BC EST #D498/99
Reconsideration of BCEST #D577/98 and D248/99

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 -

Newlands Systems Inc. and, an associated company,
Accent Stainless Steel Manufacturing Ltd.
("Newlands")

- of Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Lorne D. Collingwood

FILE NOS.: 1999/506

DATE OF DECISION: November 16, 1999

DECISION

OVERVIEW

Newlands Systems Inc. and an associated company, Accent Stainless Steel Manufacturing Ltd. ("Newlands also, "the applicant"), pursuant to section 116 of the *Employment Standards Act* (the "*Act*"), has applied for the reconsideration of decisions by the Employment Standards Tribunal (the "Tribunal"). The decisions are BCEST No. D577/98 which is dated December 29, 1998 (the "original decision") and BCEST No. D248/99 which is dated June 22, 1999 (the "decision on quantum").

The original decision overturned a Determination by a delegate of the Director of Employment Standards (the "Director") dated June 2, 1998. The delegate had decided that Nimesh Patel was a "manager" as the term is defined by the *Employment Standards Regulation* (the "*Regulation*") and, therefore, not entitled to overtime pay. In the original decision, it is decided that Patel was a team leader with some managerial responsibilities and not a manager. Calculation of the amount owed Patel was referred back to the Director.

Newlands, in a letter dated February 12, 1999, applied for reconsideration of the original decision. The application for reconsideration is made for reason of the following: One, its explanation of a $5,191.51 payment to Patel; two, a person can consult with colleagues and superiors and still be a manager; three, Patel was no less a manager because persons were hired by committee; four, the employee participated in line manager meetings; five, it was Patel's job to bring errors to the attention of people; six, Patel terminated a person and hired another; seven, Patel fits the *Act*'s definition of manager; eight, a letter of reference indicates that Patel was clearly interested in being an engineering manager; nine, Patel's complaint should have been dismissed in that he asked for and was given a letter of reference; ten, Patel filed a claim for wrongful dismissal in a court; and finally, the Adjudicator himself recognised that "Patel was clearly at the boundary between managerial and non-managerial status". Newlands on that latter point states:

> It is here we find the greatest difficulty with the ruling. How can a small to medium sized business always have managers *whose primary employment duties consist of supervising and directing other employees*? We contend Mr. Patel actively sought on an ongoing basis increased departmental responsibilities which he was awarded. Proof of this can be seen by the fact his remuneration rose steadily over his tenure and by the fact his rate of pay was commensurate with that of the Controller and the Production Manager. Both the Controller and Mr. Patel had small departments. The Controller was not paid any overtime upon his departure … .

Newlands then goes on to add,

> We are very concerned about the effect of this ruling on small businesses. It does not seem fair that the ruling is in favour of someone "clearly at the

> boundary between managerial and non-managerial status" and the company is requested to pay the amount of overtime as calculated by the Director. How do you fairly address someone who is at this boundary?

In deciding the matter of whether Patel is or is not a manager, the Adjudicator adopted the approach taken by the Tribunal in *Director of Employment Standards*, (1997) BCEST No. D479/97 (Reconsideration of BCEST No. D170/97). That leading decision calls for consideration of the following objective factors: (1) the power of independent action, autonomy and discretion; (2) the authority to make final decisions, not simply recommendations, relating to supervising and directing employees or to the conduct of the business; (3) making final judgements about such matters as hiring, firing, authorising overtime, time-off or leaves of absence, calling employees into work or laying them off, altering work processes, establishing or altering work schedules, and training the employees; and (4) that the person's job description included supervising and directing employees. But, as the Adjudicator notes in the original decision, the objective factors must be present in the person's daily activities. It is not sufficient that the person has the authority to satisfy the criteria. Moreover, a person's title will not in itself indicate that a person is a 'manager'.

