Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

D.F. Woods & Associates operating as Priority Security
("Woods")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: David B. Stevenson

FILE No.: 2001/539

DATE OF DECISION: October 11, 2001

DECISION

OVERVIEW

D.F. Woods & Associates operating as Priority Security ("Woods") seek reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of two decisions of the Tribunal, BC EST #D277/00, dated July 20, 2000, and BC EST #D330/01, dated June 19, 2001 ("the original decisions"). The first of the two original decisions cancelled a Determination dated February 29, 2000 and referred the matter back to the Director to issue a Determination on the complaint of Warren Dingman ("Dingman"). This decision was issued following two days of hearing. The second of the original decisions varied a Determination, dated February 9, 2001, resulting from the referral back ordered in the first decision and found Dingman was owed an amount of $5,462.90, plus interest pursuant to Section 88 of the *Act*. This decision was issued following another hearing.

The application for reconsideration charges that the Adjudicator of the original decisions failed to comply with principles of natural justice and also overlooked or misunderstood significant issues. Woods also contends there was a reasonable apprehension of bias.

The Tribunal accepts this application for reconsideration has been filed in a timely way.

ISSUE

In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied this case is appropriate for reconsideration, the substantive issues raised are whether Woods was denied a fair hearing and whether the Adjudicator of the original decisions overlooked or misunderstood significant issues in the appeals.

ANALYSIS OF THE THRESHOLD ISSUE

The legislature has conferred an express reconsideration power on the Tribunal in Section 116, which provides:

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.

Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the *Act*. One of the purposes of the *Act*, found in subsection 2(d), is *"to provide fair and efficient procedures for resolving disputes over the interpretation and application"* of its provisions. Another stated purpose, found in subsection 2(b), is to *"promote the fair treatment of employees and employers"*. The general approach to reconsideration is set out in *Milan Holdings Ltd.*, BC EST #D313/98 (Reconsideration of BC EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally.

Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. In *Milan Holdings Ltd., supra*, the Tribunal outlined that analysis:

> At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration: *Re British Columbia (Director of Employment Standards)*, BC EST #D122/98. In deciding the question, the Tribunal will consider and weigh a number of factors. For example, the following factors have been held to weigh against a reconsideration:
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> (a) where the application has not been filed in a timely fashion and there is no valid cause for the delay: see *Re British Columbia (Director of Employment Standards)*, BC EST #D122/98. In this context, the Tribunal will consider the prejudice to either party in proceeding with or refusing the reconsideration: *Re Rescan Environmental Services Ltd.*, BC EST #D522/97 (Reconsideration of BC EST #D007/97).
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> (b) where the applicant's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the Adjudicator (as distinct from tendering new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): *Re Image House Inc.*, BC EST #D075/98 (Reconsideration of BC EST #D418/97); *Alexander (Perequine Consulting*, BC EST #D095/98 (Reconsideration of BC EST #D574/97); *32353 BC Ltd., (c.o.b. Saltair Neighbourhood Pub)*, BC EST #D478/97 (Reconsideration of BC EST #D186/97).

> (c) Where the application arises out of a preliminary ruling made in the course of an appeal. "The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid a multiplicity of proceedings, confusion or delay": *World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.
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> 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 summarized in a previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": *Zoltan Kiss, supra*. "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*, BC EST #D199/96 (Reconsideration of BC EST #D114/96). . .

The circumstances where the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the tribunal as including:

- 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.

If the applicant satisfies the Tribunal at the first stage of the analysis in respect of any of the grounds for reconsideration, the Tribunal will address the substantive issues raised in the reconsideration relating to that ground.

I shall first address the allegations of denial of natural justice arising from reasonable apprehension of bias on the part of the Adjudicator. The allegations of bias are found in the following excerpts from the reconsideration submission:

> I would also like to address a matter that [the Adjudicator] reprimanded me, saying as a Court Clerk saying I should know better than to show emotion. My personal job was not presented at this hearing, I am not a lawyer, just a lay person. [The Adjudicator] did not disclose that he has worked as ad hoc crown counsel when Mr. Dingman was a sheriff and I as [sic] a Court Clerk. [The Adjudicator] should have removed himself from this situation. I feel he was very bias toward me and treated me unfairly. There was clear favoritism towards Mr. Dingman . . . .
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> . . .
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> The adjudicator on this matter failed to disclose that he knew both parties and should have removed himself from this matter. . . . I would also like to point out that Mr. Dingman and [the Adjudicator] remained in the conference room after the conclusion of the hearing, we sat in our vehicle outside the main entrance for a while and Mr. Dingman had still not exited the building by the time we had left.

In *Re Dusty Investments Inc. d.b.a. Honda North*, BC EST #D043/99 (Reconsideration of BCEST #D101/98), a reconsideration panel of the Tribunal set out the test for determining whether a reasonable apprehension of bias arises and the burden on an applicant alleging bias against an Adjudicator of the Tribunal:

> We adopt the following comments of Newbury, J.A. in *Finch v. The Association of Professional Engineers & GEO Scientists* (1996), 18 B.C.L.R. (3d) 361 at 376 (B.C.C.A.):
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> > The test for determining whether a reasonable apprehension of bias arises is well-known and clear: Cory J. for the Court in *Newfoundland Telephone Co. Ltd. v. Board of Commissioners of Public Utilities* (1992), 4 Admin. L.R. (2d) 121 (S.C.C.) formulated it this way:
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> > > It is of course, impossible to determine the precise state of mind of an adjudicator who has made an administrative board decision. As a result, the courts have taken the position that an unbiased appearance is, in itself, an essential component of procedural fairness.
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> > > To ensure fairness, the conduct of members of administrative tribunals has been measured against a standard of reasonable

