ON RECONSIDERATION

The employer sets out the following three points as the basis for its application for reconsideration. These points are found in the reconsideration application dated January 20, 1999. We quote:

> "1. The Adjudicator erred in failing to consider the argument that the employee's decision to move from Fort Nelson could, in light of the surrounding circumstance, have constituted a voluntary termination of employment. In failing to consider this issue, the adjudicator also failed to

consider relevant evidence and to make critical findings of fact and credibility.

2. The Adjudicator erred in law in concluding that:

    a) statements evincing Ms. Carter's subjective intentions were not relevant on the basis that express words of termination are necessary to effect a voluntary termination; and

    b) in the circumstances, the employee could retain a unilateral option to return to her employment as (sic) some point in the future.

3. New evidence is now available establishing conclusively that Ms. Carter had no intention of returning to her employment at CCMC."

The employer argues on reconsideration, as it did before the original panel and the Director's Delegate, that the complainant intended to and did leave Fort Nelson permanently and as a result voluntarily terminated her employment. That position the employer argues is confirmed in the May 23, 1997 letter from Mr. Gilgan to the complainant. The employer argues that the viva voce evidence at the appeal hearing also supported that conclusion.

The employer argues that an employee can effect termination of employment by means other than express words of termination. The employer states that the original panel failed to consider this argument and had dismissed relevant evidence that the complainant had no intention of returning to her position at CCMC. The employer argues that since an employee who has voluntarily terminated his or her employment is not entitled to severance pay the employer should be relieved of this liability.

In support of its argument that an employee's actions, without express words of resignation, may constitute a termination of an employment relationship the employer relies on Re: *Harron* [1997] BC EST #D402/97; Re: *Chang* [1997] BC EST #D244/97; Re: *Clough* [1996] BC EST #D218/96; Re: *Laguna Woodcraft (Canada) Ltd.* [1997] BC EST #D395/97.

The employer argues that the complainant terminated the employment relationship by permanently moving from the community in which the work place was situated. The employer argues that this argument was not given due consideration in the Determination and was not addressed in the original decision. The employer argues that the original panel did not even consider the possibility that an employee could terminate a work relationship by means other than a formal notice and that reconsideration is warranted on the basis that the employer was denied a fair hearing by the original panel's failure to consider a primary issue on appeal.

The employer argues, secondly, that the original panel committed errors of law. The employer argues that even though the original panel recognized that the test of a voluntary termination contained both a subjective and objective element the original panel nonetheless erred in its findings on both elements. The employer argues that the original panel failed to address the primary issue which it views as Ms. Carter's subjective intentions. The employer argues that the original panel considered a question of whether the complainant's statements were sufficient to

effect a termination rather than questioning whether the statements were evidence of an intention to do so by removing herself permanently from Fort Nelson. The employer argues that the original panel made no findings concerning the complainant's subjective intentions and that constitutes an error of law.

The employer further argues that the original panel incorrectly concluded that the statements were not relevant evidence under the objective branch of the test. The employer refers to that passage in the original decision where the original panel found that the statements were made outside of the work place, to people to whom the complainant had socialized with before and who had no authority over her at work and, finally, in circumstances where the complainant could legitimately exercise an option to return or not if she so desired at a later time.

With respect to the argument that the statements were made outside of the work place to people with whom she had socialized before and whom had no authority over her at work the employer argues that there is no requirement such statements evincing termination be made in the work place or to a person in position of authority. The employer refers to *Wille Dodge Chrysler Ltd.* BC EST #D271/98 as authority for this proposition. The employer argues that in Re: *Kearns* [1996] BC EST #D200/96 statements made to co-workers of an intention to quit were sufficient to fulfill the subjective element of the test. The employer goes on to argue that it is implicit that the original panel based its decision on an incorrect assumption that voluntary termination of employment cannot occur without express words of resignation. Thus, argues the employer, the original panel committed an error of law.

