**BC EST #D489/00**
**Reconsideration of BC EST #D313/00**

**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 -

453428 B.C. Ltd. operating as Bagel Street Café and
Blackjack Food Services Ltd.
("453428 B.C. Ltd.")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

**ADJUDICATOR:** David B. Stevenson

**FILE No:** 2000/595

**DATE OF DECISION:** December 8, 2000

## DECISION

## OVERVIEW

453428 B.C. Ltd. operating as Bagel Street Café and Blackjack Food Services Ltd. ("453428 B.C. Ltd.") seeks a reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision (the "original decision") of an Adjudicator of the Employment Standards Tribunal (the "Tribunal"), BC EST #D313/00, dated August 8, 2000. The original decision confirmed a Determination dated April 12, 2000, which had concluded that Elyse J. MacDonald ("MacDonald") was owed an amount of $4,076.67 for length of service compensation, wages, overtime pay and annual vacation pay, together with interest on the amounts owed to the employee.

The original decision concluded that 453428 B.C. Ltd. had not met the burden on an appellant to demonstrate some error in the Determination. In doing so, the Adjudicator stated:

> The Appellant has not presented any evidence challenging any of the findings concerning overtime and the finding that the companies were related companies. There is a bare allegation that there was no common shareholder, no common directorship, no common officer, and no common directing mind. The employer has not, however, filed any information concerning the shareholdings, directors, officers of each entity.

In this application, counsel for 453428 B.C. Ltd. says that the "Tribunal's decision to find our client as a related employer is one made without regard to the evidence that was before the Tribunal". Let me state at the outset that the Tribunal did not make any decision finding 453428 B.C. Ltd. to be a related employer under the *Act*. That finding was made by the Director in the Determination. The finding made by the Tribunal in the original decision was that 453428 B.C. Ltd. had not met the burden of showing there was an error in the Determination.

## ISSUES TO BE DECIDED

The first issue is whether the Tribunal will exercise its discretion under Section 116 of the *Act* to accept the application.

If the Tribunal exercises its discretion to accept the application, the substantive issue raised by this application is whether the original panel correctly interpreted and applied Section 97 of the *Act* to the facts.

## ANALYSIS

Section 116 of the *Act* confers reconsideration powers on the Tribunal:

> *116. (1) On application under subsection (2) or on its own motion, the tribunal may*

> *(a) reconsider any order or decision of the tribunal, and*
>
> *(b) cancel or vary the order or decision or refer the matter back to the original panel.*
>
> *(2) The director or a person named in a decision or order of the tribunal may make an application under this section.*
>
> *(3) An application may be made only once with respect to the same order or decision.*

Section 116 is discretionary. The Tribunal has adopted a principled approach to the exercise of this discretion. The rationale for this approach is grounded in the language and the purposes of the *Act*, including the purposes found in subsections 2(b), *"to promote the fair treatment of employees and employers"* and 2(d), *"to provide fair and efficient procedures for resolving disputes over the interpretation and application"* of the *Act* (see also, *Re Alnor Services Inc.*, BC EST #D495/99).

We also note, and adopt, the comments of the Tribunal in *Re Unisource Canada Ltd.*, BC EST #D122/98:

> "The purposes of the *Act* requires that the Tribunal avoid a multiplicity of proceedings and ensure that appeals are dealt with expeditiously, in a practical manner, and with due consideration of the principles of natural justice. In our view, this includes, generally, an expectation that one hearing will finally and conclusively resolve the dispute. Read in conjunction with Section 115, the power to "vary, confirm or cancel" a determination, imply a degree of finality, *i.e.*, a party should not be deprived of the benefit of a decision without a compelling reason.

The Tribunal has established a number of factors that will be considered when called upon to exercise its discretion under Section 116 of the *Act*. As the Tribunal has noted in several reconsideration applications, the accepted approach to such applications resolves into a two stage analysis. In *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97), the Tribunal outlined what is involved in the first stage of that analysis:

> At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration: *Re British Columbia (Director of Employment Standards)*, BC EST #D122/98. In deciding the question, the Tribunal will consider and weigh a number of factors. For example, the following factors have been held to weigh against a reconsideration:
>
> (a) where the application has not been filed in a timely fashion and there is no valid cause for the delay: see *Re British Columbia (Director of Employment Standards)*, BC EST #D122/98. In this context, the Tribunal will consider the prejudice to either party in proceeding with or refusing the reconsideration: *Re Rescan Environmental Services Ltd.*, BC EST #D522/97 (Reconsideration of BC EST #D007/97).

(b) where the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the Adjudicator (as distinct from tendering new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): *Re Image House Inc.*, BC EST #D075/98 (Reconsideration of BC EST #D418/97); *Alexander (Perequine Consulting*, BC EST #D095/98 (Reconsideration of BC EST #D574/97); *32353 BC Ltd., (c.o.b. Saltair Neighbourhood Pub)*, BC EST #D478/97 (Reconsideration of BC EST #D186/97).

(c) Where the application arises out of a preliminary ruling made in the course of an appeal. "The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid a multiplicity of proceedings, confusion or delay": *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.

