BC EST #D485/00
Reconsideration of BC EST #D348/00

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 -

Jerzy Rudowski
("Rudowski" or "employee")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Paul E. Love

FILE No: 2000/624

DATE OF DECISION: November 9, 2000

DECISION

OVERVIEW

This is an application, by the employee, for reconsideration of a Decision dated August 30, 2000. The employee alleges that the Adjudicator erred in excusing witnesses before the appellant completed cross-examination, failing to permit him an opportunity to make submissions at a hearing, and that the Adjudicator erred in failing to consider a written submission made by him in writing 3 days after the close of the hearing. The employee further alleges that the Adjudicator erred in upholding the decision of the Delegate that the employer had not misrepresented the position of relief truck driver to the employee.

In this case the Adjudicator conducted an informal hearing, and while he did not distinguish clearly between the evidence and submission phase of the hearing, he did give the parties an opportunity to adduce evidence, question the opposing party, and tell him what he ought to find, and therefore there was no breach of the principles of natural justice. While the Adjudicator did not consider a written submission sent to the Tribunal by the employee following the close of evidence it is clear that the Adjudicator exercised his discretion judicially, and in any event the submission tendered did not change the flavour of the evidence tendered by the employee at the hearing. On the issue of whether the Tribunal erred in determining whether the employer misrepresented the position offered, it is clear that the Adjudicator's finding rested on the assessment of the credibility of witnesses, and therefore the employee did not demonstrate any error in the Decision.

ISSUES TO BE DECIDED

Does this case met the threshold for consideration of the merits of the arguments advanced?

1. Did the Adjudicator commit an error in natural justice by:

   (a) excusing witnesses before the appellant was finished cross-examination;

   (b) failing to provide the parties with an opportunity to make submissions;

   (c) failing to review a final written closing argument provided by the appellant after the hearing was closed, and adjourned for the writing of the appeal decision.

2. Did the Adjudicator err in finding that the employer did not misrepresent the position to the employee pursuant to section 8 of the *Act*?

FACTS

Mr. Rudowski was hired by Timote's Trucking Ltd. ("Timote") to drive a truck owned by the company as a relief driver, while Mr. Tukuatu, the principle of the company, was on vacation. Mr. Rudowski was hired for the vacation period January 28, 2000 to February 28, 2000. In order to take up employment with Timote, Mr. Rudowski quit a job at Power Enterprises which paid him $750.00 per week and involved long distance hauling in British Columbia, Oregon and Washington.

Timote's Trucking Ltd. provided trucking services as an owner/operator to R &G Trucking Ltd ("R &G"), under a collective agreement between R & G and International Brotherhood of Teamsters, Local Union No 31. ("Teamsters"). This work involved delivering containers for CP Rail. The work is assigned to a particular driver based on the availability of work from CP Rail, and in accordance with a call out based on seniority. In the winter months, due to poor weather and snow conditions, rail transport can be delayed with the result that there is little or no work for the truckers.

The amount of work turned out to be less than what Mr. Rudowski hoped. Mr. Rudowski claimed that he was promised full time employment. He also claims that since he was prohibited by the collective agreement from hired as an employee without being a member of the union, he was not bound by the terms of the collective agreement, particularly the seniority provisions of the collective agreement. He claims that he was entitled to work based on the seniority of the truck, rather than his seniority as a driver providing services under the collective agreement. He advanced a claim for wages based on the difference between what he would have earned if he continued working with Power, and the amount of earnings which he received from Timote.

The Adjudicator conducted a hearing in the presence of the parties, and following the conclusion of the hearing on July 38, 2000, Mr. Rudowski submitted to the Tribunal Offices on July 31, 2000 a closing argument dated July 29, 2000. The further submission consisted of 1 type written page. In the written submission, Mr. Rudowski claims that the Adjudicator did not permit him an opportunity to make a closing argument, and the submission contains a closing argument. I note in reviewing the submission, it is my view that the submission does not add to the facts and argument raised by Mr. Rudowski at the hearing, and set out in the Decision.

ANALYSIS

In a reconsideration application the burden rests with the appellant to show that the application meets the test for reconsideration.