The employer further argues that the original panel's conclusion that the complainant retained a unilateral option to return to work at some point regardless of the statements that she had made is not supportable at law. The employer argues that the subjective intention to quit and the objective act of leaving Fort Nelson, when combined, constitute a voluntary termination of the employment relationship. The employer argues that before reaching the conclusion that an employee retains an option to return even after an employment relationship is severed the original panel was required to first make a finding concerning the complainant's intention on leaving Fort Nelson which, it is argued, the original panel did not do.

In essence the employer argues that the original panel was obliged to make a finding of fact on whether it was Ms. Carter's intention to leave Fort Nelson on a permanent basis. The employer argues that the original panel disregarded relevant evidence of subjective intentions and that the original panel failed to resolve conflicts in the evidence. Consequently the employer argues that it was deprived ". . . of a full and fair opportunity to have its case heard."

In addressing the objective element of the test the employer argues that the test requires a consideration of whether a reasonable person, in all of the circumstances, could draw the conclusion that an employee's actions were inconsistent with continued employment. The employer then argues that an employee who moves from a community in which her employment is situated with no intention to return has acted in manner inconsistent with that continued employment. In other words, the removal of oneself from the community where employment is located on a permanent basis fulfills the subjective element.

The employer repeats its argument that departing from Fort Nelson satisfies the objective element of the test. The employer argues that the complainant made no effort to clarify her employment status until after she was advised by a co-worker that the plant was closing. The employer further argues that before reaching a conclusion that the complainant had retained an option to return to employment the adjudicator was required to make a finding concerning whether the complainant had intended to leave Fort Nelson permanently. The employer relies on Re: *Felman* [1997] BC EST #D268/97; *Jokic v. Larry Summers Ltd.* (1995), 13 C.C.E.L. (2nd) 256 (Ont. Gen. Div.); *Mehmcke v. Penetang Bottling Co.* (1992), 41 C.C.E.L. 251 (Ont. Gen. Div.); *Strizel v. Anglo-Canadian Shipping Co.* (1995), 11 C.C.E.L. (2nd) 175 (Blaxland) to support its argument that the employer was justified in treating the employment relationship at an end in view of the actions taken by the employees in the above-noted cases.

Finally, the employer submits with its reconsideration application an Affidavit sworn December 24, 1998 by Garry Verigin. This Affidavit was sworn after Mr. Verigin and the complainant had terminated their cohabitation arrangement. In essence Mr. Verigin depones that he and the complainant had no intention of returning to Fort Nelson or to employment at the Canadian Chopstick Manufacturing Co. Ltd.

The employer also submits the Affidavit of Mrs. Dorthory Verigin, Garry Verigin's mother, who depones that Mr. Verigin and the complainant indicated that they would be leaving Fort Nelson and settling in Wasa, B.C. on a permanent basis.

The employer argues that Mr. Verigin's Affidavit does not contradict his earlier testimony but rather is a clarification of evidence given by him at the hearing. The employer states that at the time of the hearing it was not aware of Mrs. Verigin's information and argues that therefore her evidence was not previously available to the employer.

The employer argues that the original panel failed to consider evidence given by its witnesses that the complainant intended to leave her position at Canadian Chopstick Manufacturing Co. Ltd. The employer argues that this "new" evidence demonstrates more fully that the complainant had an intention to leave on a permanent basis. The employer argues that the evidence impugns the complainant's credibility who the employer argues denied much of the evidence concerning her intention to quit at the hearing. The employer argues that this new evidence, had it been presented at the hearing, would likely have convinced the adjudicator that the complainant intended to and did terminate employment when she moved from Fort Nelson.

## RECONSIDERATION ANALYSIS

Section 116 of the *Act* contains the statutory authority for the Employment Standards Tribunal to reconsider its own decisions. The section reads:

> ***Reconsideration of orders and decisions***
>
> ***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.*

The power to reconsider its decisions is a discretionary power which the tribunal uses sparingly. Section 116 is not an avenue for parties to rehash evidence or repeat arguments that were made before an original panel.

The leading case on the use of the discretionary power in Section 116 is *Zoltan Kiss* (BC EST #D122/96; Reconsideration of BC EST #D091/96).

