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 -

Wicklow Properties Ltd, Christina Lakeside Resort Ltd,
Brenher Group Management Corporation, and Brenher Construction Ltd

- of Decisions issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: John M. Orr

FILE Nos: 1999/423 and 1999/424

DATE OF DECISION: November 30, 1999

DECISION

OVERVIEW

This is an application by Wicklow Properties Ltd, Christina Lakeside Resort Ltd, Brenher Group Management Corp, and Brenher Construction Ltd (collectively referred to herein as "the Applicants") under Section 116 (2) of *the Employment Standards Act* (the "*Act*") for a reconsideration of two Decisions #D338/98 and #D339/98 (the "Original Decisions") which were issued by the Tribunal on August 11, 1999.

The issue in this case related to the nature of the working relationship entered into by Gordon and Valerie Sampson with one or more of the Applicants in the time frame of April 1995 to October 1996.

On or around April 14, 1997 Gordon Sam Sampson ("Gordon Sampson") and his wife Valerie Rita Sampson ("Valerie Sampson"), or collectively referred to herein as ("the Sampsons"), filed separate complaints under the *Act* against Wicklow Properties Ltd, Christina Lakeside Resort Resort Ltd and Brenher Group Management Corp. The Sampsons claimed they were owed wages, overtime, annual vacation pay, and statutory holiday pay. The alleged employers defended these claims by asserting that the Sampsons were contractors and not employees under the *Act*.

These complaints were investigated by a delegate of the Director of Employment Standards ("the Director") and after examining extensive materials and submissions the Director dismissed the Sampsons' complaints and determined that neither Gordon nor Valerie Sampson were employees of any of the named corporations.

Gordon Sampson filed a separate complaint against Brenher Construction Ltd for some construction work done during the same time frames and it was determined that he was an employee of Brenher Construction Ltd for a part of that time and Gordon Sampson was awarded $1570.32 for outstanding wages. This Determination was not appealed.

The Sampsons appealed the two Determinations first noted above and after a hearing on April 28, 1998 an adjudicator of this Tribunal issued two decisions on August 11, 1998, BC EST #D338/98 and #D339/98, (the "original decisions"). In the original decisions the adjudicator found that the Sampson's were employees and referred the matter back to the Director to establish the quantum of wages owing. On May 03, 1999 the Director, following the findings of the Adjudicator in the original decisions, found quantum owing to the Sampsons in excess of $50,000.00. The quantum Determination was served on the Applicants on May 11, 1999 and the Applicants gave notice of their intent to seek a reconsideration on May 25, 1999.

The Applicants, after properly waiting for the quantum determination to be completed, then filed the application on June 28, 1999 to the Tribunal pursuant to Section 116 of the *Act* for the Tribunal to reconsider the original decisions. There are five grounds set-out as a basis for reconsideration:

that the adjudicator in the original decisions committed a jurisdictional error by refusing to grant an adjournment at the hearing;

that the adjudicator erred in law by proceeding to conduct a hearing *de novo*;

that the adjudicator acted without jurisdiction when she considered whether the Sampsons were employees of Brenher Construction Ltd who was not named in the original complaint or determinations;

that the adjudicator erred in law by concluding that the Sampsons were employed by Brenher Construction Ltd;

that the adjudicator erred in law by concluding that the Sampsons were at various times employees of Christina Lakeside Resort Ltd.

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 #D497/98, #D498/98, et al). 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". Although most decisions would be seen as serious to the parties this latter consideration will 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.

The circumstances in which an application for reconsideration will be successful will 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:*
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> * *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*

In this case the reasons for the application for reconsideration raise issues that are fundamental to the fairness of the appeal process required by the common law principles of natural justice and the governing principles of the *Act*. I am satisfied that the applicant has passed the first hurdle of the process as set out in *Milan*. The application was timely, raises a significant point of law, and is a serious matter relating to substantial liability.

1. Did the Adjudicator of the original decision commit a jurisdictional error in the form of a breach of the rules of natural justice by refusing to grant an adjournment during the hearing ?

The Applicants submit the following facts as the foundation for this submission:

a) on December 29, 1997 the hearing was scheduled for April 02, 1998;
b) on February 05, 1998 the respondent made a brief submission;
c) on February 11, 1998 the Sampsons submitted submissions 19 pages in length with attached documentation in excess of 50 pages;
d) on March 19, 1998 the Sampsons provided "further evidence" consisting of some 50 pages;
e) on receipt of this material the respondents applied on March 31 for an adjournment;
f) the adjournment was granted from April 02 to April 28, 1998;
g) on April 13, 1998 the Sampsons submitted a "further submission" totalling almost 300 pages of submissions and documentation and which contained "additional evidence";
h) the respondent believed that the hearing would be on the record in that it would consider all material presented to the Director and in documents filed with the Tribunal;
i) the respondent was not prepared for a hearing *de novo* and was not prepared to cross examine the Sampsons nor to give evidence at the hearing;
j) the adjudicator indicated that an adverse inference would be drawn if the respondent

did not call evidence;

k) the respondent requested an adjournment which was denied.

The Sampsons have submitted an extensive and detailed response to the request for reconsideration which is largely evidentiary in nature but where legal argument is included I have considered their submission carefully.

The Applicants were represented at the original hearing by Mr Meiner.