The reconsideration power of the Tribunal is one to be exercised cautiously. This is because the purpose of the *Act* is to ensure that disputes are resolved fairly and efficiently, that a degree of finality is required, and that the appeal hearing is meant to be the primary forum where the Tribunal corrects errors made by the Delegate. The appeal hearing is not a discovery forum, and the appellant cannot re-litigate the entire appeal on reconsideration. The reconsideration process is meant to review errors that the Adjudicator made at a hearing, which make a difference to the parties, and to the public at large.

The Tribunal has, therefore developed a two stage process in considering applications for reconsideration (see *Milan Holdings Ltd., BCEST #D 313/98*). I must first determine whether the matters raised in the application warrant consideration. In particular, while the list is not exhaustive, I must consider whether there has been a failure by the Adjudicator to comply with the principles of natural justice, whether there has been a mistake of fact, whether there is inconsistency with other decisions indistinguishable on their facts, serious and significant new evidence not available at the time of the hearing, mistake in applying the law, failure to adjudicate on all grounds of appeal advanced., or a clerical error in the decision.

The second stage involves a consideration of the merits of the appeal, having first decided that there is a basis for reconsideration.

Mr. Rudowski submitted an appeal submission which does not clearly indicate the grounds on which he is seeking reconsideration, and there was no attempt in his appeal submission to link his submissions to the legal test which I must consider on reconsideration. I have, however, attempted to characterize the submission that he made in terms of the test, so that I can consider his submission.

On the first issue, I am satisfied that this is a case where I should consider the merits of the arguments advanced by Mr. Rudowski. The issues can be framed in a way, which if established go to natural justice or the fairness of the hearing, and might form a basis to set aside the decision of the Adjudicator. If the Adjudicator excused witnesses in an unfair manner before cross-examination was completed, failed to provide the parties with an opportunity to make submissions, and failed to consider a submission, when he had a duty to do so, this would be a breach of natural justice.

Having raised arguments within the scope of reconsideration, it is appropriate for me to proceed to examine those arguments.

Mr. Rudowski's arguments generally relate to the fairness of the hearing. In s. 107 of the *Act*, the Tribunal is given the power to conduct a hearing:

Subject to any rules or proceedings made under s. 109(c), the tribunal may conduct an appeal or other proceeding in the manner it considers necessary and is not required to hold an oral hearing.

The Tribunal has published with the approval of the Minister, rules that provide for the conduct of hearings as follows:

19. If an oral hearing is held, an adjudicator may conduct the hearing without complying with the formal rules of procedure and evidence applicable in courts of law.
20. All witnesses at an oral hearing shall be sworn or affirmed prior to giving evidence.
21. Nothing in these rules is intended to limit the power enjoyed by the Tribunal under the Act.
22. The Tribunal may conduct an appeal or other proceeding in the manner it considers necessary where these Rules are silent.

The Tribunal has great flexibility in the way that it conducts an appeal hearing, subject to the provision that it must accord the parties natural justice. Generally this means that the parties are entitled to an unbiased decision maker, who makes a decision based on the evidence and arguments presented by the parties, after the parties have had a right to be heard. Mr. Rudowski has raised issues of importance to his appeal, and to how the Tribunal conducts its business with the public.

Cross Examination:

Mr. Rudowski claims in his written submission on reconsideration that the Adjudicator excused all witnesses without first asking him whether he was finished with them.

The Adjudicator is charged with the duty to manage the process in the hearing. An appellant must be given an opportunity to cross-examine or question the opposing party and its witnesses. The appellant must be allowed some scope in cross-examination. Some appellants, particularly appellants unrepresented by counsel, have a misplaced sense of their own forensic abilities, and the utility of their cross-examination, and are immune to objections from the opposing party or the Adjudicator concerning their questions. Cross-examination is a process for gaining admissions from the opposing party, challenging the credibility of the opposing party, and challenging the evidence of the opposing party. The essential purpose of cross-examination is to adduce evidence which is of persuasive value. In the context of the Tribunal hearing, the ultimate task of the appellant is to show that the Delegate erred in the Determination.