> apprehension of bias. The test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator.
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> Consistent with the above statement, the test is an objective one. Two comments are appropriate in that context. First, because allegations of bias are serious allegations, they should not be found except on the clearest of evidence: see *A.B. Lumber Co. Ltd. and North Coast Forest Products Ltd. v. B. C. Labour Relations Board and another*, B.C.J. No. 1858, August 7, 1998, Vancouver Registry No. A980541. Second, the evidence presented should allow for objective findings of fact that demonstrate actual bias or a reasonable apprehension of bias. The rationale for this requirement is anchored in the principle that a party against whom an allegation of bias is made is not permitted to explain away the circumstances in which the allegation arises or to deny the presence of a biased mind. This principle is enunciated by Laskin, C.J.C., in *P.P.G. Industries Canada Ltd. v. A.-G. Can.* (1975), 65 D.L.R. (3d) 354 (S.C.C.), where he stated that "the introduction of evidence to explain away a situation which raised a reasonable apprehension of bias affecting that party's position in respect of a decision which he challenged" would not be permitted (see also *C.D. Lee Trucking Ltd. v. B. C. Labour Relations Board and others*, B.C.J. No. 2776, November 26, 1998, Vancouver Registry No. A981590).
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> Honda North has not provided any evidence from which a reasonably informed bystander could reasonably perceive bias on the part of the Adjudicator. Counsel for Honda North does not state anywhere in his submissions what was actually said by the Adjudicator. The allegations of bias flow from a superficial overview of the proceedings and consist mainly of subjective impressions made by counsel for Honda North about the proceedings. In this case, as in any case involving allegations of bias, there is an initial presumption that the Adjudicator acted impartially. That presumption is not overcome by presenting subjective impressions, as counsel for the applicant has done here.

In this case, the burden on Woods is to provide clear evidence demonstrating a reasonable apprehension of bias. She has failed to satisfy that burden. Woods has done nothing more than indicate the Adjudicator knew both parties and allege that Mrs. Wood was unfairly treated at the hearings. On the first point, even if the Adjudicator did know both parties through his work as ad hoc crown counsel, I fail to see how that would reasonably demonstrate bias to a reasonably informed bystander. Mrs. Wood's perception of how she was treated during the hearings can only be described as subjective and impressionistic. The allegations are unaccompanied by any real evidence that would allow an objective finding of fact showing bias.

In denying the application for reconsideration on the allegation of bias, I adopt the words of the Court of Appeal in *Adams v. Workers Compensation Board* (1989), 42 B.C.L.R. (2d) 228 (C.A.) at p. 231 to:

> This case is an exemplification of what appears to have become general and common practice, that of accusing persons vested with the authority to decide the rights of parties of bias or reasonable apprehension of it without any extrinsic evidence to support the allegation. It is a practice which, in my opinion, is to be discouraged. An accusation of that nature is an adverse imputation on the integrity of the person against whom it is made. The sting and the doubt about integrity lingers even when the allegation is rejected. It is the kind of allegation easily made but impossible to refute except by general denial. It ought not to be made unless supported by sufficient evidence to demonstrate that, to a reasonable person, there is a sound basis for apprehending that the person against whom it is made will not bring an impartial mind to bear upon the cause.

Woods has also made a general allegation of denial of fair hearing and thus ran counter to principles of natural justice. The application does not indicate any other areas which could possibly support a conclusion that Woods was denied a fair hearing.

Turning to the other ground for reconsideration, it is apparent that the focus and objective of this ground is to have another panel of the Tribunal review the evidence and argument presented by Woods and reach a different conclusion on that evidence than was reached in the original decisions. That is an objective which weighs against an application in deciding whether it is appropriate for reconsideration. It weighs even more heavily against reconsideration in this case because questions of credibility were present in virtually every significant issue of fact. It is obvious from a reading of the original decisions that credibility and weighing of the evidence presented was central to the result. As the Adjudicator noted in BC EST #D277/00:

> I must first note that many of the facts in this case were in dispute. Neither party kept notes or reduced the events to writing at the time. Both parties submitted extensive written and oral evidence re-creating the events and disagreeing with each other on most points. Many of the "facts" were not before the delegate who investigated the matter but have been responses to the determination. Both parties appeared to believe strongly in their version of events and asserted the other was lying.
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> . . .
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> In a case such as this where the evidence is so conflicting it would be easy to decide the matter simply on the basis of this onus. However, in my opinion,

> it behoves me to endeavour to resolve the fundamental issue in this case despite the unreliability of much of the evidence.

He also noted in BC EST #D330/01:

> As stated in the original adjudication, this is a case where the emotions associated with breakdown of long-term friendships has resulted in a situation where "truth" has become expendable and buried in obfuscation for all three significant participants in this dispute. Many documents are alleged to be lost; others have been dubiously recreated. The failure of the delegate to acquire all of the employer's records at an early stage in the investigation has meant that records are incomplete, undisclosed, and of dubious reliability.
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> . . .
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> I have listened to an weighed carefully the evidence of the parties, reviewed those documents made available and applied the test in *Faryna v. Chorney* [1952] 2 D.L.R. 354 (B.C.C.A.) . . .

The reconsideration panel has had no opportunity to observe witnesses, hear their evidence or make judgements about the weight to be given to the evidence presented. Nothing in the application has convinced me that the conclusions reached by the Adjudicator were patently wrong, unreasonable, or not rationally grounded in the evidence presented. Nothing suggests the Adjudicator misunderstood the issues or that he failed to address them. Woods may not like the decision, but it is not the function of reconsideration to provide another hearing to a dissatisfied party on the basis alone.

This ground does not raise any matter that warrants reconsideration and it is also denied.

ORDER

Pursuant to Section 116 of the *Act*, I order the original decisions, BC EST #D277/00 and BC EST #D330/01, be confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal