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 -

Aurora Instruments Ltd.
(" Aurora ")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: C. L. Roberts

FILE No: 2000/711

DATE OF DECISION: December 22, 2000

DECISION

This is a decision based on written submissions by Jinfu Yang, and by Dong Liang, President and CEO of Aurora Instruments ("Aurora").

OVERVIEW

This is an application by Aurora, under Section 116(2) of the Employment Standards Act ("the Act"), for a reconsideration of Decision BC EST #D220/00 (the "Original Decision) which was issued by the Tribunal on June 9, 2000. Yang also filed an application for review. (see BC EST #D540/00)

The Original Decision varied a Determination made by a delegate of the Director on February 8, 2000. The delegate concluded that Yang was not a "manager" as that was defined in section 1 of the Employment Standards Regulations, and determined that Yang was not entitled to compensation for length of service from Aurora. Neither of these conclusions were appealed.

The delegate concluded that Yang was entitled to be paid overtime pay and vacation pay, plus interest, in the total amount of $15,394.06. The Tribunal varied this aspect of the Determination on appeal.

Although the adjudicator found that the delegate had not erred in concluding that Yang was entitled to overtime pay, he determined that the delegate had not applied the appropriate "regular wage" rate in calculating Yang's overtime entitlement, thus overstating the amount owed. The Determination was remitted back to the delegate for recalculation.

ISSUE TO BE DECIDED

Whether the Tribunal erred in law in neglecting to consider evidence submitted on appeal. Mr. Liang contends that the Tribunal failed to comply with the principles of natural justice.

FACTS

The pertinent facts are set out in some length in the Tribunal's decision (BCEST D#220/00), and will be summarized only briefly for the purposes of this decision.

Yang worked for Aurora from December 15, 1996 to July 30, 1998, following which he filed a complaint with the Employment Standards Branch, contending that he was owed compensation for overtime hours. Following an investigation, the Director's delegate issued a Determination on February 8, 2000. The delegate concluded that Yang was not a manager, as noted above.

The delegate then considered Yang's claim for overtime wages. Aurora contended that Yang was paid all overtime due to him. Mr. Liang gave the delegate calculations he provided to his payroll

department with instructions on how overtime was to be calculated. The delegate found these calculations wanting, concluding that the calculations were incorrect, and that Yang had no knowledge that Aurora intended to include the overtime in his salary. Yang's pay stubs did not indicate that any overtime wages were paid.

One of Yang's pay stubs was submitted to the delegate, who concluded that it did not reflect the calculations Mr. Liang indicated were given to his payroll department.

The delegate found that Aurora failed to comply with section 27(1) of the Act, which requires an employer to give each employee a written wage statement for each pay period setting out, among other things, the hours worked, the wage rate, the overtime hours worked, and the amount of the deductions.

Although Aurora conceded that Yang was owed overtime wages, it contended that all overtime wages had been included in Yang's salary. The delegate determined that the evidence did not support Aurora's position. The delegate preferred Aurora's evidence to that of Yang's on the issue of overtime, and calculated overtime wages owed in the amount noted above.

Aurora appealed the Determination, claiming that the delegate erred in awarding Yang overtime pay in the absence of reliable evidence of Yang having worked any overtime, wrongly rejected Aurora's position that Yang's monthly salary included an allowance for 10.5 overtime hours each week, and conducted a procedurally flawed investigation.

As the appellant, Aurora had the burden of establishing to the Tribunal's satisfaction that the Determination was in error. The appeal hearing was held on May 23, 2000, during which a significant amount of documentary evidence was presented to the Tribunal. The adjudicator also heard the oral evidence of the parties and witnesses, which was subject to cross-examination.

After reviewing the evidence and considering the arguments of the parties, the adjudicator concluded as follows:

> The most credible explanation, in my view, is that nothing was specifically agreed as between the parties with respect to Yang's compensable working hours; the parties only agreed on a $2,000 monthly salary.

The adjudicator concluded, as did the delegate, that Yang was entitled to overtime pay in addition to his monthly salary. However, the adjudicator found that the delegate had erred in applying the appropriate "regular wage" rate in calculating Yang's overtime entitlement.

ARGUMENT

Aurora contends that the adjudicator neglected the employer's payroll instructions written by the President, and that he failed to consider the evidence of the payroll clerk. Mr. Liang argues that all of the facts support a conclusion that Yang's pay was based on 50.5 hours per week with overtime paid for. He also argues that "there is no evidence, as determined by the Delegate and

by the adjudicator during the investigation and the hearing, that Yang's pay was based (sic) on 40 hours per week."

Aurora summarizes evidence presented both to the delegate and to the adjudicator regarding the computerized timesheet, pay stubs, calendar of hours, ROE, and the payroll instructions, and contends that the adjudicator failed to give proper consideration to this evidence.

ANALYSIS

The Tribunal has established a two stage analysis for an exercise of the reconsideration power *(see Milan Holdings Ltd. (BCEST #D313/98*). At the first stage, the panel decides whether the matters raised in the application in fact warrant reconsideration.

> 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.
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> *(Milan Holdings, p. 7)*

The Tribunal has held that a reconsideration will only be granted in circumstances demonstrate that there has been a breach of the rules of natural justice, where there is compelling new evidence that was not available at the new hearing, or where the adjudicator made a fundamental error of law. *(Bicchieri Enterprises Ltd. (BCEST #D335/96)*

The scope of review on reconsideration is a narrow one *(see Kiss BCEST#D122/96)*:

1. failure by the adjudicator to comply with the principles of natural justice,

2. mistake in stating the facts,

3. failure to be consistent with other decisions which are not distinguishable on the facts,

4. significant and serious new evidence that would have led the adjudicator to a different decision,

5. misunderstanding or a failure to deal with a significant issue in appeal, and

6. a clerical error in the decision.

In my view, this is not an appropriate case for exercising the reconsideration power.

Aurora alleges a breach of the rules of natural justice, contending that the adjudicator failed to consider, or give sufficient weight, to evidence that was put before him. On the face of the record, I cannot find that argument tenable. Natural justice requires that parties have the opportunity to:

1. know the case against them

2. have the opportunity to dispute, correct, or contradict anything that is prejudicial to their positions; and

3. present arguments and evidence supporting their own case.

There is no evidence the Tribunal failed to give the parties a full and fair hearing. The adjudicator allowed the parties to present their evidence as if the Determination had not existed. The parties knew the case against them, had full opportunity to dispute or challenge evidence that was prejudicial to their positions, and to present full argument. That evidence was subject to cross-examination. There is no evidence that the adjudicator failed to comply with rules of natural justice.

The basis for Aurora's appeal is that the adjudicator failed to give appropriate weight to certain evidence, and his arguments.

A reconsideration application is not an opportunity to have the Tribunal "re-weigh" the evidence.(*see Milan*) The record shows that the adjudicator weighed the evidence before him, some of which was conflicting. The fact that the adjudicator did not make specific reference to all evidence put to him does not mean that he did not consider it. It may be that the evidence was not relevant to the issue on appeal, or that the adjudicator placed no weight on that evidence, as he is entitled to do. The adjudicator preferred the evidence of one party over another and arrived at conclusions that were based on that evidence. Absent any unreasonableness in that conclusion, it is not appropriate to exercise the reconsideration power.

ORDER

The determination is confirmed

C.L. Roberts

C. L. Roberts
Adjudicator
Employment Standards Tribunal