If the cross-examination becomes irrelevant, prolix, insulting or vexatious, an Adjudicator may intervene and may warn the cross-examiner of the unhelpful nature of the questions being asked, and may terminate the cross-examination, and excuse the witness. This is largely a question of the discretion of the Adjudicator sitting in the hearing, and this is a discretion that was contemplated by giving the Adjudicator the power to conduct a hearing in a manner it considers necessary. It is often a delicate balance between fairness, and efficiency, and the Adjudicator should exercise any discretion to terminate cross-examination with caution: *(Schiff, Evidence in the Litigation Process, Toronto: Carswell Company Ltd, 1978, pp 197-202).*

This is a bare allegation which is not supported in the appeal submission with any examples or any information which Mr. Rudowski hoped to obtain through the cross-examination process. This is a submission which appears for the first time in this reconsideration. One would think that if this in fact occurred, Mr. Rudowski would have objected to the closure of the hearing at the hearing, and would have repeated his objection in his written submission to the Tribunal. The Adjudicator indicates in the Decision that he gave an opportunity to the parties to cross-examine the witnesses. Without further particulars adduced by the appellant, I am unable to find any support for this allegation, and this grounds for reconsideration fails.

Taping of the Hearing:

In the submission Mr. Rudowski submits:

> "Are Tribunal hearings being taped or not? WCB hearings are being taped. That relieves the adjudicators from taking notes and ensures they are scrutinized.

> Adjudicators are not above the law and some of them simply don't qualify for the job"

Hearings before the Tribunal are not taped, and it is the practice of Adjudicators to take notes. I note that there is nothing in the statute, regulations, or rules of proceeding that requires the taping of tribunal hearings. The *Act* gives the Adjudicator discretion as to how a hearing was conducted. I note that this is not a case where the appellant asked at the outset for permission to tape the proceedings or have a court reporter present to take a record of the proceedings. On occasion appellants have been given an opportunity, at their expense, to have a court reporter present to take a record (see *Docherty*, BC EST #D098/00). The appellant does not allege that he asked and was refused an opportunity to make a record of the proceedings. The fact that the Adjudicator proceeded without a taped hearing is the ordinary course of business before the Tribunal. It is not a breach of any rule of natural justice.

A Failure to Give an Opportunity to Make Submissions:

The Adjudicator conducted this hearing on an informal basis. The parties were not represented by counsel. Both parties presented the case as a package which contained submissions and evidence. It is often difficult for unrepresented parties to distinguish between evidence and argument. At the end of the case before retiring to write the decision, the Adjudicator asked if there was anything else. Mr. Rudowski availed himself of that opportunity and provided no new submissions to the Adjudicator. He did not object to the Adjudicator's closure of the hearing.

Mr. Rudowski argues that the Adjudicator failed to follow the procedure set out in a pamphlet published by the Tribunal which describes what happens at a hearing. He particularly focuses on the following paragraph of the pamphlet:

> Once the parties have presented their evidence, everyone is given an opportunity to make a final argument or a closing argument or a closing statement. This is an opportunity to review the evidence and tell the Adjudicator what he or she should decide as a result.

The pamphlet describes in plain language a usual form of hearing conducted by the Tribunal. Section 107 of the *Act* provides that the Tribunal may conduct an appeal or other proceeding in the manner it considers necessary. At the bare minimum the parties must be given an opportunity to present evidence, question the evidence of the opposing party litigant, and tell the Adjudicator what he ought to find. In my view it is preferable that the hearing be structured to clearly distinguish between the evidence phase and the argument phase of the hearing. It appears in reviewing the hearing process as set out by the Adjudicator in his decision, that there was no clear distinction made between those phases of the hearing. It also appears that the Adjudicator did give a fair opportunity to each party to present evidence, question the evidence of the opponent, and argue the case.

I note that the "form of the hearing" was the subject of an application for reconsideration in *Collectrite Services Kelowna Ltd Re Carey Meir*, BC EST 200/192, reconsideration of #D067/00 (Orr). The particular concerns were the decision of the Adjudicator to exclude witnesses from the

hearing before the witness was called to give evidence, and a three month delay in the publication of the decision to the parties. The reconsideration Adjudicator noted:

> While the issues raised by Collectrite give rise to some concern about the conduct of this hearing and the delay over the issuing of the adjudication is unusual, there is no substantial reason to conclude that the substance of the decision was affected by these matters. The application for reconsideration does not address how the merits of the issues would have been decided any differently if the hearing was conducted in any different fashion or if the decision had been rendered more promptly.

In *Biport Forest Products Ltd*, BC EST #D429/99, reconsideration of #D149/00 (Stevenson), the "form of the hearing" and the fairness of the hearing was a grounds on which reconsideration was sought. In that case the appellant alleged that the Adjudicator conducted an investigation, placed time limits on the hearing, and arrived late for the hearing.

