BC EST #D497/98
Reconsideration of a decision in File No. 98/151

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-

Jasta Holdings Ltd. and Polmateer Enterprises Ltd. operating as PennySaver Marketing and Distribution ("Jasta")

- and by -

Communication, Energy and Paperworkers Union of Canada ("the Union")

- of a decision issued by -

The Employment Standards Tribunal ("the Tribunal")

ADJUDICATOR: Frank A.V. Falzon

FILE NOS.: 98/236; 98/263

DATE OF DECISION: October 29, 1998

DECISION

OVERVIEW

Before me are two reconsideration applications made under s. 116 of the *Employment Standards Act* ("the *Act*"), on somewhat unusual facts.

What happened, in brief, is that the Director determined on February 16, 1998 that newspaper bulk delivery drivers working for Jasta are "employees" for the purposes of the *Act* and ordered Jasta to comply with the *Act* in respect of these drivers. On March 11, 1998, Jasta both appealed to this Tribunal and applied to suspend the Determination. It asserted that - particularly in light of bargaining underway between Jasta and the drivers' Union for a first collective agreement - the Determination should never have been issued. For its part, the Union wrote a brief letter to the Tribunal on March 13, 1998 submitting that, to the contrary, it was urgent that the Tribunal resolve the "status" of these drivers given the negotiations.

On March 17, 1998, the Tribunal referred the matter back to the Director "for further investigation" under s. 114(2)(a) of the *Act*. This was a summary action, the rationale for which was founded on a Tribunal decision rendered six days earlier:

> In my view, the Determination issued by the Director ... on February 16, 1998 is incomplete and, as it now stands, is not a determination within the meaning of the *Act*. The Tribunal's position on a determination which lacks a conclusion respecting *quantum* is set out in the attached decision (*Insulpro Industries Inc.* BC EST #D099/98).

Both Jasta and the Union have asked the Tribunal to reconsider the March 17, 1998 decision referring the matter back to the Director. (For obvious reasons, both applications are being decided together). The Director agrees that reconsideration is appropriate. While the Union and the Director obviously differ from Jasta regarding the merits of the Determination under appeal, all the parties submit that the Tribunal's order under s. 114(2)(a) was inappropriate.

ISSUES TO BE DECIDED

For the purposes of this reconsideration application, it is vital to emphasize that as matters stand today, full and proper submissions regarding the grounds advanced by Jasta in opposition to the Director's Determination have not been made by the parties either before the adjudicator or this reconsideration panel.

The basis for Jasta's reconsideration application is the argument that it was wrong for the Tribunal to summarily remit the matter back to the Director for further investigation when the very point of its appeal was to argue that the Director was not validly or properly

involved in the complaint at all. Consistent with that submission, the remedy it seeks is to have the appeal considered on its merits pursuant to s. 115.

The Union's reconsideration application also reflects this position: "When the time is appropriate we will address each of the grounds set out in the Appeal of Mr. Leginsky, but at the present time the issue appears to be whether the Tribunal should be considering the employer's Appeal, rather than sending the matter back to the Branch". The Director agrees: "The present issue, in the Director's view, is whether the Tribunal should act on the appeal ... or refer the matter back to the Director."

The central issue before me is therefore whether the Registrar's decision to order the Director to reconsider this matter under s. 114(2)(a) based on *Insulpro* should be reconsidered and reversed.

FACTS

This section of the reasons provides additional detail respecting the facts and procedural history described in the Overview.

The Director's February 16, 1998 Determination arose from a complaint filed by the Communication, Energy and Paperworkers Union of Canada ("the Union") which had on April 2, 1997 been certified under the *Labour Relations Code* as the bargaining agent for the drivers who were found by the Labour Relations Board to be "dependent contractors" under the *Code*. The Union's complaint to the Director under the *Act* arose in the context of negotiations for a first collective agreement between Jasta and the Union. One of the key issues in that negotiation was whether the drivers are entitled to the protections of the *Employment Standards Act*. The Determination concludes as follows:

> Based on my investigation, I find that Jasta ,,, [has] contravened the Employment Standards Act by not considering bulk delivery drivers as employees pursuant to the Act.
>
> I order Jasta .... to cease contravening the Employment Standards Act and comply with the requirements of the Employment Standards Act.

