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 -

Marlene McIntyre Holdings Ltd. operating as Shear Pleasure
(" McIntyre ")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: April D. Katz

FILE No: 2000/687

DATE OF DECISION: December 22, 2000

DECISION

SUBMISSIONS:

Michael Shaw	on behalf of Marlene McIntyre Holdings Ltd.
Tamara Ward (Hummel)	on behalf of Tamara Hummel
Rosalie Hertel	on behalf of Rosalina Hertel
Melody Morrison	on behalf of Melody Morrison
Bill Woolsey	on behalf of the Director

OVERVIEW

The Employer, Marlene McIntyre Holdings Ltd., ("McIntyre") has applied for a reconsideration of a Tribunal Decision dated August 21, 2000, which confirmed a Director of Employment Standards Determination dated February 4, 2000. The Determination concluded that McIntyre had breached sections 16, 17, 40(2) and 58 (1) of the *Employment Standards Act* ("*Act*") in failing to pay three former employees minimum wages and vacation pay. The Determination found that McIntyre owed Tamara Hummel $3,314.39, Melody Morrison $2250.03 and Rosalina Hertel $2984.43.

ISSUE

Has McIntyre provided grounds for a reconsideration of the Tribunal decision dated August 21, 2000?

ARGUMENT

McIntyre 's submits that she had witnesses gathered for the oral hearing on June 2, 2000 before the Tribunal, who were not called to testify on her behalf. Two of the witnesses she suggests were concurrent employers of one of the employees who could have given evidence that the employee had two other part time jobs when she was working for McIntyre. The other witnesses were former employees in the salon, who would have given evidence of the positive working conditions. The witnesses had given their evidence in writing to the Delegate and were not giving new evidence.

McIntyre indicates that there was an ongoing EI investigation in Alberta regarding one employee during her period of employment. McIntyre also believes that a criminal prosecution of one of the employees was relevant to the decision and not considered.

McIntyre states that she did not contest anything stated by the three employees as she thought she would have her say after their evidence and this never happened.

McIntyre's lawyer was asked if he had anything to add and he said "No" but McIntyre does not believe she was asked if she had anything to add. She argues that she would have "spoken given the chance". She believes that the hours of operation were not fully examined and "decided on probabilities not realities". She does not believe that justice was served.

The Employees' position is that McIntyre was given several opportunities to add any new evidence during the hearing and responded "no" when asked. They submit that they heard the Adjudicator state at the hearing that this was a hearing not a trial and that this was not the time to present new evidence that was available during the investigation and should have been presented to the Director's Delegate.

The Director's Delegate's submission argues that a reconsideration should be approached with caution and not proceed simply to reargue the issues or the findings of fact based on the same evidence. The grounds for a reconsideration are limited to

1. a failure by an adjudicator to comply with principles of natural justice;

2. where a mistake of fact has been made;

3. where a decision is inconsistent with other decisions not distinguishable on the facts;

4. where significant and serious new evidence has become available that had such evidence been presented to the adjudicator it would have lead the adjudicator to a different conclusion;

5. serious mistake in applying the law;

6. misunderstandings or failure to deal with a significant issue; and

7. a clerical error in the decision.

The Director's submission is that none of these grounds are present in this situation.

THE FACTS

McIntyre operates a beauty salon, Shear Pleasure, in Prince Rupert. Tamara Hummel was employed in the salon from March 1, 1996 until October 6, 1997. Rosalina Hertel was employed from September 19, 1997 until January 15, 1998 and Melody Morrison was employed from February 3, 1998 until May 21, 1998. Each employee was paid monthly based on a straight commission of 55% of work performed.

On December 18, 1997, McIntyre had a letter prepared to the Director, which Ms Hertel and Ms Morrison signed, indicating that they were paid 51% commission plus 4% vacation pay each pay period.

The employees complained on the basis that they were not paid the minimum wage plus 4% vacation pay. They stated that they were required to work the hours the salon was open. The salon was open from 9:30AM to 5:30PM Monday to Friday and 9:30AM to 5PM on Saturday. The employees' earnings did not amount to the minimum wage.

McIntyre argued that the employees were properly paid based on the commission arrangement. She had recalculated the hours worked to perform the commission work based on the appointment books. Her evidence was that the employees were only required to work from their first appointment until they completed their last appointment each day and they had been paid for all these hours. She argued that one employee worked part time for two other employers and therefore could not have worked for her for all the time claimed.

