Employment Standards TRIBUNAL

An appeal

- by -

Monika Schittek
("Schittek")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: David B. Stevenson

FILE No.: 2001/210

DATE OF DECISION: July 31, 2001

DECISION

OVERVIEW

This is an appeal pursuant to Section 112 of the *Employment Standards Act* (the *"Act"*) brought by Monika Schittek ("Schittek") of a Determination that was issued on February 19, 2001 by a delegate of the Director of Employment Standards (the "Director").

Schittek had filed a complaint with the Director under the *Act* alleging her former employer, Young Life's Malibu Club ("Malibu"), had contravened several provisions of the *Act* and owed Schittek an amount that included the exchange rate on the conversion of U.S. dollars to Canadian dollars, overtime wages, annual vacation pay and length of service compensation. Schittek also alleged Malibu had made improper deductions from her wages and that she had incurred expenses during her employment with Malibu for which she ought to be reimbursed. The Determination concluded that Schittek's employer, which it identified in the Determination as being Young Life of Canada Foundation operating as Young Life's Malibu Club, had not contravened the *Act*, ceased the investigation of the complaint and closed the file.

Schittek says the Determination was wrong because the Director failed to consider all of the documentation provided to her, did not correctly identify the issues and did not apply the *Act* correctly to the issues.

ISSUE

The issue in this appeal is whether Schittek has demonstrated there is any error in the Determination sufficient to justify the Tribunal exercising its authority under Section 115 to vary or cancel the Determination or refer the matter back to the Director.

FACTS

Schittek was employed by Malibu from March 17, 1997 to September 15, 1999 as an Administrative Assistant (bookkeeper) for Malibu Area/Club Property No. 6500, located in or near Egmont, B.C. In her appeal, Schittek takes issue with the Director identifying her employer as Young Life of Canada Foundation operating as Young Life's Malibu Club. She claims to have been employed by Young Life operating as Young Life's Malibu Club, an extra-provincially registered society having its head office in Colorado Springs, Colorado. In support of this ground of appeal, Schittek has attached a letter over the signature of Hal Merwald, who identifies himself as the National Director of Young Life of Canada. The letter claims that neither Young Life of Canada nor Young Life of Canada Foundation have any legal connection with the Malibu Club and seems to suggest that Schittek was not employed by Young Life of Canada Foundation operating as Young Life's Malibu Club.

Schittek was hired at a monthly salary of $1668.00 (US) a month, plus benefits (medical, dental and pension). The terms of her employment were recorded in two documents included with the file, a letter over the signature of Don Prittie, the Property Manager for the Malibu property at the time Schittek was hired, dated March 11, 1997, and a Personal Action Request (PAR) signed by Mr. Prittie on March 10, 1997. The former document stated what her salary would be:

> The monthly pay would be $1668 US which translates to $2170 Canadian or $26,040 annually.

Schittek was terminated in a letter dated September 15, 1999. The letter was identified as a letter of dismissal and was to be effective as of its date. It set out the terms of a compensation package to be paid in respect of her termination, which included the following matters:

- You will be paid your standard salary for the next two weeks
- We will pay out your holiday payments that are required to date
- We will pay you a severance package equivalent to one month's salary for every year of employment at the Malibu Club.

The letter concluded:

> I trust this is in order to your satisfaction and you are in agreement with this package provided for you. It is unfortunate that our work relationship will end in this manner, but I feel changes needed to be made.

In her complaint, Schittek claimed entitlement to wages represented by the difference between the exchange rate used by Malibu to calculate her wage rate in Canadian dollars and the actual exchange rate over the period of her employment, entitlement to annual vacation pay on the severance package, entitlement to benefits during the 2½ month period covered by the severance package, reimbursement of expenses incurred by her and improper deductions made by Malibu. She also claimed that Malibu had failed to provide her with a statement of earnings and deductions for her last pay period.

The Determination identified seven issues raised by the complaint:

1. Is Schittek owed additional dollars representing exchange between U.S. and Canadian dollars?
2. Is Schittek owed overtime wages?
3. Is Schittek owed annual vacation pay?
4. Were inappropriate deductions taken from Schittek's wages?
5. Is Schittek entitled to compensation for length of service?
6. Is Schittek entitled to compensation for expenses?

