Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Director of Employment Standards
(the "Director")

- 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: Frank A.V. Falzon, Panel Chair
Paul E. Love
April D. Katz

FILE No.: 2001/488

DATE OF DECISION: November 27, 2001

MAJORITY DECISION

F.A.V. Falzon, Panel Chair (P. Love, Adjudicator, concurring):

OVERVIEW

This is an application for reconsideration by the Director of Employment Standards. To understand it, some history is necessary.

PROCEDURAL HISTORY

For present purposes, the story begins on May 23, 2000. On that date, a Tribunal Adjudicator conducted an oral hearing on Mr. Zhang's appeal from a February 8, 2000 Determination that addressed, among other things, whether Mr. Zhang's employer owed him unpaid wages for employment between July 16 and September 1, 1998. The Determination concluded that, based on Mr. Zhang's records regarding hours worked, the employer did not owe Mr. Zhang "unpaid wages".

Mr. Zhang told the Adjudicator that he only recorded weekend and holiday time, and that he worked many additional hours that he did not write down. At the hearing, which the Director did not attend, Mr. Zhang said he told the delegate all this during her investigation, a point which is confirmed in the Determination itself (p. 6): "N. Zhang claims during Monday to Friday he worked 9:00 AM to 5:30 PM with a daily 30 minute meal break, however he has only provided a typed total of his hours as a second record. This record does not show start and finish times and does not appear to have been kept in a timely manner."

On June 9, 2000, the Adjudicator held that the delegate confused the burden of proof regarding hours worked and did not interview key witnesses. He held as follows (pp. 4-5):

> The delegate had before her a situation in which the employer had not maintained *any* proper payroll records relating to Zhang despite its legal obligation in that regard. Obviously, both Zhang and Aurora had markedly divergent views regarding the number of hours Zhang worked during the period in question (July 16th to September 1st 1998). The delegate appears to have resolved the matter by simply stating that Zhang's records only recorded 72 working hours but this finding ignores Zhang's apparent position that he recorded *only* weekend and holiday hours on his calendar. Zhang says he told the delegate that he only recorded his weekend and holiday hours and that evidence stands totally uncontradicted before me.
>
> Further, and more importantly, Zhang was not obliged to maintain *any* record of his hours worked. The delegate simply did not turn her mind to the credibility of Zhang's *oral evidence* regarding his total working hours; the delegate did not attempt to corroborate Zhang's oral evidence by interviewing

> his witness, Mr. Yang. While it was certainly open to the delegate to reject Zhang's oral evidence as to his total working hours, the delegate – at least in the Determination itself – has not set out any basis for doing so and, so far as I can gather based on the evidence before me, on the balance of probabilities, it would appear that Zhang worked far more than the 72 hours credited to him by the delegate. [all italics in original]

Because additional witnesses needed to be interviewed, the Adjudicator was not in a position to determine the total hours worked. He therefore referred the matter back to the Director under s. 115(1)(b), a step which is quite appropriate and unexceptional where the Tribunal finds further investigation as being necessary to ensure a proper decision on the merits:

> 115(1) After considering the appeal, the tribunal may, by order
>
> (b) refer the matter back to the director.

What was uncommon was the Adjudicator's direction that the matter be reinvestigated by a different delegate (p. 5):

> Pursuant to s. 115(1)(b) of the *Act*, I order that Zhang's complaint be referred back to the Director so that it may be reinvestigated, taking into account the findings set out herein, by a delegate other than the delegate who issued the Determination. Following the reinvestigation, the Director may vary the Determination pursuant to section 86 of the *Act*. [emphasis added]

The Adjudicator's Order must be read in light of the Tribunal's June 9, 2000 written process direction to the parties which was issued with the Order:

> When a matter is referred back, the Director will consider the issue(s) identified in the Order. The Director will initially attempt to assist the parties in coming to a settlement. If a voluntary resolution is obtained, the matter is resolved and the Director will advise the Tribunal to close its file.
>
> If a resolution is not obtained, the Director will submit a report to the Tribunal. The report will outline the Director's decision on the matter that has been referred back for further investigation, its factual basis, and the position of the parties….
>
> Where the report is submitted to the Tribunal… the Tribunal will forward the Director's report and the other parties' replies to an Adjudicator. The Adjudicator may decide the matter based solely on written submissions or an oral hearing may be held…. The Adjudicator shall confirm, vary or cancel the Determination or again refer the matter back to the Director.

