BC EST #D568/98
Reconsideration of BC EST #D439/98

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 -

Barry Campbell

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Geoffrey Crampton

FILE NO.: 98/668

DATE OF DECISION: December 16, 1998

DECISION

OVERVIEW

This is an application by Barry Campbell for reconsideration of a Decision pursuant to Section 116 of the *Employment Standards Act* ("the *Act*"). The application was decided without an oral hearing.

The decision which Mr. Campbell seeks to reconsider was published on October 1, 1998 and numbered BC EST #D439/98 ("the Original Decision"). In it the Adjudicator confirmed a Determination dated June 29, 1998 in which the Director of Employment Standards (the "Director") found that Mr. Campbell was covered by a Variance dated February 25, 1998. That variance applied to "...all hourly-paid employees at the Kemess South Mine Site," Mr. Campbell's former workplace, and was effective from August 5, 1997 to August 5, 1999. Mr. Campbell's former employer was Royal Oak Mines Inc. which operated the Kemess South Mine.

Although duly notified of Mr. Campbell's request for reconsideration and its right to make a reply, the Tribunal did not receive a submission from Royal Oak Mines Inc. The Director opposed Mr. Campbell's reconsideration request as being without merit.

ISSUES TO BE DECIDED

1. Has Mr. Campbell established sufficient grounds that the Tribunal should reconsider the Original Decision?

   and

2. If so, should I confirm, cancel or vary the Original Decision or refer it back to the Adjudicator?

FACTS

The essential facts, as found by the Adjudicator, were set out succinctly in the Original Decision, at page 2:

> The Director issued a variance under s. 73 of the *Act* to Kemess Mines Inc concerning all hourly paid employees at the Kemess South Mine Site. The application for a variance was made on August 5, 1997 and was granted on February 25, 1998 to be effective on August 5, 1997. The employer sought a variance from sections 35, 36 and 40 of the *Act*.

> At the time the application for variance was made there were 16 employees in the group that would be affected by the variance. At the time of the investigation by the Delegate the portion of the work force covered by the variance had increased to an additional 94 employees. The employer had all new employees who commenced with the employer, sign an application for variance. One of those new employees was Mr. Campell.
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> On January 19, 1998 the Delegate was contacted by Mr. Campbell who indicated that he was not in favour of the variance. Mr. Campbell had signed previously the application for the variance. Mr. Campbell signed the variance application as one of the documents that he signed when he commenced with the employer. He was aware of the employer's application at the time that he commenced his employment...
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> The [hours of work] approved by the Director's delegate consisted of 14 consecutive work days at 12 hours per day, followed by 14 consecutive days of rest. Overtime was to be averaged over the 4 week cycle. There would be daily overtime of double time after 12 hours per day, and weekly overtime of time and one half after 40 hours per week and double time after 48 hours per week, averaged over a 4 week schedule...
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> There was no evidence in the material before me of the date that Mr. Campbell commenced for the employer. He states that:
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> > the work variance was not in place during Campbell's employment. Therefore provincial employment standards apply.
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> Mr. Campbell appears to have resigned his employment on January 19, 1998 on the date that he spoke to the Director's delegate, who was conducting the survey.

The analysis which led the Adjudicator to confirm the Determination included a finding that Mr. Campbell's submissions on Section 15.1 of the *Charters of Rights and Freedoms* would not be considered because he had not yet given notice to the Attorneys General and because his arguments on the topic were not developed upon in his submissions.

In analyzing Section 73 of the *Act*, which gives the Director the power to grant a variance, the Adjudicator relied on earlier decisions of the Tribunal (*Goudreau et al*, BC EST #D066/98 and *Wang*, BC EST #D161/98) to decide that he was limited to "... a review of the discretion exercised by the Director's delegate in granting the Variance". The Adjudicator was not persuaded by Mr. Campbell's appeal that the exercise of the Director's discretion was flawed and he confirmed the Determination that Mr. Campbell was covered by the Variance.

On October 10, 1998 Mr. Campbell have notice to the Tribunal, the Attorney General of British Columbia and the Attorney General of Canada that he was seeking a constitutional

remedy under Section 15(1) of the Charter of Rights and Freedoms. That notice was given as required under the *Consitutional Questions Act* (R.S.B.C., C. 68).

ANALYSIS

Should the Tribunal reconsider the Original Decision?

The statutory authority to reconsider a decision of the Tribunal is found in Section 116 of the *Act*:

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.

A consistent theme throughout the Tribunal's reconsideration decisions is that it should exercise its discretionary reconsideration powers with great caution and only under a very limited set of circumstances where there are no compelling reasons to do so. See, for example, *Zoltan Kiss* (BC EST #D122/96), *Director of Employment Standards* (BC EST #D313/98; Reconsideration of BC EST #D559/97) and *Khalsa Diwan Society* (BC EST #D199/98, Reconsideration of BC EST #D114/98).

The following excerpt from *Director of Employment Standards* (BC EST #D313/98) sets out the principles which guide the Tribunal in exercising its discretionary reconsideration powers under Section 116 of the *Act* in a manner that is consistent with its fundamental purposes and the principles of natural justice:

> The primary factor weighing in favor 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 previous Tribunal decisions by requiring an applicant for reconsideration to raise "a serious mistake in applying the law": *Zoltan Kiss, supra*. As noted in previous decisions, "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* (BCEST #D199/96, reconsideration of BCEST #D114/96) ... (emphasis added).