The Adjudicator went on to explain his decision as follows:

> I accept that Patel spent most of his time working on engineering problems, and some of "supervision" was answering questions and assisting staff in the department with the technical aspects of their work. He exercised very little independence or autonomy in the managerial sense. Staff in the department were highly qualified and seem not to have required close supervision. Patel did not have a budget for the department, and personnel decisions at most were made in close consultation with McQuhae and McJannett. Patel did not have independent authority or make final judgements to hire or fire other employees. No evidence was presented that he authorised overtime, vacations and other time off. His job description did include some elements of supervision, but this factor does not overcome the major part of his duties, which was the performance of engineering tasks. I also note that the department was relatively small and it is unlikely that an employer would hire a highly-qualified and well-compensated individual whose "primary employment duties" consisted of supervising other staff in a unit of that size. By contrast, Mr. Gyuricska supervised 25 to 30 persons and had team leaders reporting to him.

The Registrar of the Tribunal, on receiving the February application for reconsideration, told Newlands that the Tribunal would only consider its request for reconsideration after the process of calculating quantum was complete.

A delegate of the Director proceeded to calculate the amount of overtime claimed by Patel and, on doing that, Newlands was invited to respond and make submissions in that regard. There was no response. The delegate went on to determine, on the basis of hours worked

records which Patel had in his possession, that the employee is owed $23,916.93 including 4 percent vacation pay and $1,555.78 in interest. That determination recognises that Patel had already been paid $5,191.51 in overtime pay. The determination is in the form of a letter dated April 8, 1999 (the "April Determination").

The Registrar of the Tribunal asked Newlands if it accepted the April Determination on quantum. Newlands said it did not, that it did not owe Patel any money whatsoever. The Registrar treated that as an appeal of the delegate's determination in respect to quantum. She invited written submissions and, eventually, the matter of quantum was set for adjudication.

The decision on quantum confirms the April Determination and adds the interest which has accrued pursuant to section 88 of the *Act* since the date of issuance. Newlands chose not to submit evidence on the appeal but took the position that it would not comment on the calculation of the quantum owed to Patel until its request for reconsideration was complete. The Adjudicator considered the matter of whether the Tribunal should reconsider the original decision before reaching a decision on the matter of quantum. The Director on appeal argued that "efficient procedures for resolving disputes", and therefore the purposes of the *Act*, are best obtained if the matter of quantum were decided before proceeding with the application for reconsideration. "Two issues, one hearing, rather than two issues, two hearings." The Adjudicator was persuaded by the Director's arguments. The Adjudicator writes, "If the reconsideration upholds the original decision, then a single procedure, either a hearing or decision based on written submissions, can resolve all issues outstanding between the parties if the quantum is decided in advance of the reconsideration. To accept the position Newlands advanced would open the possibility for yet another hearing … ."

Newlands' complains of the decision on quantum in a letter dated August 12, 1999. In doing so it poses the following questions.

> "How is it fair that we cannot appeal (the original decision) without first dealing with quantum?
>
> How could we possibly be expected to accept quantum if we do not agree with the issue which precedes quantum?
>
> How can the adjudicator not support the (Determination) when the adjudicator writes "Patel was clearly at the boundary between managerial and non-managerial status"."

Newlands goes on to say that its position, that Patel was a manager, would have been compromised if it had taken a position in respect to the quantum, and also that "one cannot work on point B without first having concluded point A". It ends by questioning whether it is wrong to have two hearings on the original decision and suggesting that it is only fair.

ANALYSIS

Section 116 of the *Act* provides for the reconsideration of orders and decisions of the Tribunal. That section of the *Act* is as follows:

> **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.
>
> (my emphasis)

In that section 116 uses the word "may" rather than "will" or "must", it follows that reconsideration is not automatic but discretionary. The Tribunal has said that, for reasons of fairness and efficiency, both defined purposes of the *Act* (section 2), it will not reconsider a decision unless there is some compelling reason to do so [*Khalsa Diwan Society*, BCEST No. 199/96 (Reconsideration of BCEST No. D114/96)]. There must be an important question of fact, law, principle or fairness at stake [*Milan Holdings Ltd.* (BCEST No. 313/98, Reconsideration of BCEST No. 559/97)].