> The Tribunal will not reconsider its decision to refer the Determination back to the Director until the above process is complete. As a result, parties are encouraged to cooperate with the Director in resolving the issues specified in the Order. After the above process has been concluded, a party to a Determination may apply to have the Tribunal reconsider its decision. [emphasis added]

In the March 15, 2001 decision under review, (p. 4) the Adjudicator comments that the Director "could have challenged the direction by way of application for reconsideration under section 116(2), but chose not to do so". Given the above process direction, however, the Director might reasonably have expected that the Tribunal would not look favourably on such an application until after the reinvestigation had concluded.

The delegate's superiors apparently took issue with the Adjudicator's decision to direct that a different delegate undertake the reinvestigation. Given the Director's disagreement with the decision, the Director was faced with the following lawful options:

- Comply with the direction;
- Contact the Tribunal and seek leave to apply for reconsideration despite the practice direction;
- Seek judicial review on the basis that the Order was unacceptable and an adequate alternate statutory remedy was not available to the Director

Most regrettably, the delegate's superiors created a fourth option. In direct contradiction to and defiance of the Adjudicator's Order, the same delegate was instructed to conduct the reinvestigation without even so much as notice to the Tribunal it intended to disobey a clear direction from the Adjudicator. About this, more will be said below.

Sometime over the next 5 months, the reinvestigation took place.

On November 1, 2000, the Tribunal received a letter from Mr. Zhang, expressing concern that, contrary to the June 9, 2000 order, the same delegate was reinvestigating the matter.

On November 3, 2000, the original delegate wrote the parties. She did not issue a varied Determination. Instead, she advised the parties that based on her interviews, Mr. Zhang was in fact owed an additional $2,249.51 on account of unpaid wages. The delegate's letter set a November 27, 2000 deadline for either party to contact the delegate to dispute her calculation.

On November 24, 2000, the employer wrote to the Tribunal advising that it would not respond to the delegate's November 3, 2000 decision until the "incorrect procedure" objected to by Mr. Zhang had been clarified, presumably by the Tribunal.

So it was that the delegate reported to the Tribunal on December 20, 2000 as follows:

> This is my report back to the Tribunal, with regards to the above noted decision. I consulted with my manager on these matters, which were referred back to the Director. *My manager instructed me, in accordance with our Branch Procedure Directive, that I was to interview the witnesses of Ningfei Zhang, and that the matter would not be referred to another Delegate of the Director….*
>
> Neither of the parties has commented on the witness information and recalculation, as the Tribunal's decision requested that this be referred back to a different Delegate of the Director. Both of the parties submitted letters to the Tribunal, copies attached, which the Tribunal forwarded on to me. The parties choose to await direction from the Tribunal on this report, rather than send any comments to me….
>
> If the Tribunal requires any further information from the delegate please advise [emphasis added]

In accordance with the procedural direction it had issued on June 9, 2000, the Tribunal solicited comment from the employer and employee on the delegate's December 20, 2000 report.

On January 3, 2001, Mr. Zhang indicated he was content with the extra $2,249.51 found to be owing to him. On January 9, 2001, the employer claimed that the witness statements were questionable, asserted that the calculation was arithmetically wrong, and advised of his confusion over the fact that the same delegate conducted the reinvestigation.

Upon completion of submissions, the written submissions were reviewed by the original Adjudicator. On March 15, 2001, he found as follows:

> I am tempted, of course, to overlook the failure to comply with my original order especially given the amount of money in issue and the time it has taken, to date, to address Zhang's unpaid wage complaint. However, Aurora has, in effect, objected to the delegate's jurisdiction to reinvestigate Zhang's complaint as did, initially, Zhang, himself. I do not believe that I can sidestep the jurisdictional issue simply because it would be convenient to do so.
>
> I originally made an order directing that Zhang's unpaid wage complaint be reinvestigated by another delegate. Although the Director could have challenged that direction by way of an application for reconsideration under section 116(2), the Director chose not to do so. Accordingly, in my view, the direction was part of a valid and subsisting order and it was not open to the Director to unilaterally decide not to abide by that order. Zhang objected to

> the original delegate reinvestigating his complaint but the matter proceeded apace in any event.
>
> However, absent an order from the Tribunal, I am inclined to the view that even if Zhang had not objected, the original delegate was not at liberty to reinvestigate Zhang's unpaid wage complaint. The decisions of the Director (unlike those of the Tribunal) are not protected by a privative clause; the Act is structured such that the Tribunal's orders are binding on the Director, not the reverse. There is an important principle at stake here that, in my view, cannot be overridden simply because it might be expedient to do so.
>
> In my opinion, the Director has not complied with my original June 9th, 2000 order. Until that order is varied or cancelled (either by way of reconsideration, or failing that, through judicial review), it stands…
>
> Accordingly, I see no option but to reiterate my original order (set out earlier in these reasons) and I hereby do so. Pursuant to section 115(1)(b) of the Act, I order that Zhang's complaint be referred back to the Director so that it may be reinvestigated by a delegate other than the delegate who issued the Determination.

On June 22, 2001 the Director submitted her reconsideration application from the Adjudicator's March 15, 2001 decision. The submissions process completed in mid-July, 2001.

ISSUE

The issue is whether the Tribunal ought to reconsider the Adjudicator's March 15, 2001 decision, and if so whether the Adjudicator's decision ought to be set aside.

ANALYSIS

A. The Director's flouting of the Adjudicator's Order and the discretion to reconsider

On this application, the Tribunal is faced with a most difficult situation. The office of the Director of Employment Standards, who has the high duty to enforce the law of employment standards, has defied a clear order of this Tribunal, and then come to this Tribunal requesting reconsideration on the very question respecting which the Tribunal's order has been flouted. The Director's request for reconsideration, through counsel, offers no apology, excuse, explanation, or even mention of the decision to contradict a clear and subsisting order of this Tribunal.

To appreciate the gravity of the situation, it is perhaps worth reminding ourselves that under the *Employment Standards Act*, the Director's decisions are made subject to the appeal

decisions of the Employment Standards Tribunal. The Tribunal has express authority to decide all questions of fact or law arising in an appeal: s. 108(2). Its decision on any matter in which it has jurisdiction is final and conclusive: s. 110. The Tribunal's order in an individual appeal is legally binding on the Director.

On a human level, it is never easy to accept an Order that one regards, subjectively, as fundamentally wrong. However, because a free society must be governed by the rule of law rather than by the whims of those in power, such acceptance is the price we all pay for the ordered freedom we all cherish. It is neither open to, nor appropriate for, the subject of a binding order of a court or administrative tribunal to simply "ignore" an Order based on the view that it is illegal, inappropriate or offensive. That Government would do so is deeply troubling. To arrogate the right to take the law into one's own hands serves only to bring disrepute to the statutory scheme. It is not an exaggeration to observe that where a party asserts the right to flout subsisting orders of an agency or court, all will soon lose confidence in the system. Where that party is Government, private parties themselves may justifiably ask: "Why should we comply with Tribunal orders if the Director reserves the right to ignore them? And for that matter, if the Director can pick and choose which Tribunal decisions she wishes to comply with, why should we comply with orders of the Director?"

As reflected in the very language of the full privative clause in s. 110 of the *Act*, where a quasi-judicial decision-maker has jurisdiction to embark on the subject matter of a dispute and to render a decision that is final and conclusive, any decision it makes is valid and subsisting unless and until set aside by due process of law. It does not lose its character as a quasi-judicial decision because a court later finds an excess of jurisdiction or a breach of procedural fairness: *Danyluk v. Ainsworth Technologies Ltd.*, [2001] S.C.J. No. 46 at para. 47. The matter can be put no better than it was by the Supreme Court of Canada, in a passage that resonates as much with Tribunal Orders issued under the *Act* as it does with Tribunal orders that are filed with the Court:

> The duty of a person bound by an order of a court is to obey that order while it remains in force regardless of how flawed he may consider it or how flawed it may, in fact, be. Public order demands that it be negated by due process of the law, not by disobedience.
>
> *Canada (Human Rights Commission) v. Taylor*, [1990] 3 S.C.R. 892 at para. 90. See also Macaulay, *Practice and Procedure Before Administrative Tribunals* (2001), p. 29A-10: "All agency orders must be obeyed. They simply cannot be ignored."

