BC EST #D478/97
Reconsideration of BC EST #D186/97

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 -

323573 BC Ltd. Operating as
Saltair Neighbourhood Pub
("Saltair Pub")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Lorna Pawluk

FILE NO.: 97/535

DATE OF DECISION: February 19, 1998

BC EST #D478/97
Reconsideration of BC EST #D186/97

DECISION

OVERVIEW

This is an application for reconsideration under Section 116 of the *Employment Standards Act*, R.S.B.C. 1996, c. 113 of Decision BC EST #D186/97 issued by the Employment Standards Tribunal on May 12, 1997. That Decision confirmed a Determination which was issued by the Director of Employment Standards on December 31, 1996. The adjudicator concluded that Sheila Ferguson ("Ferguson") had been hired as a cook at a rate of $13.00 per hour plus her share of the tip pool .

Saltair applies for reconsideration on the grounds that the adjudicator misconstrued the facts before her.

Ferguson appears to take issue with Saltair's ability to be represented by counsel. (See August 4, 1997 submissions). She also suggests that the reconsideration application is a "ploy". I agree with Mr. Garner that Saltair is entitled to bring this reconsideration application under the *Act*, with or without representation by legal counsel.

ISSUE TO BE DECIDED

Are there grounds to reconsider Decision BC EST #D186/97 ?

FACTS

The facts in this case may be set out quite briefly. Ferguson was offered employment as a cook with the Saltair Pub, by manager Vern Byers ("Byers"). Subsequently a dispute arose as to the wage rate: whereas Ferguson understood the hourly wage rate to be $13.00 plus a share of the tip pool, her first paycheque was based on an hourly rate of $9.50. Saltair maintains that Ferguson agreed to be employed at a rate of $9.50 per hour plus gratuities or tips which would increase the hourly rate to $14-$15. However, the Director's delegate reasoned that since Ferguson had been receiving $10.50 per hour at employment which she quit to take the Saltair position, it would not be logical for her to have accepted the position at the wage rate as submitted by Saltair. The adjudicator in Decision BC EST #D186/97 agreed with this reasoning and confirmed the Determination which ordered Saltair to pay Ferguson $2,731.46 plus interest. This sum included unpaid wages, compensation for misrepresentation of the position and relocation expenses.

ANALYSIS

The sections in the *Act* which apply in this case are Sections 8, 79(3) and (4):

> 8. An employer must not induce, influence or persuade a person to become an employee, or to work or to be available for work, by misrepresenting any of the following:
>
> (a) the availability of a position;
> (b) the type of work;
> (c) the wages
> (d) the conditions of employment.

Remedies for breach of section 8 are available under section 79:

> 79(3) If satisfied that a person has contravened a requirement of this Act or the regulations, the director may do one or more of the following:
>
> (a) require the person to comply with the requirement;
> (b) require the person to remedy or cease doing an act;
> (c) impose a penalty on the person under section 98.
>
> (4) In addition, if satisfied that an employer has contravened a requirement of section 8 or Part 6, the director may require the employer to do one or more of the following:
>
> (a) hire the person and pay the person wages lost because of the contravention;
> (b) reinstate a person in employment and pay the person any wages lost because of the contravention;
> (c) pay a person compensation instead of reinstating the person in employment;
> (d) pay an employee or other person reasonable and actual out of pocket expenses incurred by him or her because of the contravention.

The Determination found Saltair liable under section 8 and ordered compensation under section 79(4). This was upheld by Decision #D186/97 which is being reconsidered here under section 116 of the *Act*.

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 refer the matter back to the original panel.

(3) An application may be made only once with respect to the same order or decision.