In *Milan*, a two stage analysis is employed for the purpose of assessing applications for reconsideration. I have decided to adopt that principled approach in this case. It is an approach which requires that I first decide whether the applicant has raised a matter which warrants reconsideration. Factors weighing against reconsideration are identified in the *Milan* decision as including the fact that the application is out of time; whether it arises out of a preliminary or interlocutory ruling; and has, as its primary focus, what is in effect a 're-weighing' of the evidence which was tendered at the appeal stage. The primary factor weighing in favour of reconsideration is whether the application raises a significant question of law, fact, principle or procedure.

> 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 summarised in a previous Tribunal decision by requiring an applicant for reconsideration to raise " a serious mistake in applying the law": *Zoltan Kiss*, BCEST No. D122/96. "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 No. 199/96 (Reconsideration of BCEST No. D114.96).

The circumstances in which the Tribunal has said that it will exercise its discretion were identified in *Zoltan Kiss*, BCEST No. D122/96. They include;

- failure to comply with the principles of natural justice;
- mistake of law or fact;
- significant new evidence that was not reasonably available to the original panel;
- inconsistency between decisions of the tribunal that are indistinguishable on the critical facts;
- misunderstanding or failure to deal with a serious issue; and
- clerical error.

ISSUES TO BE DECIDED

I must decide whether the Tribunal's discretionary power to reconsider an order or decision should be exercised with respect to either of the Tribunal's two decisions.

If satisfied that reconsideration is warranted, I must then decide whether Newlands has shown an error which is fatal to either of the decisions.

ANALYSIS

It is alleged that the matter of the $5,191.51 payment to Patel is important to the original decision. It is not. It is relevant to the matter of quantum but that matter is referred back to the Director in the original decision. It is the matter of whether Patel is or is not a manager, as the term is defined in the *Regulation*, that is decided in the original decision. The matter of the payment has no bearing on the matter of whether Patel is a manager.

Much of what Newlands advances as grounds for reconsideration of the original decision is nothing more than a restatement of what was its position on appeal. That includes argument that a person can consult with colleagues and superiors and still be a manager, that a person is no less a manager because persons are hired by committee, that increases in pay and his departmental responsibilities made him a manager, that his responsibilities were similar to the controller and production supervisor, and that Patel fits the *Act*'s definition of "manager" (which is in the *Regulation*, not the *Act*). And it includes the following factual assertions; that Patel supervised persons, participated in line manager meetings, and was involved in hiring and firing. To raise such points through an

application for reconsideration is to ask for a re-weighing of evidence tendered on appeal. It is not to provide grounds for reconsideration.

It is alleged that there is a letter of recommendation which shows that Patel, on leaving Newlands, was clearly interested in finding employment as an engineering manager. The original decision makes no mention of such a letter. While I am not shown the letter, I am prepared to recognise that the letter may constitute new evidence. But it is not grounds for reconsideration unless it is significant new evidence which was not reasonably available to the Adjudicator on appeal. On the basis of what Newlands has to say, I am given the impression that the letter was available on appeal and that it is not of potential significance in that it is merely an expression of future interest. It is not shown to me that the alleged letter of reference offers a compelling reason for reconsideration of the original decision.

Newlands alleges that it is unfair for a person to file a Complaint with the Employment Standards Branch after asking for and receiving a letter of reference, and that Patel's Complaint should have been dismissed for that reason. But it does nothing but make the allegation. It does not make an arguable case to believe that the Director or the Tribunal has the power to dismiss a complaint simply on the basis of a letter of recommendation alone.

Whether Patel has sued for wrongful dismissal, or not, is irrelevant. It does not go to any of the conclusions of the original decision, nor, for that matter, the decision on quantum.

Newlands argues that, as a small business, it could not employ managers whose primary employment duties consist of supervising and directing other employees. But that is not to provide a compelling reason for reconsideration. It is to say that Patel is not a manager and, therefore, agree with the original decision. The Adjudicator had to decide whether Patel was or was not a "manager", a definition which includes a person "whose primary employment duties consists of supervising a directing other employees" (section 1, the *Regulation*). As the term is defined, it is not important **why** a person's work is not primarily that of manager, but whether it is or is not **primarily** that of a manager.