Deeply troubled as we are by the instruction to the delegate that the Tribunal order be flouted, is that conduct a basis for our refusing the Ministry's request to re-examine the question whether the Adjudicator was legally correct in directing that a different delegate conduct the re-investigation? In other words, may we exercise our discretion under s. 116 and refuse reconsideration of an issue that we would otherwise examine if we conclude that the party requesting the reconsideration does not come to the Tribunal with "clean hands"?

After careful reflection, we have concluded that if any consequences are to flow from the direction given to the delegate to contradict the Adjudicator's order, those consequences will have to be external to this reconsideration process. This Tribunal, whose jurisdiction is purely statutory, has made clear that 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: see extensive discussion in *Re Valorosso*, BCEST #RD046/01; Reconsideration of BCEST #D466/99. Our jurisdiction lies not in equity, but in statute. While the reconsideration discretion is properly informed by factors such as "delay" - which is key to this statutory regime even though also found in equity (*Act*, s. 2(d)) - the same cannot be said for a doctrine such as "clean hands".

The validity of an extant Order is logically distinct from the question whether a party has complied with it. Our primary concern must always be with the fair and lawful treatment of the individual employer and employee who have been involved in this process. To deny an otherwise valid reconsideration request because of the conduct such as took place here would improperly prejudice the parties. In plainer language, it is not appropriate to penalize the parties for the Director's misconduct. If, despite that misconduct, the Director has an important point to make, we should listen to it.

Adding to the complications of this unfortunate file, the Director's reconsideration application only asks us to revisit the March 15, 2001 decision, and does not expressly seek reconsideration of the June 9, 2000 decision. This could be significant because in the March 15, 2001 decision, the Adjudicator faced the narrow question whether to accept a reinvestigation conducted contrary to his own previous Order, and in the absence of any argument by the Director as to why his June 9, 2000 order was wrong.

Were we to limit our gaze to the March 15, 2001 Order, the answer on reconsideration would be clear. The Adjudicator showed the courage and fortitude to do the only thing he could do: confirm his previous Order. The Director not having even made a submission to the Adjudicator that he revisit his June 9, 2000 order, it is difficult to give any weight to the Director's submission about "*stare decisis*": (Director's submission, pp. 13-14).

Despite the fact that Director only asked us to reconsider the March 15, 2001 decision, it is clear from the balance of counsel's submission that the Director's fundamental objection is with the original June 9, 2000 direction that a different delegate undertake the reinvestigation. Given our independent discretion under s. 116 to reconsider any previous Tribunal decision, given the Tribunal's June 9, 2000 practice direction deferring any reconsideration of that decision until after the reinvestigation, and given the need for finality in a dispute that has been ongoing for 3 years, we felt that it would be artificial to limit our gaze to the March 15, 2001 decision.

For the reasons given below, we have concluded that the Adjudicator erred, on June 9, 2000, when he directed a different delegate to undertake the reinvestigation.

B. Standard of review of the Adjudicator's decision

We begin by noting that the Adjudicator's decision could potentially be viewed in one of two ways. It could be seen as a discretionary judgment that, whether or not reinvestigation by the same officer would give rise to bias in law, Adjudicators have a discretion to require the Director to "exceed" legal bias standards to ensure a process even "purer" than that a Court would require, for example, on an application for judicial review. Alternatively (and probably more correctly), it could be seen as a statement that reinvestigation by a new officer is necessary precisely to avoid a reasonable apprehension of bias in law.