In that case the reconsideration Adjudicator determined that the Adjudicator is entitled to control the process in his own proceeding, and that the less formal "investigatory style" adopted by the Adjudicator did not prevent the parties from receiving a full opportunity to present their case. The Adjudicator also noted that the parties had not objected to the approach of the Adjudicator at the hearing.

While the form of this hearing does not match the description set out in the appeal process pamphlet, there does not appear to have been a breach of natural justice. There is a discretion on the part of the Adjudicator to conduct a hearing in a manner that he or she considers necessary, and too formal an approach might inhibit the parties from having a fair opportunity to present and develop their case. The touchstone is whether the party received a fair opportunity to present and develop their case in terms of presenting evidence, questioning the evidence presented by the opposing party, and telling the Adjudicator what the Adjudicator ought to find. No error in the original decision has been shown by the appellant to have resulted from the hearing procedure adopted by the Adjudicator. In this case the departure from the hearing process described in the pamphlet did not by itself result in a breach of a principle of natural justice. This grounds for reconsideration fails.

Failure to Consider the Written Submission of Mr. Rudowski dated July 29, 2000:

It is apparent that the Adjudicator "closed" the hearing by advising the parties that he would be issuing a decision in writing. I note that there is no submission from Mr. Rudowski that he objected to the closing of the hearing, at the time of the hearing. Mr. Rudowski supplied a submission 3 days later, and says that there was adequate time for the Adjudicator to circulate that argument to the parties, and obtain their written submissions. He says that this is a ground why the decision should be set aside.

Decisions of the Tribunal are required to be in writing, and published to the parties (*Act*, s 111) There will often be a gap in time between the hearing and the publishing of the decision by the Tribunal. As a matter of law, once an Adjudicator has rendered a decision in writing on all the issues which were placed before the Adjudicator and that decision has been published to the

parties by the Tribunal, that Adjudicator is "*functus*" and has no power to revise a decision. The power set out in s. 107 of the *Act* to conduct a hearing "in the manner it considers necessary", also implies that prior to rendering a decision in writing the Adjudicator has the power to re-open a hearing to receive further evidence and submissions of the parties. Such a power may be important, and may forestall a reconsideration application by a party who, for example, has just received new evidence which could not have been adduced at an earlier stage, or by a party who erred in failing to make an argument or advance evidence to the Tribunal, or a party who discovered and disclosed a calculation error. In my view, given the unrepresented parties which appear before this Tribunal, and the informality of the process, and the importance of resolving cases on their merits, in a fair and expeditious manner, the decision to reopen involves the judicious exercise of a discretion.

It is apparent in this case that the Adjudicator turned his mind to whether he ought to re-open the hearing and consider the submission of Mr. Rudowski. The Adjudicator stated as follows:

> ... In this case, both parties had chosen to represent themselves. And I assumed, correctly as it turned out, that the parties were not at all familiar with hearings and the ways of courts and tribunals. I therefore chose to conduct an informal hearing as suits the parties that are unfamiliar with hearings and tribunals. I heard from Rudowski, then Timote and Timote's witnesses, with Rudowski being given an opportunity to cross-examine each of those witnesses. I then turned to Rudowski once again and heard his reply. As Rudowski raised new matters on reply Timote was given a chance to respond and Rudowski was allowed to reply.
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> As each of the parties went about presenting matters to me, they argued their case as they went about presenting evidence. In other words, everything arrived as a package. And once I heard the last of Rudowski's replies, it appeared clear to me that I had heard all of what he, and Timote for that matter, had to say in regard to the appeal. As such, I moved the hearing to a close. I began by stating that it seemed to me that all of what the parties had to say had been said, and I then went on to explain that I was reserving judgement and that the parties would in due course be receiving a written decision on the appeal. There being no objections, I adjourned the hearing.
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> I believe if Rudowski does have more to say on the appeal it is as an afterthought. I am satisfied that Rudowski was given a full opportunity to present his case and that he had nothing more to present to me on the 28th. When I adjourned that day, I had heard all of his arguments. He had told me what he thought my decision should be and why. I have therefore decided that I will not accept his submission but will consider only the information which is now before me.

