

**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 -

The Director Of Employment Standards  
(the "Director")

- of a Determination issued by -

The Employment Standards Tribunal  
(the "Tribunal")

**ADJUDICATOR:** David Stevenson

**FILE No.:** 98/354

**DATE OF DECISION:** October 13, 1998

## DECISION

### OVERVIEW

This is an application for reconsideration pursuant to Section 116 of the *Employment Standards Act* (the "Act") by the Director of Employment Standards (the "Director") of a decision of the Employment Standards Tribunal (the "Tribunal"), BC EST #D037/98, dated February 11, 1998 (the "original decision"). The original decision cancelled two Determinations of the Director relating to Randhawa Farm Contractors Ltd. ("Randhawa"), one that concluded Randhawa had contravened Section 17(1) of the *Act*, and which resulted in the imposition of a fine in the amount of \$12,600.00, and the other which cancelled Randhawa's farm contractor licence under Section 7(c) of the *Employment Standards Regulation* (the "*Regulation*").

The Determinations were cancelled because the Director was unable to show that an earlier Determination, dated July 3, 1997, which imposed a \$0.00 penalty pursuant to subsection 29(2) of the *Regulation*, had been served on Randhawa. The July 3, 1997 Determination was the first penalty imposed on Randhawa under that subsection, which sets out a statutory scheme of gradually increased penalties for recorded contraventions of certain provisions of the *Act* identified in Appendix 2 of the *Regulation*.

The Director says the decision is reviewable under Section 116 on three grounds: significant new evidence that was not available to the adjudicator in the original decision; mistake of law; and misunderstanding or failure to deal with a serious issue.

### ISSUE TO BE DECIDED

The issue is whether the Director has brought this case within any of the established grounds on which the Tribunal would review the original decision.

### FACTS

The facts are not at issue.

On November 7, 1997, the Director issued two Determinations against Randhawa. The content of those Determinations are summarized above. On November 12, 1997, Randhawa appealed the Determination which imposed the penalty. In the cover letter to the appeal, Randhawa says:

I am only appealing Nov 07/1997 Determination, regarding 12600 dollars.

The grounds of appeal was that the penalty was unreasonable and that Randhawa was not clearly told that a second contravention would result in a \$12,600.00 penalty.

The Tribunal scheduled an expedited hearing on the appeal for November 28, 1997 which was re-scheduled to December 1, 1997 to accommodate the Director's Counsel.

At the hearing, Randhawa testified that he did not receive the July 3, 1997 Determination. The analysis of his evidence generally, and in particular on this critical area is found in the following passage of the original decision:

Mr. Randhawa's evidence was that he was quite certain that he did not receive the Determination. Counsel for the Director argues that there is no credible

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evidence that the employer did not receive the July 3, 1997 Determination. In all the circumstances, I am inclined to agree. Overall, I found Mr. Randhawa to be evasive and vague in his testimony, including with respect to his knowledge of the requirements of the *Act* and the *Regulation*. With respect to the specific issue of whether the Employer actually received the July 3, 1997 Determination, I find that Mr. Randhawa's testimony was less than credible. First, there was a meeting on July 3, 1997. A Demand for Employer Records was hand delivered to Mr. Randhawa on that date at the Branch office. Mr. Randhawa was uncertain what actually transpired at the meeting, apart from his insistence that he did not receive the Determination.

The Director produced no evidence at the hearing before the original panel that Randhawa had been served with the July 3, 1997 Determination. Relying on Section 122(2) of the *Act*, the adjudicator in the original decision found the burden of proving service of the July 3, 1997 Determination was on the Director and that burden was not met on the evidence.

**ANALYSIS**

Section 116 of the *Act* confers reconsideration powers on the Tribunal:

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.*

The circumstances in which an application for reconsideration will be successful are limited. Those circumstances have been identified in several decisions of the Tribunal, commencing with *Zoltan Kiss*, BC EST #D122/96, and include:

- 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.

The first ground of appeal raised by the Director is that there is significant new evidence that was not available to the adjudicator in the original decision that establishes Randhawa was served with the July 3, 1997 Determination.

I do not accept that this case involves a question of new evidence that was not reasonably available to the original panel. There is simply no question that the Director was required to prove service of the July 3, 1997 Determination on Randhawa. The requirement of service is a

statutory obligation of the director. Section 81(1) of the *Act* requires the Director to serve a copy of the Determination on any person named in it. It reads:

81. (1) *On making a determination under this Act, the director must serve any person named in the determination with a copy of the determination that includes the following:*
- (a) *the reasons for the determination;*
  - (b) *if an employer or other person is required by the determination to pay wages, compensation, interest, a penalty or another amount, the amount to be paid and how it was calculated;*
  - (c) *if a penalty is imposed, the nature of the contravention and the date by which the penalty must be paid;*
  - (d) *the time limit and process for appealing the determination to the tribunal.*

In the appeal, the Director says the failure to produce evidence of service was based on a lack of notice that non-receipt of documents would be raised by Randhawa in the appeal. I agree with the adjudicator in the original decision that the Director bears the burden of showing the statutory obligation to serve a determination has met. In my opinion, this burden stands apart from any reason for appeal that may be raised by an individual. Practically speaking, an appeal of a Determination will confirm the fact of its service in most cases. But that will not be so in every case, and in particular it will not be so in cases where increased penalties are imposed under to subsection 29(2) and are based on one or more previous contraventions of the specified provisions of the *Act*. In such cases, the Director is required to prove service of the relevant Determinations in a hearing before the Tribunal and bears the risk of failing to prove service.

The Director also says the failure to prove service at the hearing was based on a lack of opportunity to arrange the attendance of two Employment Standards Branch co-op students who, it is said, personally served the July 3, 1997 Determination on Randhawa. It is apparent from the submission supporting that argument that the evidence the Director seeks to introduce on the question of service was available to the Director at the time of the hearing and the Director simply failed to bring it forward. If there was some problems with personal attendance of the persons having the relevant evidence, the Director could have sought an adjournment or, as it has here, sought to introduce the evidence in affidavit form. What the Director cannot do is proceed with the hearing and, having failed to prove service, seek to introduce the evidence on reconsideration that should have been introduced on appeal.

It follows from what I have said above that I also do not agree with the Director on the second ground for reconsideration. The Director says there was a sufficient evidentiary foundation to show that Randhawa probably received the July 3, 1997 Determination:

The Director submits that given the preponderance of evidence submitted by her, it had been established the events alleged by the Director had “probably occurred”. . . . [B]ased on all the evidence, the Director on the balance of probabilities had established the Appellant’s receipt of documents, . . . . The Adjudicator’s application of the higher and inapplicable standard of proof beyond a reasonable doubt resulted in the cancellation of the Determinations.

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Having read the original decision several times, I do not accept that the Director was required to prove “beyond a reasonable doubt” that Randhawa was served with the July 3, 1997 Determination. I do not read the original decision as saying more than the Director had not tendered evidence proving service of the July 3, 1997 Determination and, in the circumstances, the adjudicator was unwilling to imply that service had been effected, notwithstanding some suspicion about the veracity of Mr. Randhawa as a witness.

I agree with the original decision that it was not up to Randhawa to disprove receipt of the July 3, 1997 Determination, it was up to the Director to prove it had been served.

The final ground for reconsideration argues that the adjudicator in the original decision misunderstood or failed to deal with a serious issue. The “issue” upon which this ground of appeal is based is the issue of the credibility of Mr. Randhawa. This argument, however, simply restates the basic premise of the second argument, that the adjudicator should have implied service, not because of any evidence presented by the Director, but because the adjudicator had some doubt about the reliability of Mr. Randhawa’s evidence. This is not a case where the adjudicator was called upon to weigh competing evidence. Simply put, there was no evidence that the July 3, 1997 Determination had been served. I am unaware of any principle that would have *required* the adjudicator in the original decision to imply conclusions of fact from the failure of Mr. Randhawa to be candid in his testimony. I agree that it was open to the adjudicator to do that, but it is apparent from the decision that he chose not to, perhaps considering the consequences to Randhawa of implying service were too significant to relieve the Director of the responsibility to prove it directly. Nor do I agree there was there any “shifting” of the burden of proof on the matter of service. The original decision clearly indicates the Director has the statutory obligation to serve and, where it is necessary, the requirement to prove service. Nowhere does the original decision suggest the proof required must be “proof beyond a reasonable doubt”.

The Director has not brought this case within any of the established grounds of reconsideration.

That does not, however, end the matter. It is clear from the material provided by the Director that Mr. Randhawa was not truthful in testifying he had not received the July 3, 1997 Determination. The Director submitted affidavits from the two Employment Standards Branch co-op students who met with Mr. Randhawa and his wife on July 3, 1997 and personally served on Mr. Randhawa and his wife a copy of the July 3, 1997 Determination. Both individuals also attest to having personally observed Mr. Randhawa sign the “Proof of Service” stamp on the July 3, 1997 Determination. In reply to the application for reconsideration, Counsel retained by Randhawa on the application, states, in part:

With respect to the factual issues regarding receipt of the July 3 Determination, my client reiterates his previous evidence that while he does recall attending a meeting on July 3 at the Employment Standards Branch he does not recall receiving the Determination in question.