In *Zoltan Kiss* the Tribunal set out some typical grounds that the Tribunal may use as a guide to reconsider an order or decision. Those grounds were stated as (1) a failure by the Adjudicator to comply with the principles of natural justice; (2) there is a mistake in stating the facts; (3) a failure to be consistent with other decisions which are not distinguishable on the facts; (4) some significant and serious new evidence has become available that would have lead the Adjudicator to a different decision; (5) some serious mistake in applying the law; (6) some misunderstandings of a failure to deal with a significant issue in the appeal; and finally (7) some clerical error exists in the decision. That list is not viewed as exhaustive of the possible grounds for reconsidering a decision or order.

The Tribunal went on to set out important reasons why its statutory power to reconsider orders and decisions should be exercised with great caution. Some of those reasons are:

> Section 2(d) of the Act established one of the purposes of the Act as providing fair and efficient procedures for resolving disputes over the application and interpretation of the Act. Employers and employees should expect that, under normal circumstances, one hearing by the Tribunal will resolve their dispute finally and conclusive. If it were otherwise it would be neither fair nor efficient.
>
> Section 115 of the Act establishes the Tribunal's authority to consider an appeal and limits the Tribunal to confirming, varying or canceling the determination under appeal or referring the matter back to the Director of Employment Standards (presumably, for further investigation or other action). These limited options (confirm vary or cancel a determination) imply a degree of finality to Tribunal decisions or orders which is desirable. 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 reason.

> It would be both unfair and inefficient if the Tribunal were to allow, in effect, two hearings of each appeal where the appeal hearing becomes nothing more than a discovery process for a reconsideration application.
>
> In his report, Rights & Responsibilities in a Changing Workplace, Professor Mark Thompson offers the following observation at pate 134 as one reason for recommending the establishment of Tribunal:
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> > The advice the commission received from members of the community familiar with appeals system, the staff of the Minister and the Attorney General was almost unanimous. An appeals system should be relatively informal with the minimum possible reliance on lawyers. Cases should be decided quickly at the lowest possible costs to the parties and the Ministry. The process should not only be consistent with principles of natural justice, but be seen to meet those standards.
>
> Professor Thompson also noted that the appeal process should not be protracted because many claimants (employees) ". . . need the monies in dispute quickly to meet their basic needs." (See *Zoltan Kiss*, supra)

In Re: *Allard* [1997] BC EST #D265/97 the Tribunal stated:

> "It is the policy of the Tribunal that the power to reconsider orders and decisions under Section 116 is a power that should be exercised with caution and should only succeed where there has been a demonstrable breach of the rules of natural justice, or a fundamental error in law or where compelling new evidence is available. This policy has been established in order to provide a fair and efficient process where one hearing will provide a means of final and conclusive resolution of a dispute. The purpose is to allow cases to be resolved quickly, efficiently and inexpensively and it is contrary to the spirit and intent of the act to allow a re-hearing where a submission is based on a re-hash of evidence and argument before the original panel. Indeed it has been stated that reconsideration should be used sparingly and only in exceptional cases. (See *World Project Management Inc. et al* BC EST #D134/97)"

As stated previously the original panel held a hearing into this matter on February 17, 1998 in Nelson, British Columbia. The principle witnesses testified at that time. The original panel heard that testimony and recorded it in some detail in the original decision. More importantly the original panel had the benefit both hearing the evidence and observing the witnesses. As stated on page 8 of this award we are of the view that the original panel preferred the evidence of those who testified for the complainant over the evidence of those who testified for the employer. As a reconsideration panel we are not prepared to disturb what we view as findings of credibility made by the adjudicator after assessing the evidence and the witnesses at the original hearing.

We turn now to the employer's first grounds for reconsideration. The employer argues that the adjudicator erred by failing to consider that the complainant's decision to relocate from Fort

Nelson constituted, in view of the totality facts and circumstances, a voluntary termination of employment. The employer also argues that the original panel failed to consider relevant evidence and make critical findings of fact and credibility.