We do not see this as a simple case of reviewing a "discretionary judgment" of an Adjudicator. As a matter of principle, the Director's discretion to deploy limited personnel resources as the Director considers appropriate, and based on information the Tribunal does not necessarily possess, ought only to be interfered with where an Adjudicator finds that that deployment of personnel would contravene a legal principle, such as the principle regarding bias. Because such an order would be exceptional, it would be incumbent on an Adjudicator to provide a clear articulation of reasons why the original delegate is, in the Adjudicator's view, legally precluded from reinvestigating the matter.

On a full and fair reading of both decisions, it is apparent that legal concerns were indeed at the root of the Adjudicator's decision. The Adjudicator recognized that the Order he was making was exceptional. It appears clear that in the absence of legal concerns, the Adjudicator would not have made the Order he did.

The present reconsideration therefore turns *not* on the review of an Adjudicator's discretion, but instead on a question of law – did the Adjudicator correctly conclude that a reinvestigation by the same delegate would give rise to a reasonable apprehension of bias? Because bias arguments have a factual component, we have also asked ourselves whether we ought to defer to the Adjudicator's decision to the extent that includes a factual component.

In the unique circumstances here, the answer is "no". The Adjudicator explicitly stated that his decision was based purely on his reading of the Determination. He does not suggest that he received evidence from the parties that would touch on the bias question. If this matter proceeded to Court, the Court would base its assessment on the Determination. This Panel must be at liberty to do the same. We are in no different position than was the Adjudicator with respect to this question.

Because bias goes to jurisdiction, no deference can be granted to the Adjudicator. The standard of review is correctness. If, because of legal error, the Order under review puts the parties, and their witnesses, through a second "reinvestigation", this Panel must be able to correct this error.

C. Was there a reasonable apprehension of bias in law?

As a matter of law, it is clearly open to the Tribunal to refer a matter back to the Director with directions in circumstances where the Tribunal properly concludes that the delegate in question was subject to bias or a reasonable apprehension of bias. As the Director concedes in counsel's submission (para. 36), such authority is necessarily implicit in the authority to remit, in order to ensure the process at first instance is not tainted before it begins.

One species of reasonable apprehension of bias arises where a decision-maker is asked to conduct a quasi-judicial adjudication having already formed a negative view about a person's credibility. As wisely noted in *British Columbia Nurses' Union v. British Columbia Women's Hospital*, [1997] B.C.J. No. 855 (C.A.) at para. 14:

> It is, in my opinion, completely unrealistic to expect a decision maker to free his or her mind from a previous conclusion that someone is, in essence, lying, and to reach a new and entirely balanced conclusion free from that previous settled decision on the basis of new evidence which may do nothing more than add another piece to the total puzzle of credibility and fact finding.

British Columbia Nurses' Union was a labour arbitration case. The interest at stake was nothing less than dismissal. The allegation was extremely serious: that a nurse had harshly shaken a crying newborn baby while shouting at the baby: "will you shut up?" It was a credibility case of the most serious variety. The arbitrator, who conducted a quasi-judicial hearing, concluded that the nurse had shaken the baby and issued written reasons to that effect. When new evidence came to light and the LRB ordered a new hearing, it ordered that the matter go before the same arbitrator. The Supreme Court reversed the direction that the case continue before same arbitrator. The Court of Appeal upheld the Supreme Court's decision. Even recognizing that the test for "bias" in administrative law is flexible (*Old St. Boniface Residents Assn. Inc. v. Winnipeg (City)*, [1990] 3 S.C.R. 1170), the nature of the allegations, the interests at stake and the nature of the arbitrator's function clearly justified the highest standards for bias in that case.

This case is very different from *British Columbia Nurses' Union*. First, on the issue of credibility, it is not at all apparent that the delegate here made a finding that Mr. Zhang, was "in essence", lying. Indeed, the Adjudicator's June 9, 2000 decision did not state that the delegate had arrived at previous conclusion as to Mr. Zhang's credibility. The flaw was stated to have been a failure to turn her mind to the question of credibility in light of her error as to the onus of proof and the failure to interview witnesses (p. 5):

> The delegate simply did not turn her mind to the credibility of Zhang's *oral evidence* regarding his total working hours; the delegate did not attempt to corroborate Zhang's oral evidence by interviewing his witness, Mr. Yang. While it was certainly open to the delegate to reject Zhang's oral evidence as to his total working hours, the delegate – at least in the Determination itself – has not set out any basis for doing so and, so far as I can gather based on the

