BC EST #D498/98
Reconsideration of BC EST #D099/98

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-

The Director of Employment Standards

- of a decision issued by -

The Employment Standards Tribunal
("the Tribunal")

AJUDICATOR:	Frank A.V. Falzon
FILE NO.:	98/357
DATE OF DECISION:	October 29, 1998

DECISION

OVERVIEW

This is an application by the Director of Employment Standards ("the Director") under s. 116 of the *Employment Standards Act.* The application was filed with the Tribunal on June 5, 1998.

The Director has asked the Tribunal to reconsider the March 11, 1998 decision of an Adjudicator cancelling the Director's November 27, 1997 Determination in this matter. The Determination had made findings:

- that 4 workers were "employees" under the *Employment Standards Act* ("the *Act*");
- that Insulpro Industries Inc. and Insulpro (Hub City) Ltd. were associated companies under s. 95 of the *Act*;
- that the companies had contravened s. 3 of the *Act*; and
- that the complaint of one employee should be dismissed as being out of time.

The Adjudicator's March 11, 1998 decision cancelled the November 27, 1997 Determination. She held that it was "null and void" because the Determination document did not include any finding or decision regarding quantum.

The Director did in fact render a Determination regarding quantum in this matter on January, 23, 1998. That Determination referred back to the findings made on November 27, 1997 and went on to find contraventions and impose penalties.

In respect of the January 23, 1998 Determination, the Adjudicator's March 11, 1998 decision states as follows:

> I make no decision respecting the January 23, 1998 Determination. Section 86 of the *Act* confers a power to "vary or cancel a determination" on the Director. In an earlier decision (*Devonshire Cream Ltd.* B.C. EST #D122/97) the Tribunal decided that once an appeal is filed the Director's jurisdiction ceases under Section 86. There has been no appeal of the January 23, 1998 Determination. Therefore, in light of this decision, the Director could cancel and issue a new determination or vary the January 23, 1998 Determination. In either case the time period for commencing an appeal on the merits would commence anew.

As noted above, the Director made its s. 116 reconsideration application on June 5, 1998. The Director points to what it describes as profound anomalies in the Tribunal process and fundamental inconsistencies with the *Act*, past Tribunal decisions and judicial authority.

ISSUES TO BE DECIDED

The Director's s. 116 submission raises numerous grounds, all of which reduce to two fundamental objections to the Tribunal's March 11, 1998 decision:

> (a) the Tribunal issued its decision absent a proper appeal - the employer's letter of December 12, 1997 was not an appeal and in any event was totally deficient for that purpose;
>
> (b) the Tribunal has no power to compel the Director to make a determination within a specific period of time.

While these are the issues which the Director seeks to raise, the threshold question before me is whether - particularly in light of events which have transpired since the Tribunal's March 11, 1998 decision - this is an appropriate case for reconsideration.

FACTS

The originating legal event in the matter before me was the Director's November 27, 1998 Determination.

On December 12, 1997, the Tribunal received a letter from the employer's counsel. That letter, written with consent of the Director, advised the Tribunal that a Determination regarding quantum was forthcoming, and asked that the appeal period be extended until the "quantum" Determination was made. On December 16, 1997, the Registrar agreed to this request, but only as long as the quantum Determination was issued no later than January 9, 1998. The Registrar's letter states:

> ...I agree to extend the time period for requesting an appeal of the Determination dated November 28, 1997. The latest date for submitting an appeal on both Determinations will be the expiry of the time period for requesting an appeal of the Determination respecting *quantum* (which I understand will be issued by the Director no later than January 9, 1998). **In the event that the Determination on quantum is not issued by the Director by January 9, 1998, the Tribunal will consider submissions that the Determination issued on November 28, 1997 is null and void given the absence of a decision respecting *quantum***
>
> [emphasis added]

As can be seen, the employer's request was for an extension to the appeal period. The Registrar's reply was that if the quantum Determination was not issued by January 9, 1998, the Tribunal would consider submissions about whether the November 28, 1998 Determination is null and void. This issue had not previously been raised by either of the parties.