Mr. Campbell's request for a reconsideration of the Original Decision is based on various grounds, as set out in his submissions to the Tribunal, and can be summarized as follows:

- there is a mistake in the Adjudicator's recitation of the facts in the Original Decision;
- the Adjudicator misunderstood Mr. Campbell's argument concerning Section 15(1) of the *Charter*;
- the Director's delegate may have failed to conduct a proper investigation prior to issuing the variance;
- Mr. Campbell was coerced by his former employer into signing the Variance application;
- the Director's delegate and Kemess Mines Inc. engaged in discriminatory practices against Mr. Campbell;
- the Adjudicator was biased;
- the Director applied the *Act* incorrectly in making the Determination and in granting the Variance by including Mr. Campbell in the Variance and by failing to enforce the minimum standards established under the Act.

The following statement in his submission of October 26, 1998 summarizes Mr. Campbell's views:

> My rights have been infringed upon under the Employment Standards Act and the Canadian Charter of Rights and Freedoms and it is my intention to continue the matter until I receive all of the overtime wages that are due to me while I was employed by Royal Oak Mines (Kemess).

Closely related to and perhaps inter-twined with his submission concerning the *Charter*, is his view that he was the subject of discrimination:

> "...because the company paid (him) wages according to the 'proposed' work variance schedule which 'had not been approved' and paid other workers overtime wages for hours worked in excess of 8 hours." (sic)

In my view, Mr. Campbell's submissions fall far short of establishing any basis for his view that he was the subject of discrimination. I have reviewed Mr. Campbell's argument concerning Section 15 of the *Charter* in light of the relevant jurisdiction and have concluded that it is without merit and must be dismissed as he has identified no ground of discrimination listed in Section 15 or one analagous thereto.

The Adjudicator adopted the correct test in reviewing the Director's exercise of her discretionary power (see page 5 of the Original Decision) and there is no basis for me to find either bias by the Adjudicator or discriminatory practices by the Director's delegate. The non-payment of overtime wages to employees of businesses (contractors and sub-contractors) engaged by Royal Oak to perform work at the Kemess site is irrelevant to Mr. Campbell's complaint, appeal and reconsideration application.

In Mr. Campbell's submission, there was "a flagrant...failure to apply the law" because the Director's delegate made errors in processing Royal Oak's application for a variance. That view is based on his belief that "variance applications are normally made jointly by the employer and employees..." and was one of the grounds on which he made his appeal under Section 112 of the *Act.*

Section 72 of the *Act* states, in part:

> "An employer and any of the employer's employees may, in accordance with the regulations (sic), join in a written application to the director for a variance of any of the following..."

Section 73(1) of the *Act* gives to the Director the power to grant a variance:

> (1) The director may vary a time period or requirement specified in an application under section 72 if the director is satisfied that
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> (a) a majority of the employees who will be affected by the variance are aware of its effect and approve of the application, and
> (b) the variance is consistent with the intent of this Act.

Section 30 of the *Employment Standards Regulation* (B.C. Reg. 396/95) sets out the procedure to be followed for a variance:

> 30. (1) To apply under section 72 of the Act for a variance, a letter must be delivered to the director.
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> (2) The letter must be signed by the employer and a majority of the employees who will be affected by the variance and must include the following:
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> (a) the provision of the Act the director is requested to vary;
> (b) the variance requested;

(c) the duration of the variance;
(d) the reason for requesting the variance;
(e) the employer's name, address and telephone number;
(f) the name and home phone number of each employee who signs the letter.

At page 5 of the Original Decision, the Adjudicator made the following comments:

> The investigation conducted by the Director's delegate in January and February of 1998 revealed that the majority of employees to whom the variance would apply had approved of the variance. From the wording of the *Act* it is clear that it is not necessary for all the employees to be in favour of the variance for the Director to grant the variance. Even if all or almost all of the employees were to support the variance that would not mean that the Director is compelled to rubber stamp a proposal : *Arcos Consulting Ltd.* BC EST # D410/98. There is no requirement in the *Act* that the application be a joint application of the employer and employees as long as the majority of the affected employees are aware of the effect and approve of the application. Once a delegate has approved the variance it applies to all the employees in a particular category of work specified in the variance.
>
> The Director's delegate found that the variance was consistent with the purposes of the *Act*. The *Act* provides for a minimum set of standards to all employees in an employment relationship, unless excluded by regulation (s. 3). The *Act* is set up so that an employee cannot waive the provisions of the *Act* (s. 4).

At page 6, the Adjudicator went on to conclude:

> It appears to me that the issue of whether to grant a variance from the hours of work provision and overtime provisions, is a matter that falls squarely within the jurisdiction of the Director. One cannot say that there has been any error of jurisdiction. There has been no abuse of power by the Director. There does not appear to be any supportable evidence that Mr. Campbell was surprised by the variance application of the employer. He must have been aware of this application from the first date of employment. I therefore find that it was not unreasonable for the variance to be issued to be effective as of the date of application. This appears to be consistent with the reasonable expectations of the parties. There is nothing unreasonable about the decision that the Director made in this matter.

It is clear on the face of the Variance that the Director received an application from Kemess Mines Inc. and the more than 100 employees listed in schedule "A" attached to the Variance. Thus, I find there is no basis for this aspect of Mr. Campbell's application.

Mr. Campbell asserts that he was coerced into signing a variance application at the time he became employed at Kemess. The Adjudicator found, at page 4 of the Original Decision, that there was no evidence of coercion. I can find nothing in Mr. Campbell's various submissions which satisfies me that the Adjudicator made a mistake of fact or law on this point. Any evidence or argument which Mr. Campbell wished to make on this point should have and could have been placed before the Adjudicator. There is nothing to suggest that there is some significant and relevant new evidence on this point which I should consider.

When I consider Mr. Campbell's submissions and review the Original Decision I find that Mr. Campbell has not established that there are sufficient grounds to reconsider the Original Decision.

ORDER

For the reasons given above, pursuant to Section 116 of the *Act*, I decline to cancel or vary the Original Decision.

Geoffrey Crampton
Chair
Employment Standards Tribunal