BC EST #D512/98
Reconsideration of BC EST #D373/98

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 -

Y.M. Inc.
operating as
Stitches and Sirens

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: John M. Orr

FILE No: 98/412

DATE OF DECISION: November 20, 1998

DECISION

OVERVIEW

This is an application by Y.M. Inc., operating as Stitches and Sirens, ("YM") under Section 116 (2) of *the Employment Standards Act* (the "Act") for a reconsideration of Decisions No. D373/98 (the "Decision") which was issued by the Tribunal on September 01, 1998.

This case involved a finding that YM required its staff to wear clothing at work which was purchased (at a discount) from YM stores. The Director and the Adjudicator found that such clothing was "special clothing" as contemplated in section 25 of the *Act* and as such must be provided by YM without charge. Alternatively, such clothing was considered as promoting YM's business and therefore the requirement for staff to wear in-house clothing was a cost of doing business which may not be passed on to the employees in accordance with section 21 of the *Act*.
YM submits in its application that the Adjudicator for the Tribunal made a number of errors in the decision. Firstly, they claim that the Adjudicator erred in finding that the employer was not denied an opportunity to respond to the complaint. Secondly, that he was wrong in finding that "dress code" could fall within the ambit of section 25. Thirdly that the Adjudicator erred in basing his decision on section 21 of the *Act* rather than section 25 and fourthly that the Adjudicator did not consider the submission that the clothes purchased by the employees were not all "special clothing".

PROCEDURAL HISTORY

On June 02, 1998 the Director issued a Determination in which the delegate found that Amardeep Bhandal and Coralee Spier worked as managers in the retail clothing stores owned and operated by YM. The delegate found that the managers were required at all times at work to wear only merchandise that had been purchased in one of the locations owned and operated by YM. The delegate found that this requirement was a contravention of sections 25 and 21(2) of the *Act*. The Determination required YM to compensate the employees for the cost of the clothing purchased.

YM appealed to the Tribunal on June 26, 1998. The written appeal is extensive and sets out four grounds of appeal. The first ground of appeal relates to an allegation that YM was not given an opportunity to respond and that the investigation was "prejudged". The other three grounds related to the interpretation and application of section 25 to both the requirement of a dress code and the actual purchases claimed by the employees as special clothing.

On September 01, 1998 an adjudicator of the Tribunal gave a written decision, "the Decision", in which he reviewed the filed materials, the original Determination, and the submissions of counsel for YM. The Decision orders that the Determination be confirmed.

ANALYSIS

The current suggested approach to the exercise of the reconsideration discretion under section 116 of the *Act* was set out by the Tribunal in *Milan Holdings Ltd.,* BCEST #D313/98 (applied in decisions BCEST #D497 and #D498). In *Milan* the Tribunal sets out a two stage analysis in the reconsideration process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. In deciding this question the Tribunal should consider and weigh a number of factors such as whether the application is timely, whether it is an interlocutory matter, and whether its primary focus is to have the reconsideration panel effectively "re-weigh" evidence tendered before the adjudicator.

The Tribunal in *Milan* went on to state that the primary factor weighing in favour of reconsideration is whether the applicant has raised significant questions of law, fact, principle or procedure of sufficient merit to warrant the reconsideration. The decision states that "at this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general". In my opinion most decisions would be seen as serious to the parties and this latter consideration should not be used to allow for a "re-weighing" of evidence or the seeking of a "second opinion" when a party simply does not agree with the original decision.

It is one of the defined purposes of the *Act* to provide a fair and efficient procedure for resolving disputes and it is consistent with such purposes that the Tribunal's decisions should not be open to reconsideration unless there are compelling reasons: *Khalsa Diwan Society* BCEST #D199/96. In my opinion, the circumstances in which an application for reconsideration will be successful should be limited. In a Reconsideration decision dated October 23, 1998, *The Director of Employment Standards*, BCEST #D475/98, the Adjudicator sets out those limits as follows:

> *Those circumstances have been identified in several decisions of the Tribunal, commencing with* Zoltan Kiss,*BCEST #D122/96, and 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*

I would agree with this summary of the position taken to date by the Tribunal except to add that the mistake of fact referred to above must be one that is evident on the face of the record and not a matter of the weight or assessment of evidence. I would further add that, in my opinion, these various approaches have evolved with some flexibility and should continue to do so because reconsideration is a matter of discretion, not of right. No doubt the Tribunal has not yet seen the limits of appellate issues or ingenuity.

In this case the grounds for the application for reconsideration are, for the most part, the same as the grounds for the appeal from the Director's determination to the Adjudicator in the original decision. It is clear to me that the Adjudicator gave due consideration to the submissions of the appellant. He carefully considered the allegation that YM was denied an opportunity to respond and found that the employer was not in any way denied an opportunity to respond to the employee's complaints. The adjudicator found that the Director's delegate had not prejudged the issue and fully complied with section 77. There is nothing new in the application for reconsideration beyond the submissions dealt with by the Adjudicator of the original decision.

The issues about "dress code" and "special clothing" were all clearly argued in the appeal and duly considered by the Adjudicator. There is nothing inconsistent in finding that there was a dress code and that such dress code meant that, in the circumstances of this case, the employer was requiring the employees to wear special clothing. The fact that "dress code" is discussed in the *Interpretation Guidelines Manual* is not binding on the Tribunal and is irrelevant.

The issues about whether the actual clothes purchased were indeed required clothes is a matter of evidence to be considered and weighed by the Director and by the Adjudicator. It is not appropriate to re-weigh that evidence on an application for reconsideration.

The one point of law that arises on the application is whether the Adjudicator should have considered section 21 when that particular section was not raised as an issue by the parties to the appeal. I find however that I do not have to address this point because the Adjudicator clearly found that both section 25 and section 21 could apply. The Adjudicator confirmed the Determination on the basis of section 25 which was clearly argued and the section 21 argument can be treated as surplusage.

The applicants fourth submission is in essence a re-argument of the right to respond argument which was rejected by the Adjudicator. Again all of these issues were argued in the materials presented to the Adjudicator and it is not appropriate for me to simply substitute my view for his, even if I was inclined to do so, which I am not.

I have reviewed, in full, the submissions presented by YM on this application and can find nothing that would persuade me that there has been a denial of natural justice, any significant new evidence, any misunderstanding of or failure to deal with a serious issue, mistake of law, or that the decision is inconsistent with any other Tribunal decisions.

ORDER

Pursuant to Section 116 of the *Act* I decline to vary or cancel the decision BC EST # D373/98.

John M. Orr
Adjudicator
Employment Standards Tribunal