On January 8, 1998, Director's counsel wrote to the Tribunal. The letter requests a "further and final extension" to January 30, 1998. From the way the letter is framed, it is somewhat unclear whether the Director's extension request relates to Insulpro's appeal period, or the Director's ability to issue a Determination on *quantum.*

It is evident that both the Registrar and Insulpro interpreted the letter as a request by the Director to extend the time for her to produce a Determination on quantum. On January 9, 1998, counsel for Insulpro submitted that the Director's justifications for an extension lacked substance and that in any event the November 27, 1998 Determination was "null and void". On January 16, 1998, the Director responded, in part, as follows:

> The Director and their counsel initially consented to an extension of the time limit for appeal of the Determination, in order to facilitate a settlement of this matter. This intention remains unchanged. A cancellation of the baseline Determination would work a substantial prejudice to the complainants, as it and a quantum Determination would have to be reissued by the Director's delegate. There is no indication that there would be substantial or any prejudice to the employer Insulpro by a delay of ten to fifteen days.

On January 19, 1998, the Tribunal refused to grant the extension and invited submissions on whether the Determination was null and void absent a decision respecting quantum. That letter reads as follows:

> This letter sets out the Tribunal's decision on whether to grant the Director of Employment Standards ("the Director") an extension to the date by which to issue a Determination on *quantum.*
>
> I have considered the submissions of counsel for the Director and counsel for Insulpro Industries Inc. ("Insulpro"). I have decided not to grant an extension to the Director for the reasons set out below.
>
> First, Mark Tatchell, the Director's Regional Manager indicated that a Determination on *quantum* would be issued by January 9, 1998. Second, the Tribunal was not notified until one day prior to the deadline that there were factors which made it "difficult to impossible" to meet the deadline of January 9, 1998. Third, it is not established that Insulpro caused delays in record production. Fourth, I am not satisfied that staff absences is an adequate reason given the Director was aware as of December 16, 1997 of the deadline....
>
> In accordance with my letter of December 16, 1997, I now invite the parties to file submissions on the issue of the whether the Determination issued on November 28, 1998 is null and void given the absence of a conclusion respecting *quantum*.

It appears from the foregoing that an original request by the employer to extend the period within which it might file an appeal was altered into an inquiry into whether the Tribunal

should give the Director more time to make a *quantum* Determination without inquiring into whether the original Determination was null and void.

On January 23, 1998, the Director issued the Determination respecting quantum.

On February 2, 1998, the employer submitted as follows:

> We submit that Determination (ii) [the *quantum* Determination] is of no force and effect unless and until Determination (i) is ruled by the Tribunal to be valid and operative and therefore assume that the time for appeal of Determination (ii) will not run until such a decision is made.

For its part, the Director submitted on February 13, 1998 that neither Determination had been appealed and therefore it was not appropriate for the Tribunal to accept submissions on the validity of the first Determination. The employer responded by submitting additional material impugning the Director's investigation and offering this as an additional basis to find the Determinations null and void.

On March 11, 1998, the Tribunal issued its decision cancelling the November 27, 1997 Determination.

On March 23, 1998, the employer wrote to the Tribunal advising that it would appeal the January 23, 1998 Determination if that were necessary but that:

> ...the issue of the nullity of the January 23, 1998 Determination should be addressed as a preliminary matter. If you disagree with this suggestion and would like submissions on the substance of the January 23, 1998 Determination before the time for appeal has expired, we would appreciate your direction in that regard, as well as confirmation as to when the time for appeal expires.

On April 16, 1998, the Registrar advised the employer that the Director had cancelled the January 23, 1998 Determination and that there was accordingly no Determination to appeal. The Director cancelled the January 23, 1998 Determination in favour of a new Determination dated April 2, 1998.

The April 2, 1998 Determination made fresh findings on precisely the issues that had been dealt with in the November 28, 1997 Determination (whether the complainants were employees and whether Insulpro Industries Ltd. and Insulpro (Hub City) Ltd. were associated companies under s. 95 of the *Act*) and also addressed the matter of quantum.