> evidence before me, on the balance of probabilities, it would appear that Zhang worked far more than the 72 hours credited to him by the delegate. [italics in original; underlining added]

The matter is admittedly complicated by the Adjudicator's March 15, 2001 elaboration, which much more directly suggests a "pre-judgment" by the delegate (p. 4):

> While I did not then – and do not now – have any concerns about the integrity of the particular delegate, I could envision Mr. Zhang having such concerns. Further, at least by implication, the delegate had found Zhang not to be fully credible – she rejected his evidence with respect to both his hours worked and his wage rate. The delegate also rejected Zhang's assertion that the notations on the calendar reflected only weekend and holiday hours, not his entire working hours. As I read the Determination (and that is all I had to go by since the delegate did not appear at the appeal hearing), Zhang's seeming lack of credibility was of central concern to the delegate.

The test for reasonable apprehension of bias does not depend on the subjective assessment of a particular party. It is an objective assessment of whether a reasonable person, fully apprised of the relevant facts, would conclude that the decision-maker, because of his or her statements, conduct or relationship to the parties, could not bring an impartial mind to bear upon the cause. We will return to the issue of "credibility" below.

Before doing so, however, it is important to note the second difference between this case and *British Columbia Nurses' Union* - namely that the Director does not exercise the kind of pure quasi-judicial role exercised by labour arbitrators in dismissal cases. In administrative law, the threshold for a finding of bias must be considered in light of the fundamental nature of statutory process, which, in the present instance, was described as follows in *Milan Holdings:*

> An investigation is, by its nature, different from a proceeding conducted in the cool detachment of a quasi-judicial hearing where all the parties are present and procedural niceties are attended to. Investigations are a dynamic process, in which information is collected from different persons in different circumstances over time. At different points during the investigation, the investigator may hold different perspectives or viewpoints that lead him or her in one direction or another. A proper investigation cannot be run like a quasi-judicial hearing. Investigations necessarily operate in much more informal, flexible and dynamic fashion. All this is reinforced by s. 77 which requires only that "If an investigation is conducted, the director must make *reasonable efforts* to a give a person under investigation an opportunity to respond". This modification of the common law standard is legislative recognition that the Director's role is more subtle and more complicated than can be expressed by the label "quasi-judicial". On completing an investigation, the director may make a determination: s. 79(1). At the time such a determination is made, it is an unavoidable practical reality that other investigations on related subjects

> may still be underway and that tentative conclusions may have been reached in respect them, pending a decision as to what, if any enforcement action is appropriate on an individual or more general basis: *Re Takarabe* (BCEST #D160/98). This is precisely the situation which presents itself here.

This is not to say that the employment standards process should subject a party to a reinvestigation by a delegate who has reached a previous conclusion that a person is not to be believed. If the true and proper reading of the matter is that the delegate has firmly concluded that a person was "in essence, lying", the only proper outcome is to remit the matter to a different delegate: *British Columbia Nurses' Union, supra*. However, having carefully reviewed the February 8, 2000 Determination, we do not think the evidence meets this test.

The first point to note about the Determination is that the delegate did not find against the employee on all points. On the critical issue whether Mr. Zhang was an employee, she found in his favour.

On the issue of hours worked, we think the Adjudicator correctly characterized matters in his June 9, 2000 decision when he stated that, faced with contradictory oral statements and no employer records, the delegate resolved to decide the matter based only on records and an incorrect understanding of the onus of proof. The delegate's reliance on employee records, and her error on the onus of proof, are captured at p. 7 of the Determination: "Due to a lack of adequate records and based on the information provided, there is not enough evidence to support that any wages are owing to N. Zhang."