Finally, in applying for reconsideration, Newlands alleges that it has been treated unfairly. As I understand what it claims, it is that there was unfairness in three respects. One, that to say that "Patel was clearly at the boundary between managerial and non-managerial status" is to recognise that he sat on the fence between managers and non-managers, and that fairness precludes an Adjudicator from deciding that a person in that position is a manager (I will call this "the boundary argument"). Two, that it is unfair to expect Newlands to submit evidence on the matter of quantum, in that to do that would have compromised its position that Patel was a manager. Three, that the appeal process is in itself unfair because employer and employee did not have the same opportunity to make appeals and submissions and/or because of the way in which the Tribunal has proceeded. Does Newlands make an arguable case that there has been a failure to comply with the principles of natural justice? I find that it falls well short of doing so.

The boundary argument is not an arguable case for reconsideration in that it depends on an obvious misconception. The Adjudicator did not go so far as to express, never mind find, that Patel sat teetering on the fence between managers and non-managers. In the context of his analysis, it is clear that in saying that Patel was "at the boundary", the Adjudicator meant nothing more than to say that Patel was close to it. Newlands misconstrues the Adjudicator's statement. Its boundary argument is a misconstruction.

Newlands position, that Patel was a manager, would not have been compromised if it had taken a position on, or provided information for the purpose of, the overtime pay calculations. It is nonsense to suggest that its case on reconsideration would have been somehow damaged through doing that. There is simply nothing which prevented submissions on the calculations, Newlands' opposition to the original decision being a matter of record in that it had applied for reconsideration of the decision. Moreover, Newlands accepted that Patel worked overtime. Newlands' claim has been that Patel was a manager and is therefore not entitled to overtime pay.

At each stage of the decision-making, Newlands has been given sufficient opportunity to be heard. The first Determination was appealed and both Patel and Newlands were given the opportunity to make submissions on the appeal. Newlands lost the appeal and applied for reconsideration. Newlands was told that the Tribunal would not proceed with that application until the matter of quantum was resolved. The matter of quantum was, in the meantime, decided. The delegate issued the April Determination but not before giving Newlands a chance to make submissions on what was worked in the way of overtime and the calculations. Newlands simply chose not to participate at that point. There was then the appeal of the April Determination. Both Patel and Newlands were given the opportunity to make submissions. The decision on quantum was issued and Newlands' application for reconsideration was brought on. All parties were again given the opportunity to make submissions, this time written submissions. If Newlands has not been heard on a point, it is because it chose not to make a submission, not for reason of a lack of opportunity.

The decision on quantum deals with whether the Tribunal should decide the matter of quantum before proceeding to decide the application for reconsideration of the original decision, what Newlands' describes as deciding B before A. Newlands alleges unfairness but that is all that it does. It does not make anything which resembles an arguable case that the appeal process has in its case been unfair.

Section 107 of the *Act* allows the Tribunal to conduct its appeals and reconsiderations as its sees fit, just so long as it is consistent with the principles of natural justice and the *Act*.

> 107 Subject to any rules made under section 109 (1) (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 simply acted so as to reduce the number of possible hearings and decisions. That is a reasonable thing to do in this day of scarce resources and to do so is

consistent with efficiency, a purpose of the *Act* (section 2 of the *Act*). And it was done without compromising fairness in any way, the parties having been given sufficient opportunity to be heard at each stage of the appeal process.

In summary, I find that there is nothing in the two applications for reconsideration by Newlands that warrants reconsideration. The applicant does not raise a significant question of law, fact, principle or procedure. Newlands believes that the original decision is wrong and it has made a number of allegations in respect to the two decisions of the Tribunal and the appeal process but, on examining its many claims, I find that what Newlands really seeks on applying for reconsideration is an effective re-weighing of evidence tendered at the appeal stage. That is not reason to proceed with reconsideration. I find that there is not in this case a compelling reason to reconsider the original decision or the decision on quantum.

ORDER

The application for reconsideration of Tribunal decisions BCEST No. D577/98 and BCEST No. D248/99 is dismissed.

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Lorne D. Collingwood
Adjudicator
Employment Standards Tribunal