The employees stated that at least half of the appointments were from walk in clients. No one knew when a walk in client would arrive so they had to be at work all the time. There was evidence that McIntyre became angry if staff did not arrive at 9:30AM whether they had an appointment or not.

After hearing from all the witnesses, the employer and the employees and based on the written evidence submitted to the Director's Delegate and submissions from McIntyre's counsel and her accountant, the Adjudicator concluded that there was no basis for varying the Determination and dismissed the appeal.

McIntyre filed this request for reconsideration on October 6, 2000 based on the arguments outlined above.

ANALYSIS

The purpose of the *Act* is to facilitate the quick, efficient and inexpensive adjudication of complaints. This appeal involves claims for one employment period, which ended more than three years ago and two, which ended over 32 months ago. The primary factor weighing in favour of a reconsideration is whether the applicant has raised significant questions of law, fact, principle or procedure of sufficient merit to warrant reconsideration.

It has been stated that the reconsideration power should be used sparingly and only in exceptional cases. (See World Project Management Inc.BC EST # D134/97; Re: Allard BC EST # D265/97). Allowing more than one hearing in a matter extends the proceedings and delays the remedy or resolution of the complaint. A degree of finality is desirable. (See Re: Kiss BC EST # D122/96; Re:Pacific Ice Company BC EST # D241/96; Re: Restaurontics Services Ltd. BC EST # D274/96; and Re: Khalsa Diwon Society BC EST # D199/96).

The authority to reconsider orders and decisions under Section 116 is a discretionary power that is to be exercised with caution. Section 116 of the *Act* provides as follows.

> 116 (1) On application under subsection (2) or on its own motion, the tribunal may:
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> (a) reconsider any order or decision of the tribunal, and
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> (b) cancel or vary the order or decision or refer the matter back to the original panel.

The Tribunal has written extensively about the basis for reconsideration and has adopted the criteria set out by the Delegate in his submission. I will examine McIntyre's request under each of the criteria.

1. Principles of natural justice

McIntyre argues that her witnesses were present but were not called. The employees point out that the Adjudicator set out the limited nature of an appeal and that the evidence that was available during the investigation was not new evidence. The Adjudicator that asked McIntyre's counsel if there was anything more and he responded "no". There is no suggestion that counsel was unaware of the EI claim, criminal proceedings and the part time work. He presumably decided not to call the witnesses because it was not relevant to the claim under appeal. It is hard to imagine how other proceedings involving these employees would have changed the hours of work they had with this employer.

I find no evidence of denial of natural justice in these proceedings.

2. Mistake of fact has been made

The employer and the employees disagree on the question of the hours of work and whether the employees needed to be at work all the hours the salon was open on the days the employee was working. Two decision-makers have considered the evidence on this issue and both have concluded that the employees evidence is to be accepted on this point.

There is no purpose in having another decision-maker review the same facts. I find no evidence of a mistake of fact that would warrant a reconsideration.

3. Decision is inconsistent with other decisions

I find no evidence that this decision was inconsistent with other decisions.

4. New evidence that would have lead the adjudicator to a different conclusion

Having found that the employees needed to be at work all day of the days they worked as a finding of fact, there was no new evidence presented in the submissions before me that would support granting a reconsideration on this ground.

5. Serious mistake in applying the law

I find no allegation of mistake in applying the law.

6. Misunderstandings or failure to deal with a significant issue

The issues raised in the appeal were dealt with in the decision and the reconsideration application does not raise any new issues.

7. Clerical error in the decision

There is no suggestion of a clerical error in the decision.

In Milan Holdings Ltd. BC EST #D313/98, the Tribunal set out a two-stage process for analyzing requests for reconsideration. The first stage is to decide whether the matter raised in the application for reconsideration warrants a second examination.

I have determined that this request for a reconsideration does not pass the first stage. There is no basis on which to pursue a reconsideration. The Adjudicator gave the employer a full opportunity to present the appeal. Based on the evidence presented the Adjudicator confirmed the findings of the Determination.

CONCLUSION

Based on the submissions before me I find no error of law, fact, principle or procedure of sufficient merit to warrant reconsideration by the Tribunal. The request for a reconsideration is denied.

ORDER

This Application is denied pursuant to Section 116 of the Act.

The Decision is confirmed. Pursuant to section 116 of the Act, I order that the Decision BC EST #D354/00 dated August 21, 2000 is confirmed with interest pursuant to section 88 of the *Act*.

April D. Katz

April D. Katz
Adjudicator
Employment Standards Tribunal