I am extremely troubled by that response in light of the following comments in the original decision:

Mr. Randhawa’s evidence was that he was quite certain that he did not receive the Determination. . . . Mr. Randhawa was uncertain what actually transpired at the meeting, apart from *his insistence* that he did not receive the Determination. (emphasis added)

The evidence before the adjudicator in the original decision about whether Randhawa received the July 3, 1997 Determination went much further than “he does not recall receiving the Determination in question”. The evidence given by Mr. Randhawa projected a certainty and an “insistence” that he had not received the July 3, 1997 Determination.

The totality of the evidence before me on this application indicates that the result obtained by Randhawa in the original decision was procured by a fraud or deceit on the Tribunal. The conduct of Mr. Randhawa has undermined the integrity of the appeal process and the administrative responsibility of the Tribunal. This conclusion is not one that is reached lightly, but in this application the evidence meets the test outlined by the Tribunal in *Insulpro Industries Inc. and Insulpro (Hub City) Ltd.*, BC EST #D403/98, where it was noted that:

The evidence must point clearly to the conclusion that the process was tainted to such a degree that to allow the Determination to stand would be an affront to fundamental principles of justice that underlie a reasonable person’s sense

of decency and fair play (see *R. v. Conway*, [1989] 1 S.C.R. 1659 at 1667).  
(page 9)

The question is what authority the Tribunal has to address a fraud or other circumstance that has undermined the integrity of its process.

There are numerous decisions to the effect that a court judgment secured by fraud is a nullity and may be quashed by a reviewing Court. In the context of administrative tribunals, while there is still some controversy about the authority of an administrative tribunal to re-open a decision which is procured by fraud or deceit in the absence of an express power to do so, it is considered settled that an administrative tribunal which is given a general statutory power to reconsider its own decisions can re-open a decision based on fraud or deceit. Subsection 116(1) of the *Act*, which is set out above, provides the Tribunal with that authority, either at the instance of a party named in the decision, or on its own motion.

There is also authority for the proposition that even without express authority to reconsider its own decisions, any administrative tribunal has a duty, if not an implicit authority, to maintain the integrity of its process and may re-open any decision in the face of concerns that call the integrity of the process into question (see *Canadian Pacific Express Ltd. v. Ontario Highway Transport Board*, (1979) 26 O.R. 193).

The limited circumstances under which the Tribunal will review a decision under Section 116 of the *Act* incorporates the concept of the desirability for finality in its decision making process. As the Tribunal noted in *City of Surrey*, BC EST #D433/98:

The rationale for the approach of the Tribunal [under Section 116] is rooted in two primary objectives - to provide “*fair and efficient procedures for resolving disputes over the application and interpretation of the Act*” and the need to achieve some finality to Determinations made by the Director.  
(page 7)

That concept is re-inforced in Section 110 of the *Act*. However, neither the authority of the Tribunal to address a fraud or deceit nor its duty to ensure the integrity of the process is diminished by the desirability for finality. The propriety of this view was recognized by the British Court of Appeal in *Meek v. Fleming*, [1961] 3 All E.R. (C.A.) where Lord Justice Holroyd Pearce stated:

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Where a party deliberately misleads the court in a material manner, and that deception has probably tipped the scale in his favour (or even, as I think where it may reasonably have done so) it would be wrong to allow him to retain the judgment thus unfairly procured. *Finis litium* is a desirable object, but it must not be sought by so great a sacrifice of justice which is said must remain the supreme object. Moreover, to allow the victor to keep the spoils so unworthily obtained would be an encouragement to such behaviour, and do even greater harm than the multiplication of trials. In every case it must be a question of degree, weighing one principle against the other.  
(page 154)

Those comments were echoed by Lord Justice Willmer at page 155:

. . . the application of the maxim [that it is in the public interest that there be an end to litigation] cannot be pressed to the extent of allowing a miscarriage of justice to go uncorrected. The rules relating to the admission of fresh evidence do not apply, e.g. in a case where fraud or surprise is alleged. . . .

A decision based on fraud or deceit is a nullity. A decision that is otherwise undermines the integrity of the process may be re-opened by the administrative tribunal on its own motion. Either way, the result is that the original decision is cancelled. The matter will be referred back to the original panel. The parties should be aware that the Tribunal has the authority under Section 107 of the *Act* to decide an appeal without an oral hearing.

**ORDER**

Pursuant to Section 116 of the *Act*, I order the original decision be cancelled and the matter referred back to the original panel.

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**David Stevenson**  
**Adjudicator**  
**Employment Standards Tribunal**