BCEST # D513/00
Reconsideration of BCEST # D221/00 and #D110/00

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 -

BLG - Business Loan Group Inc.
("BLG" or the "Employer")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Ib S. Petersen

FILE No: 2000/676

DATE OF DECISION: November 20, 2000

DECISION

SUBMISSIONS

Mr. Rod Owens	on behalf of the Employer
Mr. Doug Stevens	on behalf of the himself
Mr. W.H. Dennis	on behalf of the Director

OVERVIEW

This is an application by the Employer pursuant to Section 116 of the *Employment Standards Act* (the "*Act*"), against two Decisions of the Employment Standards Tribunal (the "Tribunal") issued on February 28 and August 14, 2000: *Parsons*, BCEST #D221/00 and 110/00. The Decision in #D110 was the result of a hearing on March 10, 2000. The Decision in D#221/00 was based on written submissions.

BACKGROUND

The Employer was a company specializing in providing financial services to small businesses, primarily brokering and administering loans. Parsons was hired by the Employer as its Okanagan-Kootenay Territory Manager, commencing November 12, 1998.

In D#110, the Adjudicator cancelled the part of a Determination, dated November 16, 1999, which concluded that Parsons was not owed compensation for misrepresentations by the Employer relating to matters enumerated in Section 8 of the *Act*. The Adjudicator concluded that the Determination was wrong and that the Employer had, in fact, misrepresented certain matters, including the financial success of the Employer and the number of financial managers Parsons was hired to manage. He concluded that the representations related to wages, one of the enumerated items in Section 8, because Parsons was compensated in part by commissions based on the profits generated by the financial managers reporting to him. The only issue before the Adjudicator was the contravention of section 8. He concluded that Section 8 had been contravened. The Adjudicator referred the matter of the appropriate remedy back to the Director.

In D#221/00, the Adjudicator dealt with the delegate's remedial decision. The delegate accepted Parson's claim that, if what was represented to him by the Employer was true, he would have earned $14,950 more in wages. The delegate did not accept Parson's claim for additional expenses and dismissed the claim. The Adjudicator agreed with the delegate. Following the delegate's remedial decision, the Employer filed a submission, disagreeing with the delegate's assessment. The point of this submission was that conclusion concerning Parson's earnings was incorrect because it did take into account amounts paid under "dealership agreements and any administrative allowance." The Adjudicator had two concerns about the submission. First, it had not been provided to the delegate during the investigation leading to the remedial decision. Second, it was inconsistent with the evidence at the hearing of the appeal and the position taken

by the Employer at that hearing. In the result, the Adjudicator declined to accept an argument based on the alleged dealership agreements. However, notwithstanding it was not raised before the delegate, the Adjudicator did accept that there was some merit to the Employer's assertion and he reduced the amount owing to account for the administrative allowance that would have been deducted from the total commissions by 10%. In the result, the Adjudicator ordered the employer to pay $13,455.

ISSUE

As noted the Employer applies for reconsideration. The Employer application is based on the following:

1. The adjudicator changed the venue for the hearing and gave the Employer no time to prepare or attend. The hearing was changed from Vernon to Kamloops.

2. While the Employer participated via telephone conference, much of the conversation was not "audible because of the telephone connection and because of my hearing problem."

3. The Employer "felt" that the Adjudicator had made his decision before the hearing.

4. The Employer says that it was wrong of the Adjudicator to "review" his own work (with reference to the remedial decision).

The issue presented to me, in this application, is whether the Employer, in these circumstances, is entitled to have the Adjudicator's decisions reconsidered?

ANALYSIS AND DECISION

Section 116 of the *Act* provides (in part):

> *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 may make an application under this section.*

An application for reconsideration should succeed only where there has been a demonstrable breach of the principles of natural justice, where there is compelling new evidence not available at the original appeal, or where the adjudicator has made fundamental error of law. In *Zoltan Kiss* (BCEST #D122/96), and other decisions, the Tribunal has emphasized that it will use the power to reconsider with caution in order to ensure finality of the Tribunal's decisions and

efficiency and fairness of the system. Consistent with those principles, the Tribunal has adopted an approach which resolves into a two stage analysis (see *Milan Holdings Inc.*, BCEST D#313/98, reconsideration of BCEST #D559/97). At the first stage, the reconsideration panel decides "whether the matters raised in the application in fact warrant reconsideration" considering such factors as:

1. the timeliness of the application together with any valid reason for a delay;

2. whether the primary focus is to have the reconsideration panel "re-weigh" the evidence;

3. whether the application arises out of a preliminary ruling made in the course of an appeal;

4. whether the application raises 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; and

5. whether the application raises an arguable case of sufficient merit to warrant reconsideration.

