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
(the "Director")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR:	Ib S. Petersen Fern Jeffries Paul Love
FILE No:	2000/574
DATE OF DECISION:	December 6, 2000

DECISION

APPEARANCES:

Ms. Shirley Kay	on behalf of the Director
Mr. Quoc On	on behalf of KEA Foods Enterprises Ltd.

FACTS AND ANALYSIS

This is an application by the Director pursuant to Section 116 of the *Employment Standards Act* (the "*Act*"), against a Decision of the Employment Standards Tribunal (the "Tribunal") issued on March 24, 2000 (#D134/00) (the "Decision"). In the Decision the Adjudicator set aside a $500 penalty imposed on the Employer for failing to produce proper payroll records and cancelled a Determination dated January 6, 2000.

The facts are relatively straightforward. On December 3, 1999, the delegate issued a Demand for Employer Records to be produced by December 20, 1999. However, the Employer did not respond to the Demand until it received the Determination. When the Employer received the Determination, it contacted the delegate on January 10, 2000. According to the Decision, the delegate requested that the Employer deliver the records no later than January 11, 2000. The Employer complied with this.

In this application for reconsideration, which was filed on August 18, 2000, or almost five months after the date of the Decision, the Director argues that the Adjudicator made errors of law and that the Decision must be reconsidered. In brief, the Director says that the Adjudicator erred when he accepted that the conversation between the delegate and the Employer on January 10 as the basis for the cancellation of the Determination. The Employer opposes the reconsideration application.

The only issue to be decided here is whether the application is timely. For the reasons set out below, and in the case referred to, we are of the view that the application is not timely. The principles applicable to an application for reconsideration are well established (see for example, *Milan Holdings Inc.*, BCEST D#313/98, reconsideration of BCEST #D559/97). First, the power to reconsider is discretionary. Second, 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 many decisions, 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.

The panel in *The Director of Employment Standards*, BCEST #D122/98 reconsideration of BCEST #D172/97 (the "*Unisource decision*") correctly stated the law with respect to the timeliness issue and we adopt those principles. In *The Director of Employment Standards*, BCEST #D263/00 reconsideration of BCEST #D214/99, the panel stated:

> "We reaffirm the principles set out in *Unisource*. In our view, an application for reconsideration under the *Act* must be filed within a reasonable time. What constitutes a "reasonable time" depends on the circumstances of each particular case. While we agree that the Tribunal may be guided by the principles applied by the courts, we do not agree that we must follow the approach developed by the courts in judicial review applications.... We agree that the length of the delay may not be determinative. If good cause can be shown for a long delay, the Tribunal will exercise its discretion to reconsider....
>
> .... In our opinion the principles set out in *Unisource* are correct, and in keeping with the approach adopted by the Tribunal on reconsideration applications as expressed in *Milan*, *above*, and other cases, and we reaffirm those principles.
>
> Moreover, we emphasize that those principles are in keeping with the final and binding nature of the decision of the Tribunal touched upon in *Unisource*:
>
> > "The purposes of the *Act* require that the Tribunal avoid a multiplicity of proceedings and ensure that appeals are dealt with expeditiously, in a practical manner, and with due consideration of the principles of natural justice. In our view, this includes, generally, an expectation that one hearing will finally and conclusively resolve the dispute. Read in conjunction with Section 115, the power to "vary, confirm or cancel" a determination, imply a degree of finality, *i.e.*, a party should not be deprived of the benefit of a decision without a compelling reason. ..."

The Director's submissions may be summarized as follows. First, absent a finding of "prejudice" the Tribunal has no jurisdiction to reject an untimely application for reconsideration. Second, the Director also argues that the *Act* is remedial legislation which must be construed in a broad and liberal manner in order to ensure the protection of employees. The Director says that restrictions on the right of a party to apply for reconsideration, the Tribunal is affecting not the Director, but the employees. Third, the Director argues that a time limitation is substantive in nature rather than procedural and that the Tribunal may not make rules which affect substantive matters. Fourth, the Director also argues that it is manifestly unfair and contrary to principles of natural justice to do so without notice to parties who may be adversely affected. We have considered those submissions and do not agree. The submissions of the Director were fully addressed in *The Director of Employment Standards (Meadowvale Holdings)*, BCEST #D530/00, reconsideration of BCEST #D512/99.

The Director mentions that she has indicated her position with respect to "timeliness" in a number of applications for reconsideration and goes on to suggest that "[i]n virtually all cases, the Tribunal has ignored those submissions." There is no foundation for that statement. While the Director does not agree with the principles enunciated by the Tribunal on the issue of timeliness, it is, in our view, neither proper nor particularly persuasive for the Director to keep making substantially the same submissions on the same issue. The Director is a party in the proceedings before the Tribunal and has a legitimate interest in the application and interpretation of the *Act*. It must be remembered, however, that the intervention of the Director in an employment dispute between the parties may impose costs, and delay, and uncertainty for the parties. A significant purpose of the *Act*, as expressed in s. 2(d) is to provide for fair and efficient procedures for resolving disputes over the application and interpretation of the *Act*. The legislative intent, and the jurisprudence before the Tribunal ensures that employment standards issues are dealt with before the delegate, unless there is a significant error which warrants investigation by the Tribunal. There are strict time limits which an appellant must observe in the filing of an appeal. There is a very limited right of reconsideration.

It is important for the Tribunal to be consistent in the application of its decision making principles, bearing in mind that the circumstances of the case must be considered. The Tribunal has developed a principled method of dealing with applications for reconsideration, which is consistent with the scheme of the *Act*, and particularly the importance of fair and efficient procedures. It is important for the parties to have finality in the dispute. The legislature has provided for the finality of Tribunal orders by the insertion of a private clause into the *Act*.

In our view, it is an abuse of process for the Director to raise a substantially similar issue of law, repeatedly, when the Tribunal has dealt with the issue. We find it difficult to understand why the Director objects to explain the delay in filing this application for reconsideration. Such an appeal can be considered to be "lacking in good faith" pursuant to section 114(1)(c) of the *Act*, where no reason is advanced for a substantial delay, in the filing of an application for reconsideration. In the absence of any reason advanced for the lengthy delay in filing, this application for reconsideration is dismissed.

ORDER

Pursuant to Section 116 of the *Act*, the application for reconsideration is dismissed.

Ib S. Petersen

Ib S. Petersen
Adjudicator, Panel Chair
Employment Standards Tribunal

Fern Jeffries

Fern Jeffries
Chair
Employment Standards Tribunal

Paul E. Love

Paul E. Love
Adjudicator
Employment Standards Tribunal