Read as a whole the Determination does not support the conclusion that the delegate had concluded that Zhang was lying. The Determination does not say this, nor does it make any statements about the "positive" credibility of the employer. We must be realistic and recognize that, of all the issues that investigators and adjudicators have to face in their duties, questions of credibility are the most difficult. In many cases, decision-makers have been known to avoid the question altogether: *Re Ontario Public Service Employees Union et al. and The Queen in right of Ontario* (1984), 45 O.R. (2d) 70 (Div. Ct). In yet other cases, they may choose to prefer the evidence of one witness over another based on a legal error regarding the onus of proof, and without also making a finding that one person was lying.

The best reading of the Determination in this case is that, faced with two different stories, and not knowing who to believe, the delegate simply avoided the credibility question on both sides and resolved to decide the matter according to "corroborative" records, on the assumption that Zhang had the onus of proof, and without interviewing additional witnesses. We do not share the conclusion that Mr. Zhang's "seeming lack of credibility was of central concern" to the delegate. There is no evidence that she experienced any partiality as between these parties, and in fact we consider that had she applied a different onus of proof, the result would in all likelihood have been different. What can at most be said is that she reached a tentative conclusion which preferred the evidence of one side in an incomplete investigation process, but preferring the evidence of one party based on a legal error about the standard of proof is quite a different matter than concluding that one party was a liar.

We share the Adjudicator's belief that there is no basis to question the integrity of the delegate. Viewed objectively, in light of the statutory function and the language of the Determination, it is our view that the February 8, 2000 Determination is more properly characterized a Determination reached after an incomplete investigation. It was not a basis for finding a reasonable apprehension of bias against the employee.

ORDER

As a result of our decision, the June 19, 2000 Order of the Adjudicator is set aside to the extent that it purports to remit the matter to a new delegate for reinvestigation. The December 20, 2000 report will stand.

Following that report, Mr. Zhang indicated his acceptance of it. However, Aurora has pointed to discrepancies in the witness evidence to the delegate, which discrepancies appear to us to be more in the nature of details rather than a wholesale rejection of the evidence.

It is our view that the delegate should complete the process she started on December 20, 2000, and promptly decide whether, based on Aurora's January 9, 2001 letter, she will amend her recommendation and arrive at a varied Determination. Following a varied Determination, either party will have the right to appeal to the Tribunal.

Having stated this as the process provided by law, the Panel wishes to express its concern with respect to the time it has taken to conclude this matter. We would encourage all parties to take the required steps to conclude this dispute quickly and with finality.

The Panel would be remiss in failing to observe that none of its comments regarding the Director's conduct in failing to comply with the Adjudicator's June 19, 2000 extend to the delegate. The delegate's supervisors placed her in the invidious position of having to choose between compliance with this Board's order, or insubordination to her employer. The responsibility for her predicament rests with those who gave the instruction.

Frank A.V. Falzon
Adjudicator
Employment Standards Tribunal

Paul E. Love
Adjudicator
Employment Standards Tribunal

A. Katz, Adjudicator, concurring:

OVERVIEW

The Director seeks reconsideration of a Tribunal Decision, which ordered that the matter be reinvestigated by a different delegate without finding bias. These reasons concur in the results of the majority decision of the Panel. This decision is included as a reflection of a different interpretation of the Determination and the Tribunal Decision. We shared the view that too much time had passed to put the parties through more steps in the process.

This matter proceeded by way of written submission.

ARGUMENT

The facts and process are well laid out in the majority decision. This decision is concerned with the arguments the Director raised to do with the jurisdiction of the Tribunal. The Director argues that in the absence of a finding of bias the Tribunal has no authority to direct the Director to appoint a different delegate to investigate a complaint after hearing the parties to the complaint.

Neither the employer, Aurora, or the employee, Ningfei ("Tony") Zhang, made written submissions although both parties had contacted the Tribunal during the reinvestigation to express their concern about the same delegate conducting the investigation.

THE LAW

Reconsideration

Tribunals have written extensively about the basis for a reconsideration. Section 116 of the Act states:

> 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.

The power to reconsider orders and decisions under Section 116 is a discretionary power that is exercised with caution. The Tribunal has adopted limited grounds for reconsideration of decisions. Those grounds include

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

b) where a mistake of fact has been made;

c) where a decision is inconsistent with other decisions not distinguishable on the facts;

d) 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;

e) serious mistake in applying the law;

f) misunderstandings or failure to deal with a significant issue; and

g) a clerical error in the decision.