While the Adjudicator has a discretion to "reopen a hearing", the Adjudicator is not obliged to re-open the hearing. The fact that the Adjudicator could have read and sought rebuttal submissions from the employer, does not mean that the Adjudicator was required to do so. There has to be some finality to the hearing process, and if the parties are given a full opportunity to place their evidence and submissions before the Tribunal, there will rarely be any need for an Adjudicator to

re-open a hearing. It is apparent that the Adjudicator felt that this matter was fully argued by the parties, and that there was no need for him to consider further submissions.

I note that I have reviewed the final submission made by Mr. Rudowski. The final submission adds nothing to the facts and arguments submitted by him at the hearing. These submissions are reflected in the Decision. In my view, the Adjudicator did not err in refusing to re-open the hearing and consider the submission of the appellant. His decision appears not to have been unreasonable, and by my reading of the submission, he appears to have correctly concluded that nothing remained "unsaid" at the hearing. There was no breach of a principle of natural justice which could have affected the outcome of this appeal.

Findings of Fact:

Absent the procedural issues raised by the appellant, the appellant seeks to disturb the findings of fact made by the Delegate and by the Adjudicator. Although this appeal fails because the appellant was not able to establish that the alleged natural justice errors affected the outcome, I must say that the appellant's argument with regard to the result of the hearing is weak, and by itself would not merit reconsideration. It is simply an attack on the findings of fact made by the Adjudicator, and would not meet the test for reconsideration set out in *Milan Holdings Ltd.,* BC EST #D 313/98.

In this case the Adjudicator found that the Delegate did not err in his finding that the employer did not misrepresent the job. The Adjudicator found that Mr. Rudowski knew he was being hired as a relief driver, and that work was assigned on a seniority basis. The Adjudicator found that the usual understanding of seniority, is that seniority rests with the individual and not the equipment operated by the individual. The Adjudicator preferred the evidence of the employer, that the employer advised that the work was on an on-call basis, and on the basis of seniority.

Both the Adjudicator and the delegate found that Mr. Rudowski knew that he accepted a job which paid on the basis of a percent of the gross income of the truck , and that work would be assigned on the basis of seniority. Mr. Rudowski apparently took the work on his own hope that he would receive a lot of work. This hope was not, however, based on any representation made by the employer. The Adjudicator determined that while ordinarily it might not make sense for an individual to quit a job which was guaranteed to pay more, for an on-call relief position, the Adjudicator found that the appellant wished to remain in the Vancouver area during the winter and avoid the risks of long-distance hauling over mountainous and snowy passes in Oregon and California.

It is clear that the Decision of the Adjudicator, and indeed the Determination made by the Delegate rests in part on their assessment of the credibility of witnesses. In particular the Adjudicator, did not accept the evidence of Mr. Rudowski with regard to his understanding of seniority. The Adjudicator stated:

> ...Indeed, I am led to accept that matters are likely just as Timote Tukatau describes, namely, that he told Rudowski that work would be assigned according to seniority and that is all that he told him. I am given no reason to disbelieve Timote Tukutau, Ken Marshall or any of Timote's other witnesses. Each of the

> witnesses appears forthright and convincing. Their statements are, moreover, found to be reasonable and consistent with one another. Timote's version of matters is consistent with the governing collective agreement, of which Tukutau is well aware, and is consistent with what people usually mean when they speak of "seniority", namely a worker's length of service. Seniority almost always rests with the worker. The only exception that I am aware is that it will sometimes rest with a crew or group of workers, and I have been reading collective agreements for thirty years and twice conducted , for the provincial Ministry of Labour, detailed studies of all collective agreements 200 employees or more. I have never heard of such a thing as truck specific seniority.
>
> I doubt, as it is so very unlikely, that a man of Rudowski's experience would not know what is meant by "seniority".

Without stating the test he applied with regard to assess credibility, it is clear that the Adjudicator applied the usual approach with regard to credibility which is set out in *Faryna v. Chorny, [1952] 2 DLR 354 (B.C.C.A.).* The evidence of Mr. Rudowski could be said to be entirely inconsistent with the preponderance of possibilities:

> In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

The Adjudicator is in a better position to decide credibility than I am as an Adjudicator conducting a reconsideration based on written file materials. Assessments of credibility of witnesses as a matter for the Adjudicator at the hearing. I am not satisfied of any error in this matter.

ORDER

Pursuant to section 116 of the *Act*, I order that the Decision in this matter, dated August 30, 2000 be confirmed.

Paul E. Love

Paul E. Love
Adjudicator
Employment Standards Tribunal