Reconsideration is not an opportunity to rehear the evidence or redetermine the matter afresh, but rather a more limited reconsideration of the earlier decision. The typical grounds by the Tribunal ought to reconsider an order or decision were outlined in *Zoltan T. Kiss* BC EST D122/96:

- failure by the Adjudicator to comply with the principles of natural justice;
- there is some mistake in stating the facts
- failure to be consistent with other decisions which are not distinguishable on the facts
- some significant and serious new evidence has become available that would have led the Adjudicator to a different decision
- a serious mistake in applying the law
- some misunderstandings of or a failure to deal with a significant issue in the appeal
- some clerical error exists in the decision

This power should be exercised with caution and is not an opportunity to reweigh the evidence. As the submissions filed on behalf of Saltair fail to establish the grounds listed above, this application fails. The arguments are dealt with in turn.

Mr. Byers submitted a letter dated June 12, 1997 from Mr. McIver which stated:

> The determination of the Director of Employment Standards dated December 31, 1996, makes absolutely no sense to me. Ms Lyle has apparently made her decision on the basis of a contravention by Saltair Pub of Sections 8(a) and 66 of the *Employment Standards Act*. In my opinion, those sections have absolutely no application to the within situation.
>
> It would appear to the writer from a review of the *Employment Standards Act* and the applicable facts that, if anything, the Saltair Pub has contravened Section 57(c) of Part 8 of the *Employment Standards Act*. The remedies available as a result of such a contravention are pursuant to Section 59 of the *Employment Standards Act*.
>
> The decision of the Employment Standards Tribunal, once again, appears to make no sense. Further, it does not appear that procedural fairness operated at the Tribunal level.
>
> It would appear that the Tribunal and the earlier decisions by the Employment Standards Branch were reached in a high-handed and capricious manner.

Specifics of the behavior were not set forth so that it is not possible to deal with them here. However, I note that the *Employment Standards Act*, R.S.B.C. 1996, c. 113, which governs the complaint, previous Tribunal proceedings and these proceedings does not contain a section 57(c); moreover, section 57 in this statute falls not in Part 8 but rather Part 7. Section 57 of this *Act* deals with annual vacation entitlement and section 59 is not a remedy section, but rather places certain restrictions on an employer's right to limit annual vacation time. There is reason to believe that this opinion letter is based on the wrong legislation, most probably the former *Employment Standards Act* which is no longer in force and has been replaced as of December 1, 1995 by the current act. For example, the old act has a section 57(c) which falls under Part

8, and section 59 outlines the remedies for various contraventions.

In submissions prepared by Mr. Garner on behalf of Saltair, it was argued that since the *Income Tax Act* defines income to include wages, salaries and gratuities

> . . . it is perfectly reasonably (sic) for Mr. Byers to have told Ms Ferguson that he would pay her $9.50 per hour but that her total income would probably amount to $14.00 to $15.00 once she included her share of the tip pool in her income, which of course she is required to do by law.

Ferguson said that when she met with Byers, she was told that the wages would amount to something between $13 and $15. Byers denies this. In a written submission, Byers said that Ferguson contradicted herself as she asked for $14.00 per hour but says she was offered $13-15 per hour. Mr. Garner argues that Byers' version of events is more consistent with the evidence than that of Ferguson and that the failure to recognize this is a patently unreasonable finding.

In a submission dated December 15, 1997, Mr. Garner repeated that Mr. DeAmicis applied for and was hired for the same type of work that Ms Ferguson was doing. Included in the submission was a copy of an undated letter offering DeAmicis employment at $9.50 per hour. Mr. Garner also offered new evidence, including payroll information to demonstrate that no staff member makes over $10.00 per hour at the Pub; further unsworn and written testimony by Mr. Byers; and letters from current employees stating that their offers of employment had not been misrepresented. Mr. Garner also noted:

> Also, the Employment Standards Act provides Ms Lyle with rather liberal powers to enter Employers' premises and inspect Employers' documents. These powers couples with her duty to investigate complaints leaves one wondering why she did not simply ask to see these records.

With respect to these comments, Ms Lyle responds with several points. First, the fact that another employee was offered employment at $9.00 per hour is not helpful to Saltair's case as "there are many reasons for different rates of pay being offered to different employees". Second, she indicated that payroll records had not been presented in her investigation or to the adjudicator so that they should not be admitted now. She makes a similar criticism of letters from current employees stating that their employment offers had not been misrepresented. She also argues that as Mr. Byers had not previously questioned the amounts itemized on the Determination, he should not now be permitted to take issue with them for a first time.