The panel in *Milan Holdings* noted, at page 5 (QL version):

> "After weighing these and other factors relevant to the matter before it, the panel may determine that the application is not appropriate for reconsideration. If so, it will typically give reasons for its decision not to reconsider the adjudicator's decision. Should the panel determine that one or more of the issues raised in the application for reconsideration, the panel will then review the matter and make a decision. The focus of the reconsideration panel "on the merits" will in general be the correctness of the decision being reconsidered."

I am of the view that the application for reconsideration has not met the threshold set out in *Milan Holdings*. I will briefly address the Employer's arguments. The one thing that stands out in this application is the lack particulars as to how the Adjudicator allegedly erred. The onus is on the Appellant to show that the Adjudicator erred.

First, the Employer says that the adjudicator changed the venue for the hearing and gave the Employer no time to prepare or attend. The hearing was changed from Vernon to Kamloops. The hearing was scheduled by notice dated February 7, 2000 for a hearing on February 28, 2000. Initially, it was to be heard in Vernon. The hearing was moved to Kamloops to be heard on February 28. That is where Parsons and the adjudicator reside. The employer objected to the change of venue. The Employer argued that the Employer's business--and Parsons' employment--had been in Vernon and that it was a five-hour return trip which imposed a serious hardship on Owens. The Tribunal considered the balance of convenience and decided to continue with the hearing in Kamloops and offered a later start time (to accommodate Owens' travel time) or participation via telephone conference. The Tribunal arranged for Owens to participate via telephone conference. In my view, while it may have been somewhat inconvenient for the Employer, nothing flows from the change of venue. Owens' suggestion that the change impacted on his ability to prepare for and attend the hearing has little merit. He did

not object to the date. Given the amount of travel time to Kamloops from Vernon, the Employer was not unduly inconvenienced.

Second, while the Employer participated via telephone conference, the Employer argues that much of the conversation was not "audible because of the telephone connection and because of my hearing problem." It is of the utmost importance that parties are able to participate fully in the hearings held by the Tribunal. From time to time, parties participate via telephone conference. While this may not be ideal for any number of reasons, there is no indication on the face of the Adjudicator's decision that the Employer had any difficulty participating in the hearing via telephone conference. Moreover, there is nothing on the face of the reconsideration application that the Employer raised these difficulties with the Adjudicator at the hearing. I would have thought that if the Employer, as is now asserted, had difficulties in participating in the hearing that it would have raised these matters at the time of the hearing or, if the Employer was in doubt, perhaps soon after the hearing was concluded. There is no indication of that. As well, there is no indication that the Employer brought any hearing impairment--of which no details are provided in the application--to the attention of the Tribunal prior to the hearing. If the Employer was unable to participate fully, I would, as well, expect that the Employer to clearly set out what it is in the appeal decision it disagrees with. There are no particulars of which of the Adjudicator's findings of fact or conclusions of law, the Employer disagrees with.

The Employer "felt" that the Adjudicator had made his decision before the hearing. There is nothing to support this allegation and I summarily dismiss it.

The Employer says that it was wrong of the Adjudicator to "review" his own work (with reference to the remedial decision). The Employer has misunderstood the process. The Adjudicator did not "review"--or reconsider--his own decision. The Adjudicator rendered a decision with respect to the merits of Parson's appeal with respect to Section 8 of the *Act*. He then referred the issue of the remedies that would flow from his decision. He made that decision for two reasons. First, there was no evidence or argument before him with respect to remedy. Second, he was of the view that the "originating authority" to provide a remedy was with the Director under Section 79 of the *Act*. In short, the Adjudicator did not review his own work.

In short, the application for reconsideration is dismissed.

ORDER

Pursuant to Section 116 of the *Act*, I order that the Decisions D#110/00 and D#221/00, be confirmed and the application for reconsideration be dismissed.

Ib Skov Petersen

Ib Skov Petersen
Adjudicator
Employment Standards Tribunal