On March 11, 1998, Jasta took two steps before this Tribunal, both of which were underscored by its position that the Director should not have allowed its process to be used by the Union to interfere with the ongoing collective bargaining process:

> (i) filed an appeal which alleged, *inter alia*, that (a) there was no proper complaint under s. 74 for the Director to investigate; (b) the Director has no power to issue a "declaratory order"; and (c) the Director should have refused to investigate the Union's complaint under s. 76.

(ii) applied under s. 113(1) for the Tribunal to suspend the effect of the Determination.

On March 13, 1998, the Union wrote to the Tribunal expressing a very different perspective. It requested the Tribunal to resolve the driver status issue expeditiously as "all efforts toward a first Collective Agreement have ceased pending the outcome of the appeal to the Tribunal".

On March 17, 1998, the Tribunal referred the matter back to the Director for further investigation under s. 114(2) which provides as follows:

> 114(2) Before considering an appeal, the tribunal may
> (a) refer the matter back to the director for further investigation, or
> (b) recommend that an attempt be made to settle the matter.

The Tribunal's order under s. 114(2)(a) was made for reasons expressed as follows:

> In my view, the Determination issued by the Director ... on February 16, 1998 is incomplete and, as it now stands, is not a determination within the meaning of the *Act.* The Tribunal's position on a determination which lacks a conclusion respecting *quantum* is set out in the attached decision (*Insulpro Industries Inc.* BC EST #D099/98).

On March 26, 1998, Jasta applied to the Tribunal under s. 116(2) to reconsider its March 17, 1998 decision. Jasta says that it was wrong of the Tribunal to summarily remit the matter back to the Director for further investigation when the very point of its appeal was to argue that the Director was not validly or properly involved in the complaint at all.

On April 15, 1998, the Union filed its own reconsideration application. The Union agrees that the Tribunal's March 17, 1998 decision is "in fundamental error". Its position is that this matter should be remitted to the Tribunal properly consider the employer's appeal. On May 11, 1998, the Union acknowledged that it seems "incongruous" that the Union should support Jasta's appeal, but that "procedurally it is crucial that the legal status of these "dependent contractors" is determined with some finality".

On May 13, 1998, the Director submitted that the issue on this reconsideration should focus on the Registrar's order under s. 114(2) - namely, whether the Tribunal should act on Jasta's appeal or whether it properly referred the matter back to the Director for further investigation.

ANALYSIS

In my opinion, the proper approach to the exercise of the reconsideration power under s. 116 of the *Act* was set out by this Tribunal in *Milan Holdings Ltd.*, (BC EST #D313/98, Reconsideration of BC EST #D559/97) at pp. 6-7:

> Consistent with the need for a principled and responsible approach to the reconsideration power, the Tribunal has adopted an approach which resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration: *Re British Columbia (Director of Employment Standards)*, BCEST #D122/98. In deciding this question, the Tribunal will consider and weigh a number of factors. For example, the following factors have been held to weigh against a reconsideration:
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> > (a) Where the application has not been filed in a timely fashion and there is no valid cause for the delay: *Re British Columbia (Director of Employment Standards)*, BCEST #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 BCEST #D007/97).
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> > (b) Where the application's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): *Re Image House Inc.*, BCEST #D075/98 (Reconsideration of BCEST #D418/97); *Alexander (c.o.b. Pereguine Consulting)* BCEST #D095/98 (Reconsideration of BCEST #D574/97); *323573 BC Ltd. (c.o.b. Saltair Neighbourhood Pub)*, BC EST #D478/97 (Reconsideration of BCEST #D186/97);
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> > (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 multiplicity of proceedings, confusion or delay": *World Project Management Inc.*, BCEST #D134/97 (Reconsideration of BCEST #D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.
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> 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*. As noted in previous decisions, "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* (BCEST #D199/96, reconsideration of BCEST #D114/96)....
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> The Panel wishes to make clear that parties ought not to confuse the two stage *analytical* approach reflected in these reasons with the practical reality that the reconsideration application be based on one set of submissions. Parties will be able to use their own judgment regarding how best to structure their submissions given the Tribunal's approach to reconsideration. The Panel also wish to make clear that nothing in these reasons should be taken to signal a departure from the perspective that reconsideration is a matter of discretion, not of right.