Apart from the fact that the April 2, 1998 Determination includes findings regarding *quantum*, the only difference between the Determinations of November 28, 1997 and April 2, 1998 is that the former includes a finding that one of the five complaints was dismissed as being out of time. As that complainant never appealed the Determination, that difference is not germane to the outcome of these reasons.

The employer appealed the April 2, 1998 Determination. On September 14, 1998, Adjudicator Stevenson issued reasons regarding both the Director's process in arriving at the April 2, 1998 Determination and the substance of her reasoning. That matter is still ongoing before this Tribunal. In his September 14, 1998 decision, the Adjudicator has directed that additional evidence and submissions be filed on the issue whether the complainants are "employees" for the purposes of the *Act*.

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:
>
> > (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).
> >
> > (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.

> 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)....

> 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.

While the Director has raised a number of issues which might otherwise legitimately warrant reconsideration, I have concluded any benefit of addressing these grounds is in this case heavily outweighed by the reality that any reconsideration decision I might render will have no practical effect on, and will not assist to resolve, this particular dispute.

The issues raised by the Director relate exclusively to the Adjudicator's process relative to a Determination which has since been overtaken by a subsequent Determination issued by the Director. The April 2, 1998 encompasses all the issues dealt with in the November 28, 1997. It also deals with quantum. The April 2, 1998 Determination is itself now under active appeal to this Tribunal. The Director chose to cancel the January 23, 1998 Determination on quantum in favour of the April 2, 1998 Determination which incorporated all issues relative to these complainants.

In these circumstances, I cannot see how any decision I might make relative to the Adjudicator's process respecting the November 27, 1998 Determination would have any practical effect on the substance of the complaints. It cannot help to resolve them. Indeed, it might well have the opposite effect of unnecessarily complicating matters if - in the wake of Adjudicator Stevenson's appeal proceedings - I were to refer this matter back to the

original panel or make some other order suggesting that the November 28, 1997 order might still be subject to active consideration.

The Director appears to fairly concede that her reconsideration application - made two months after her April 2, 1998 Determination - is academic insofar as this particular dispute is concerned. In fact, under the heading "Remedy", the Director submits as follows:

> The Director submits that as a "new" Determination has been issued, which is in the usual process of appeal, what should be addressed are the procedural and jurisdictional difficulties with the decision of March 11, 1998 and the process which led to it. The Director also requests that the Tribunal reconsider the baseline assumption that "compensation" is required in a Determination....
>
> The Director asks that the Tribunal remedy the decision by making it conform with the practices of the Branch and Tribunal, which the Director submits better support the purposes of the Act.

I respectfully decline the invitation. What the Director is effectively requesting is that the reconsideration power be used to render a form of "advisory opinion". She is not seeking to revive the November 28, 1997 Determination. Her quarrel is with the reasons and the process which gave rise to the Adjudicator's March 11, 1998 decision.

In my judgment, the reconsideration power should not be used to render opinions which have no practical benefit on the dispute before the Tribunal. The reconsideration power is an exceptional and discretionary power. The minimum requirement for its exercise should be that the end product of the reconsideration will have some real and substantial prospect of resolving the dispute between the parties: *Act*, s. 2(d). To utilize it for some other purpose would be inconsistent with the purposes of the *Act*. In this respect, there is much to be said for the wisdom of the common law that adjudicative bodies are not designed to offer legal opinions. The overriding function of an adjudicative body is to resolve disputes.

It appears to be implicit in the Director's submission that a reconsideration decision in her favour would affect future Tribunal practice. However, this would be an incorrect assumption. As a matter of law, a reconsideration decision binds only on the decision of a particular adjudicator in a particular case. Beyond that, there is no doctrine of *stare decisis* implicit in s. 116 of the *Act* that would render my decision binding on any future adjudicator or reconsideration panel. Even if a reconsideration decision were binding, there is a question as to how much general guidance it might offer given the unique facts of this case.

I have accordingly concluded that the interesting issues raised by the Director will have to await an appeal where their resolution will matter. This is not such a case.

ORDER

I order that pursuant to Section 115 of the *Act* that the Director's application for reconsideration is dismissed.

Frank A.V. Falzon
Adjudicator
Employment Standards Tribunal