The power to adjourn a hearing is discretionary and must be exercised in accordance with the principles of natural justice: *Prassad v. Canada (Minister of Employment & Immigration* (1989) 57 D.L.R.(4th) 663 (SCC). As such the Tribunal should not interfere with the discretion of the Adjudicator unless there is a clear and unequivocal breach of the principles of natural justice.

In this case the Adjudicator sets out her reasons for denying the application for adjournment on pages 3 - 5 of the original decision. She states that:

> *At the hearing, Mr Meiner stated that he had provided no further submissions or documents because "the Sampsons had done such a good job" of supplying documents. Mr Meiner hesitated in commencing cross-examination and claimed that he would require two days to do it and needed time to prepare for it. I reviewed with him the opportunities which he had to review documents and submissions prior to the hearing and that having heard Mrs Sampson's evidence he could question her on anything she had stated or submitted. He then cross-examined Mrs Sampson and Mr Sampson.*
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> *After the Appellants had finished with their submissions and evidence, Mr Meiner was invited to present his case. He asserted he did not wish to provide any evidence. He stated that he had no further information to add to that of the Director in her determination.*
>
> *I explained to Mr Meiner that although the onus was on the Appellants to show why the determination should be varied, the hearing was the employer's opportunity to provide its side of the case and to dispute anything stated by the Appellants.* **Without any evidence from the employer or any challenge by the employer to the Appellants' evidence, he would risk the Tribunal drawing adverse inferences** (emphasis added). *At this juncture Mr Meiner requested an adjournment to consult with counsel to prepare his response to the appeal. This request was denied as he had already been granted a previous adjournment and time to prepare for the hearing of the appeal.*

The only reason given for not granting the adjournment is that Mr Meiner had had a previous adjournment. The fact of a previous adjournment is a relevant factor to be taken into consideration but is not, and should not, be determinative of the issue. No other reasons were given for denying the adjournment. However, what is of greater concern was the context of the request for the

adjournment.

According to the reasons for decision, Mr Meiner requested the adjournment after being told by the adjudicator that "without any evidence from the employer or any challenge by the employer to the Appellants' evidence, he would risk the Tribunal drawing adverse inferences". Mr Meiner had previously indicated to the adjudicator that he was content to stand on the evidence, documents, and submissions previously before the Director and filed on the appeal. He clearly indicated that he was not planning on cross-examining or leading evidence. However when he was advised about the possibility of adverse inferences being drawn he requested an adjournment.

There are two problems that arise on these facts. Firstly, the adjudicator was fundamentally wrong in law in suggesting that adverse inferences could be drawn from the failure of the respondent to testify. This Tribunal has consistently placed the onus on an appeal on the appellant. The process on an appeal is not a hearing *de novo* and the respondent is at liberty to rely upon the all the material previously submitted to the Director, subject of course to any challenges raised on the appeal to the admissibility, credibility, or relevance of that material. It is not the law that adverse inferences may be drawn. The case cited by the adjudicator: *Re British Columbia Director of Employment Standards,* BCEST #D051/98 does not stand for such a proposition. It simply states the common sense proposition that if an appellant fails to present evidence it is generally fatal to the appeal but if a respondent fails to show or adduce evidence the onus is still on the appellant. But if the appellant adduces sufficient evidence to persuade the Tribunal that the determination was wrong then there is a risk if the respondent fails to attend or oppose in any way. Nevertheless it would not be proper to draw any inferences adverse to the respondent simply because of his inaction.

Case law referring to the drawing of adverse inferences deals only with the trial process and even then such inferences may only be drawn in very limited circumstances: *Jacobsen v. Nike Canada Ltd* (1996) 19 BCLR (3d) 63. An appeal to the Tribunal is not a trial process: *World Project Management Inc.* BCEST #D134/97.

The second problem which arises is that, on the facts as described by the adjudicator and even without external evidence, it is clear that the statement made by the adjudicator about adverse inferences was the catalyst for Mr Meiner to seek an adjournment. If such an adjournment had been granted counsel would have been able to make submissions that would have, in all likelihood, corrected the situation about the drawing of adverse inferences. The adjournment became essential to ensure the fairness of the hearing and should have been granted.

Having found that an adjournment was essential to ensure the fairness of the hearing and that the adjournment should have been granted I do not have to consider the balance of the grounds of appeal and must consider the appropriate remedy.

Section 116 of the *Act* provides that the Tribunal may cancel or vary the order or decision or refer the matter back to the original panel. If I were to cancel the original decisions then the original determinations would be reinstated and the Sampsons would have lost their opportunity to appeal. This would not be a fair result for the Sampsons. I am not in a position to vary the original decision and therefore the only other remedy contemplated in Section 116 is to refer the matter back to the original panel.

However, in my opinion, Section 116 is permissive and not exhaustive. The purposes of the *Act* include the need to promote the fair treatment of employees and employers and to provide fair and efficient procedures for resolving disputes. I do not believe that referring this matter back to the original panel would fulfil these purposes where the original panel has already reviewed the evidence, drawn inferences of credibility, and reached conclusions. Therefore it seems to me that the only fair and reasonable remedy is to cancel the original decisions and the May 3, 1999 quantum Determination and refer this matter to a new panel of the Tribunal to rehear the appeals.

ORDER

This Tribunal orders, pursuant to Section 116 (1)(b), that Decision #D338/98 and Decision #D339/98 and the May 3, 1999 quantum Determination are cancelled but the two appeals which were the subject of the original decisions be referred to a new panel of the Tribunal for hearing.

John M. Orr
Adjudicator
Employment Standards Tribunal