In my opinion, this is an appropriate case for reconsideration. The grounds raised by the parties in support of the application have merit. They raise important questions of law and principle. The decision to summarily remit this matter to the Director for investigation had significant implications for the parties. This is reflected in the parties' unanimous view that reconsideration is appropriate in this case.

Having concluded that this is an appropriate case for reconsideration, I have also concluded that the Tribunal's March 17, 1998 order should be cancelled. I arrive at this decision for the following reasons.

First, I agree with Jasta that consideration of at least two of the grounds on which it has challenged the Determination logically and properly precede any issue arising from the absence of a decision regarding *quantum* in the Determination. While Jasta's argument about "declaratory orders" bears some similarity to the basis for the decision in *Insulpro,* remitting the matter to the Director for further investigation does not meet Jasta's more fundamental objections that Determination should not have been entertained in the first place either because there was no complaint under s. 74 or because it should have been dismissed under s. 76. If either of those grounds is valid, there exists no Determination to further investigate. As noted above, submissions on these points were not filed by the parties either before the adjudicator or the reconsideration panel.

Related to the previous point is my second concern, which is that in the circumstances of this case the parties should have been given the opportunity to comment on whether or what extent the Tribunal's recent decision in *Insulpro* was germane to this appeal. In arriving at this conclusion, I specifically refrain from commenting on whether a general duty of fairness arises under s.114(2)(a) of the *Act* given that such an order is made "before the appeal is considered" and does not constitute a final determination of the appeal by the Tribunal: *Re Bell* (BCEST #D097/98). Ultimately, the existence and nature of a duty of fairness depends on all the circumstances and in particular, the legislative intent considered in light of the impact of the decision on the parties affected by it. It will suffice

to say that in my view, the nature of the power being exercised in s. 114(2)(a) is capable in some circumstances of giving rise to a duty to provide a modicum of procedural fairness.

Whether the error in this particular case is characterized as one of practice and principle rather than a formal breach of procedural fairness, it is sufficient for my purposes to conclude that on either basis a remedy should be issued under s. 116. Jasta's appeal and the Union's first submission to the Tribunal made clear that based on the ongoing negotiations which had stalled pending the appeal, both parties felt that the appeal was crucial to the future of the negotiations. It does not appear that either party was aware of or was seeking to rely on the *Insulpro* decision which had been rendered by the Tribunal only six days earlier. It is not common for the Tribunal to exercise the power in s. 114(2)(a). No party had requested that it do so. For its part, Jasta had raised objections challenging the Director's ability even to consider the Union's complaint. In all these circumstances, while there was of course no difficulty with the Tribunal identifying an important threshold question which had not arisen in submissions, this issue should have been canvassed, however briefly, with the parties. Such a process would have benefited both the parties and the Tribunal.

ORDER

For the reasons I have given, I hereby cancel, pursuant to s. 116(1)(b) of the *Act*, the March 17, 1998 order of the Tribunal. It will be noted that I have chosen the remedy of cancelling the order rather than remitting the matter back to the "original panel". I do this because of the nature of the order under reconsideration. Since the order under s. 114(2)(a) was made before the appeal was considered, I do not consider there presently to be a panel seized of this matter: *Re Bell, supra*.

Given my conclusion that consideration of Jasta's more fundamental objections must precede consideration of whether the March 11, 1998 *Insulpro* decision was either applicable or correctly decided, it would be inappropriate for me to render findings on those issues in this decision. It obviously makes much greater sense for that issue to be addressed, if it is necessary to do so, in conjunction with the appeal as a whole and in the context of complete submissions on those issues.

Finally, I wish to acknowledge and offer my apology to the parties for the three month period during which these reconsideration applications have been on reserve with the panel. At the time the reconsideration applications were filed, there existed significant urgency arising from the fact that negotiations between Jasta and the Union over a first collective agreement had broken down pending resolution of this matter. It is unknown whether, in the intervening months, that concern has now been addressed by the parties. If it has been addressed, a question arises as to whether or on what basis the appeal will continue.

As the likely effect of my order will be to have Jasta's appeal proceed to a Tribunal adjudicator for a decision on the merits, it would obviously greatly assist the Tribunal for the parties to advise the Registrar at their earliest convenience regarding their intentions regarding the appeal. Depending on the parties' responses, the Tribunal can provide the parties with appropriate direction regarding the nature and timing of submissions.

Frank A.V. Falzon
Adjudicator
Employment Standards Tribunal