The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases. At this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general. The reconsideration panel will also consider whether the applicant has made out an arguable case of sufficient merit to warrant the reconsideration. This analysis was summarized in previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": *Zoltan Kiss, supra*. "The parties to an appeal, having incurred the expense of preparing for and presenting their case, should not be deprived of the benefits of the Tribunal's decision or order in the absence of some compelling reasons": *Khalsa Diwan Society*, BC EST #D199/96 (Reconsideration of BC EST #D114/96). . .

If satisfied the case warrants reconsideration, the Tribunal will proceed to the second stage of the analysis, addressing in a substantive way the issues raised.

I conclude this application does not warrant reconsideration.

The outcome in the original decision was based on a failure by 453428 B.C. Ltd. to provide any evidence showing the Determination was wrong. As the Adjudicator of the original decision noted:

. . . the burden is on an appellant to demonstrate an error such that I should vary the or cancel the Determination. The appellant has not presented any evidence challenging any of the findings concerning overtime and the finding that the companies were related companies. There is a bare allegation that there was no common shareholder, no common directorship, no common officer, and no directing mind. The employer has not, however, filed any information concerning the shareholdings, directors, officers of each entity. Based on the information

> which is before me, the employer has not established any error in the Determination.

That is a correct summary of the material before the Adjudicator when he made the original decision. I do not accept the argument of counsel for 453428 B.C. Ltd. that the "bare allegations" made in their appeal was "evidence" before the Tribunal. Rather, I agree with the Adjudicator in the original decision that the appeal submissions made by 453428 B.C. Ltd. amounted to nothing more than a bare denial of the findings of fact made in the Determination.

Counsel for 453428 B.C. Ltd. says that the bare denial made in the appeal submission should be viewed no differently than the Determination, which, he suggests, was "based on simple allegations", unsupported by documentary evidence. That is a wrong view of the effect of a Determination. The role of the Director under the *Act* includes a requirement to investigate complaints alleging contravention of the *Act* and to reach legal conclusions based on the investigation. The Determination has legal effect and is accorded a deference consistent with its legal effect in an appeal. In *Re World Project Management Inc. and others*, BC EST #D134/97 (Reconsideration of BC EST #D325/96), the Tribunal made the following observation:

> As the procedure is an appeal from a determination already made and otherwise enforceable in law, the appellant should be expected to clearly set out the aspects of the determination not agreed with and delineate the issues.

In the same decision, the Tribunal also notes it would be neither "fair" nor "efficient", referring to paragraph 2(d) of the *Act*, to ignore the investigation and the Determination, which is essentially what counsel for 453428 B.C. Ltd. is advocating. If, as counsel says, the Determination was "based on allegations", unsupported by documentary evidence, that is an area which should have been raised and addressed in the appeal, but it was not.

Essentially, this application represents an invitation by counsel for 453428 B.C. Ltd. that the Tribunal re-weigh the material that was before the original panel, arrive at a different conclusion about the effect of the "bare denial" and allow the applicant a further opportunity to advance the merits of the appeal. It is not, however, the purpose of the reconsideration process to allow a party to prop up an inadequate appeal, allowing additional evidence to be submitted, an oral hearing to be held and/or a new argument to be raised after the initial appeal has been dismissed[1]. That would be entirely inconsistent with the objectives of the appeal process under the *Act*, which are reflected in the following statement of the Tribunal in *Re Unisource Canada Ltd.*, *supra*:

> The purposes of the *Act* requires that the Tribunal avoid a multiplicity of proceedings and ensure that appeals are dealt with expeditiously, in a practical manner, and with due consideration of the principles of natural justice.

It is also telling that the remedy sought by 453428 B.C. Ltd. is for the Tribunal either to allow the applicant to provide "further documentary evidence" or "to allow an oral hearing". In my view,

[1] I also note, in this context, that the application alludes to an error of law in the interpretation and application of Section 95 in the circumstances of the case. This issue was not raised in the appeal and was not considered in the original decision.

that is an admission that the appeal was inadequate and deficient and, by inference, an acknowledgement that the original decision was correct in its conclusion that 453428 B.C. Ltd. had not met the burden of showing the Determination was wrong.

Finally, the applicant cannot rely on its alleged belief that there would be an oral hearing on its appeal. While the *Act* provides a right to appeal a Determination, it does not provide a right to an oral hearing on that appeal and there was ample notice that the appeal could be decided without an oral hearing. The appeal was delivered to the Tribunal on May 5, 2000. On May 8, 2000, the Tribunal acknowledged receipt of the appeal. All parties, including the applicant, were provided a copy of that acknowledgement, which contained the following paragraph:

> The parties are advised that this matter will be decided by an Adjudicator. The Adjudicator may decide this appeal based solely on written submissions or an oral hearing may be held. An oral hearing may not necessarily be held.

The appeal brochure that accompanied the Determination also indicated that the appeal may be decided solely on written submissions. If the Tribunal was shown to be responsible for the error made by the applicant, that would be considered in the exercise of our discretion under Section 116, but there is no such allegation made and, in any event, no basis for such an allegation.

**ORDER**

Pursuant to Section 116 of the *Act*, the application for reconsideration is denied.

***David B. Stevenson***

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

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