I find that the evidence supports the conclusion of both the Director's delegate in the original Determination and by the adjudicator in the subsequent Tribunal decision. The arguments referred to above and made by Mr. Garner asks this panel to reweigh the evidence and to substitute a new decision for that of the original decision maker. This is outside the scope of the reconsideration powers as conferred by section 116. Much of Mr. Garner's argument takes issue with Ferguson's credibility and integrity. As this is not a rehearing of either the original Determination or the earlier Decision, it would not be appropriate to interfere with findings about credibility. I would also point out that it is difficult to understand why Ferguson would have accepted a job which paid less than her previous job. The adjudicator heard the evidence and confirmed the job offer was made for work at $14.00 per hour and I find no reason to interfere with that conclusion.

Mr. Garner argued that the presence of the Director's delegate at the oral hearing before the adjudicator results in "a definite appearance of bias" and that this is an "obvious violation of Administrative Law". He also argues that the adjudicator failed to weigh the evidence "fairly" and ruled much of the evidence offered by Byers "inadmissible, not relevant or unhelpful". In a submission dated December 15, 1997, Mr. Garner stated:

> . . . we re-state our strenuous objection to Ms Lyle's involvement in this reconsideration. Her input, even with respect to the most trivial of matters, is a blatant and repugnant violation of the principles of fundamental justice. Ms Lyle's involvement as an "interested party" creates an unbearable apprehension of bias, given that it is her original Determination that is ultimately under review. In administrative law terms, justice must not only be done, but it must appear to be done. In this case, Ms Lyle's involvement in the reconsideration of her original Determination makes it impossible for justice to be done, given her obvious self-interested bias towards upholding her original Determination.

Despite the strong tone of Mr. Garner's objections, he cites no case law in support of his objection. He does not identify the nature of the "blatant and repugnant violation of the principles of fundamental justice" and does not explain what is meant by "unbearable apprehension of bias". Thus, nothing in the submissions convinces me that Ms Lyle's involvement breached of the rules of nature justice, nor does it raise an apprehension of bias, the test for bias in administrative law. Moreover, I note that the Director's participation in Tribunal proceedings was considered in *BWI Business World Incorporation, B.C.E.S.T. No. D050/96*. That decision set out the guidelines for the Director's participation and while they were developed in the context of a section 112 appeal, they apply with equal validity to section 116 applications:

> (1) The Director is not the statutory agent for the employee(s) named in the determination.
>
> (2) The Director is entitled to attend, give evidence, cross-examine witness and make submissions at the appeal hearing.
>
> (3) The Director's attendance and participation at the appeal hearing must be confined, however, to giving evidence and calling and cross-examining witnesses with a view to explaining the underlying basis for the

determination and to show that the determination was arrived at after a full and fair consideration of the evidence and submissions of both the employer and the employee(s).

(4) The Director must appreciate that there is a fine line between explaining the basis for the determination and advocating in favour of a party, particularly when one party seeks to uphold the determination.

(5) It will fall to the Employment Standards Tribunal adjudicator in each case, given the particular issues at hand, to ensure that the line between explaining the determination and advocating on behalf of one or other of the parties is not crossed.

(6) It will also fall to the adjudicator to ensure that all relevant evidence is placed before the Tribunal for consideration.

Finally, I cannot identify a breach of any of these principles by Ms Lyle's participation in this reconsideration application.

In the initial submissions in this appeal, Mr. Garner reserved the right to comment on the question of quantum and how much Ferguson was owed if Saltair was found liable. He was contacted by Tribunal personnel and asked if he wished to comment on this issue. However his subsequent submission does not deal with this question and thus it is presumed that the quantum is no longer at issue.

ORDER

Pursuant to section 116 of the *Act*, I confirm Decision BC EST #D186/97.

Lorna Pawluk
Adjudicator
Employment Standards Tribunal