We cannot agree with the employer's argument. We turn to the original panel's outline of evidence given by Mr. Gilgan at the appeal hearing of this matter. At page four of its decision the original panel set out points in Mr. Gilgan's testimony:

- Ms. Carter had attempted a graduated return to work.
- After not succeeding she voiced her concern to him about not being able to continue with her duties
- He asked her to call him on the Thursday but never heard from her.
- He spoke to Frank Senko and was told that they were not coming back.
- He spoke to Jirina Senko who also said they were not coming back.
- He told Ms. Carter on May 5 or 6 that she was not an employee and followed up with a letter May 23, 1997
- While he (Mr. Gilgan) was at a restaurant on March 18, 1997 with Paul Tanaka, a contractor to CCMC, he was addressed by Ms. Carter and Mr. Verignan (sic) from a nearby table. At this time asked (sic) Ms. Carter if she was moving and she replied "certainly". He asked if that meant she was not returning to CCMC and she replied "not likely" in a very sarcastic tone.

The May 23, 1997 letter was entered as evidence and clearly states the employer's position.

The original panel also outlined the evidence given by Jirina Senko at that hearing. In particular the original panel stated that evidence in this manner:

> ". . .[S]he attended the Coach House Restaurant with them on March 20, 1997 and claims that in reply to her question of whether they would be returning they said "no". They also discussed Ms. Carter's attendance at the Victoria Pain Clinic and Mr. Verignan (sic) working in Nanaimo or Parksville. She testified that she spoke with Ms. Carter again in late April when Ms. Carter phoned and asked what she could do to get severance. Mrs. Senko said that her response to Ms. Carter was "you said you were not coming back"; to which Ms. Carter stated she had not signed anything."

The original panel also reviewed Ms. Carter's evidence. It noted that she denied that she was at the restaurant on March 18, 1997 and that she submitted that there had been no conversations between her and Mr. Gilgan where she said she would not return to her employment. The original panel noted that Ms. Carter also gave evidence about the March 20, 1997 dinner at the Coach House Restaurant and stated that at no time during the dinner did either she or Mr. Verigin mention that they would not return nor that she quit. The original panel also notes that Ms.

Carter denies saying during her attempted return to work that she would never be able to do her job. The panel noted that she said that she was confused about why the pain continued and "couldn't give 100 per cent" to her job.

The original decision states that Ms. Carter testified that Mr. Verigin needed to find other employment near the pain clinic since the cost would not be covered under her medical plan. The original panel also noted that Ms. Carter submitted that the taking of the medical leave was the only thing that made sense at the time. She testified that she would not be able to attend the pain clinic without Mr. Verigin working as there would be up to a three month waiting period after the assessment before the clinic was done. She also testified she would not be able to fly back and forth to the clinic and there was no way that she would leave her nine year old daughter in Fort Nelson. Mr. Verigin's parents had offered to care for the daughter at their home in Wasa, B.C. where the complainant intended to enroll her daughter for the remaining months of the school year.

We disagree with the employer's first argument. We find that the adjudicator considered the evidence before her and made findings of fact based on the credibility of the witnesses and the probabilities of the circumstances. The employer has a fundamental disagreement with the findings of fact made by the original panel. That is not a basis for reconsideration. A reading of the original decision indicates that the original panel considered the evidence surrounding the complainant's move from Fort Nelson and came to the conclusion that the move was motivated by a desire to seek medical attention that had been recommended by her attending physician in Fort Nelson. The original panel had the opportunity to assess the witnesses and in so doing believed the complainant's testimony that she did not intend to quit. At the top of page 11 of the original decision the original panel stated:

> "I find that Ms. Carter's actions were entirely consistent with her genuine pursuit of medical assistance for her disability."

We find that the original panel did consider the evidence that was before it, made critical findings of fact based on that evidence and the assessment of the credibility of the witnesses and in so doing came to the conclusion that the move from Fort Nelson was made to pursue medical attention rather than terminate employment. We do not agree that the original panel failed to consider a significant issue on appeal. The original panel considered the employer's evidence and its argument that that evidence should be viewed as the employee removing herself permanently from Fort Nelson which would equate to an intention not to return to employment. That argument was rejected in favour of the conclusion that the she left Fort Nelson to pursue medical treatment. It must be kept in mind that at the time she left Fort Nelson which was March 23, 1997 she was on long term disability benefits and the plant was still running.