The purpose of the Act is "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act", section 2(d). Allowing more than one hearing in a matter extends the proceedings and delays the remedy or resolution of the complaint. The Tribunal's authority is limited to confirming, varying or canceling a determination, or referring a matter back to the Director of Employment Standards under Section 115. The above reasons imply that 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 purpose of the Act is to facilitate the quick, efficient and inexpensive adjudication of complaints. 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).

The criteria for exercising the discretion to reconsider a decision was stated in Re *Milan Holdings Ltd*., BC EST #D313/98. In *Milan Holdings*, 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. In deciding this question, the Tribunal considers whether the focus of the request for reconsideration is to have a second panel effectively re-examine the evidence presented to the adjudicator in the first decision. 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 merit reconsideration. Reconsideration will not be used to allow a "re-weighing" of evidence or the seeking of a "second opinion" when a party simply disagrees with the original decision. (See *Wicklow Properties Ltd*., et al., BC EST #D518/99)

The time that has passed since the original complaint in 1998 is significant and any decision made here should be expeditious.

The issues raised by the Director in the submission do, however, raise important and significant issues of law and fact for the Tribunal to consider.

THE FACTS

The facts and history of the complaint are well covered in majority decision.

ANALYSIS

The Director was not represented at the Tribunal hearing. The Adjudicator listened to the parties. In his June 9, 2000 decision the Adjudicator found it appropriate to order that a different delegate conduct the reinvestigation when he referred the matter back to the Director. A referral back to the Director rarely contains the direction to assign a different delegate. In his decision the Adjudicator found that the delegate misdirected herself as to where the onus lay in providing evidence of hours worked. It did not speak to bias.

In the Determination the delegate stated that the complainant, the employee, Ningfei ("Tony") Zhang had told the delegate that he worked Monday to Friday from 9:00 AM to 5:30 PM and had a record of additional hours worked on holidays and weekends. The delegate only accepted Tony's claims for the hours documented on weekends and holidays. The evidence of the complainant was not contradicted but the delegate ignored it until the reinvestigation two years later. The Adjudicator could have found that the delegate had made a credibility finding but he did not to do that.

It is unfortunate that the Adjudicator did not provide any other supporting reasons for his Order that a different delegate conduct the reinvestigation. There may have been other factors that arose in the hearing but they are not in the decision. There was enough evidence from the above facts plus something that may have come out in the hearing that may have given rise to concerns of bias. Unfortunately the original decision of June 9, 2000 did not state anything about bias and the decision of March 15, 2001 is not sufficiently helpful to draw a clear conclusion at this time that there was a reasonable apprehension of bias for the reasons stated in the majority decision.

Both the employer and the employee raised their concerns about the Director's choice to ignore the Tribunal's order and reappoint the original delegate to do the reinvestigation. Both parties contacted the Tribunal separately expressing concern with the process when the same delegate commenced her reinvestigation.

The statutory regime set out in the Act was brought into disrepute for these parties regardless of the outcome of this decision. It is noteworthy, however, at the end of the day neither party sought a reconsideration of the Tribunal's decision to refer the matter back to the Director to comply with the original order. I am comfortable that the delegate did the best she could in the circumstances to conduct a fair process in the reinvestigation.

It may be that the Order on June 9, 2000 was simply made as an abundance of caution to ensure the parties had confidence they were being heard by the delegate. There was no new evidence of concern about bias in the reinvestigation.

If the Tribunal finds bias the decision must make that clear so that the Director can proceed properly to ensure a fair process.

CONCLUSION

For the reasons given I have concluded that the Decision of June 9, 2000 did not justify the Adjudicator's order for a different delegate to undertake the reinvestigation. Having made this finding, the March 15, 2001 decision cannot be justified. I therefore concur with the majority in the result.

ORDER

The December 20, 2000 reinvestigation report will stand subject to any amendments arising from the employer, Aurora's, January 9, 2001 letter being adopted by the delegate.

Following a varied Determination, either party will have the right to appeal to the Tribunal.

April D. Katz
Adjudicator
Employment Standards Tribunal