The employer argues that an employee's actions even if the employee does not utter expressed words of resignation could constitute a quit. The employer refers to Re: *Harron*, supra, Re: *Chang*, supra, Re: *Clough*, supra, and Re: *Laguna Woodcraft (Canada) Ltd.*, supra. Those cases are distinguishable on the basis that work was available for the employee but the employee chose not to report. Therein lies the fundamental distinction with the facts in Ms. Carter's case. Ms. Carter did not face the choice of whether to return to work because the plant closed before she was put to making that hard decision. In other words in each of the cases cited by the employer

the employee was actively at work when the employee made the choice not to return or report for the next available shift.

As a further grounds for reconsideration the employer argues that the original panel did not address the primary issue which was the subjective element of Ms. Carter's intentions. The employer argues that the original panel erred by asking itself whether the complainant's statements were sufficient to effect a termination rather than whether the statements were evidence of subjective intention by removing herself permanently from Fort Nelson. The employer argues that the original panel erred when it considered that statements made by Ms. Carter were not relevant because they were made outside the work place, to people to whom she socialized with before, who had no authority over her at work and in circumstances where she could legitimately exercise the option to return or not if she desired at a later time.

We disagree with the employer's characterization of evidence. A reading of the original decision indicates that the original panel did not accept that those statements were made in the context in which the employer characterizes that they were made. Furthermore, the original panel indicated that even if the statements were made Mr. Gilgan did not accept them at the time as constituting a termination. At page 11 the original panel stated:

> "I find from this testimony that whatever he claimed he was told by Ms. Carter at P & J's restaurant on March 18, 1997 he clearly did not consider it to have constituted termination. He also testified that normally the termination would have come through his office and through Mr. Bamford, her supervisor."

It is clear from a reading of the original decision at the bottom of page 9 and over to the bottom of page 10 that the original panel correctly placed the onus on the employer, as appellant, to demonstrate that there was an error in the Determination or some other basis for the Tribunal to vary the finding of the Director's Delegate that the complainant on April 1, 1997 was an employee. At the bottom of page 10 the original panel stated that it found that the employer as appellant had not advanced "clear and unequivocal" evidence to support the conclusion that Ms. Carter voluntarily exercised her right to terminate her employment.

In the following analysis of the facts and the law it is clear that the original panel did not accept that the move from Fort Nelson was a permanent move which was inconsistent with continued employment. To support its contention that the original panel erred by not making a finding concerning whether or not the complainant intended to leave Fort Nelson permanently the employer referred to four cases. In Re: *Felman* an employee conveyed to her employer through a third party that she would not be returning to work at the end of a six week leave of absence. The employee did not seek authorization to extend the leave. In *Mehmcke v. Penetang Bottling Co.*, supra, the employee requested a one week vacation to travel to Germany. The employer had denied the request on the basis the employee could not be spared and that the employee had already had lengthy absences from work. Regardless, the employee left for the trip to Germany. In both of the above cases the employer was entitled to treat the employment relationship at an end. However, both of those cases can be distinguished on the basis that work was available and the employee chose not to make him or herself available for it. In the one case the employee did not return from the leave and in the other case the employee chose to travel to Germany. That is much different from our case where the complainant remained on long term disability leave.

The employer also argues that *Strizel v. Anglo-Canadian Shipping Co.*, supra, and *Jokic v. Larry Summers Ltd.*, supra, support the proposition that employees do not hold a unilateral option to return to work but rather that an employer may consider an employment relationship terminated when an employee fails to provide medical reports, progress on medical status or an expected return date.

*Strizel v. Anglo-Canadian Shipping Co.*, supra illustrates our point. In that case an employee cleaned out her desk, altered her resume on the office computer from "is employed" to "was employed" and left on the vice-president's desk a doctor's note recommending medical leave of absence along with her keys and her petty cash flow. However, it was found that those actions did not constitute the resignation. Rather the resignation, or the objective evidence of subjective intent to terminate the employment, was found in the employee's failure to respond to the employer's repeated attempts to garner further information from the employee and an indication of a return date.

That is not the case with Ms. Carter. She kept her employer fully informed of her medical status and the fact that she was leaving Fort Nelson to seek medical attention. At the time that she left Fort Nelson, and the approximately one week later when the plant closed, the complainant was on long term disability leave. We do not find the above cases help the employer's argument.

In our view this illustrates the point that the objective element of the test for a voluntary termination may take some time to fulfill. Ms. Carter did not have to make a decision to terminate employment because she was not put to the choice of returning or quitting. We do not see this as a question of whether a reasonable person would view the move from Fort Nelson as a "quit" but rather view the matter as the original panel did - a pursuit of medical attention. The complainant simply was never put, due to the circumstances of the closure, to having to answer the question whether she would or could report for duty.

Thirdly, the employer argues that new evidence is available. The new evidence is in the form of Affidavit's sworn by Garry Verigin and his mother, Dorothy Verigin. Mr. Verigin depones that he and Ms. Carter had no intention of returning to Fort Nelson. Dorothy Verigin depones that her son and the complainant indicated that they would be leaving Fort Nelson and settling in Wasa, B.C. on a permanent basis.

In order for new evidence to be considered on appeal or reconsideration it has to be evidence that was not reasonably available previously and evidence that, had it been adduced, would likely have lead an adjudicator to a different conclusion. We do not agree that the Affidavits filed on reconsideration constitute new evidence. It is the same evidence that was lead at the hearing to support the employer's case; that is, it was evidence of the complainant's move from Fort Nelson which the employer argued was a permanent move.

Mr. Verigin testified at that hearing. He was available to the employer on cross-examination. This evidence was available at that time and could have been elicited through cross-examination. The affidavit evidence is inconsistent with the evidence at the hearing. At the hearing Mr. Verigin supported the complainant's evidence that the move from Fort Nelson was made to seek medical attention. He cannot now be allowed, in affidavit form, to contradict that evidence by declaring that the move was permanent.

With respect to the evidence of Dorothy Verigin we are not prepared to find that it constitutes new evidence. Rather it is the same evidence being given by a different person. Neither Mrs. Verigin's evidence nor that of her son Garry is the type of evidence that we feel would have caused the original panel to draw a different conclusion.

In our view it appears that the purpose of submitting the affidavits of Garry Verigin and Dorothy Verigin was to challenge the truthfulness of the complainant's evidence. The appellants attempt to accomplish this by attacking the credibility of the complainant through the affidavit evidence. However, as mentioned previously, the original panel had the opportunity to view the witnesses and assess their testimony against the totality of the circumstances of the case. The appellant now attempts an ex-post facto attack on that finding. The onus rests on the appellant. The appellant must show that the process was tainted to such a degree that allowing the Determination to stand would be an affront to fundamental principles of a fair hearing. We do not see in this case where there is conspicuous evidence that would lead us to conclude that the whole process before the original panel was tainted. We do not see where the affidavit material provides consistent and conclusive evidence to overturn the original panel's findings.

The reconsideration power under Section 116 of the *Act* is one that is used sparingly. The reconsideration provision is not an avenue for parties to rehash the evidence that was given to the delegate during the investigation stage or to an appeal panel under a Section 112 hearing. Upon reading the original decision we do not see where there has been a failure to comply with the rules of natural justice; or that the original decision contained a mistake of fact; or that the Affidavit evidence of Garry Verigin or Dorothy Verigin was not reasonably available at the time of the original hearing; or that the original decision contained an error of law or inconsistency with other tribunal decisions. The reconsideration provision is not an unfettered opportunity for a party to reargue the case. (See Re: *Robert* [1996] BC EST #D217/96)

For the above reasons the application for reconsideration is dismissed.

**ORDER**

The original decision dated August 25, 1998 and cited as BC EST #D369/98 is confirmed with interest to be calculated to date.

| *E. Casey McCabe* | *David B. Stevenson* | *Fern Jeffries* |
|---|---|---|
| **E. Casey McCabe**<br>**Panel Chair**<br>**Employment Standards Tribunal** | **David B. Stevenson**<br>**Adjudicator**<br>**Employment Standards Tribunal** | **Fern Jeffries**<br>**Tribunal Chair**<br>**Employment Standards Tribunal** |