7. Is Schittek entitled to benefits to be paid to her after her dismissal, while her salary was continued?

The Delegate responded to each of the issues as follows:

1. The *Act* defines wages as:

   "wages" includes

   (a) salaries, commissions or money paid or payable by an employer to an employee for work,

   . . .

   The Act also requires that the employer pay the employees in Canadian currency. Clearly, the profit or loss incurred by the employer in exchanging U.S. dollars for Canadian dollars in order to comply with the requirement to pay Schittek in Canadian dollars are not wages payable pursuant to the Act.

2. Schittek provides no information to support her claim for overtime. She has not suggested that she worked overtime hours or that the employer owes her overtime in any way other than by "ticking" the box on the complaint form she filed with the Employment Standards Branch.

3. Schittek claims to be owed vacation pay on the 2½ months severance pay that the employer paid her on her termination. Severance pay, paid at the discretion of the employer that is over and above the statutory requirement for compensation for length of service is not considered to be wages, and therefore does not attract vacation pay.

4. Schittek has made no claim that she had moneys deducted from her wages that should not have been deducted, other than to "tick" the box on the complaint form that she submitted to the Branch. She states that the deductions were for taxes. Taxes are statutory deductions and must be deducted and remitted.

5. If Schittek was terminated without cause or notice, she would have had an entitlement to two weeks compensation for length of service. The employer paid Schittek 2½ months. She has no further entitlement to compensation for the loss of her employment.

6. Schittek claims that she is owed for expenses incurred. She provides a list of articles purchased. However, the list does not say by whom the articles were purchased or to whose account they were charged. Schittek has failed to establish that she bore any of the cost of doing the employer's business.

7. The *Act* does not require that an employer pay benefits in the form of medical or dental plan. The granting or withholding of such benefits is a matter between the employer and the employee and unenforceable pursuant to the *Act.*

ARGUMENT AND ANALYSIS

The arguments raised by Schittek in this appeal, in addition to her argument concerning the identity of the employer, can be summarized as follows:

1. She was hired in US dollars and agreed to a salary expressed in US dollars and converted to Canadian dollars. Her employer has not correctly converted the agreed salary and as a result, she has not been paid what was agreed. She made several attempts over the years to have her employer address this matter, without success. The failure of her employer caused her to be paid an amount of wages, including overtime wages, less than what was agreed.

2. She was entitled to annual vacation pay on the severance package paid to her on termination, because the *Act* says that annual vacation pay must be paid on all money that meets the definition of wages under the *Act*, including length of service compensation payable under Section 63 of the *Act*. She says the money paid as severance ought to be considered wages because it is compensation for loss of employment.

3. Monies deducted from wages ought to be considered improper deductions if their legitimacy cannot be substantiated. Malibu did not account for the deductions made from her final paycheque, so those amounts should be found due to her.

4. An amount related to an expense report prepared for Malibu appears to have been included in her taxable income for the year 1999 and it should not have been. Malibu claims this amount was paid out in November, 1999, but Schittek cannot confirm that she claims the information needed to determine that has not been provided by the employer.

5. While Malibu confirmed the continuation of medical and dental benefits for the 2½ month period covered by the severance payment, no such confirmation has been received in respect of the pension benefit. Schittek claims the pension benefit is wages under the *Act* and must be paid.

In reply to the above arguments, the Director has responded as follows:

1. The letter of offer to the employee advises her that her salary will be $1688 US or $2170 Canadian. There is nothing to suggest that fluctuation in exchange rate will raise or lower her wage. Her wage, paid in Canadian dollars, as required by the Act is $2170.00. I cannot imagine that Ms. Schittek would have accepted a lower rate had the exchange become unfavorable to the US dollar. Wages cannot be pegged to a foreign exchange rate.

2. In determining that Schittek had no entitlement to vacation payor other benefits on the 2½ months severance pay paid to her by the employer, I relied on the Act and the

interpretation provided in Employment Standards Tribunal decision D104/00, Chomey and New Chelsea Society. It is noted that it was agreed that moneys paid that are not paid pursuant to the Act are not wages and do not attract vacation pay. A copy of that decision is attached.

3. Schittek accepted the amount paid [on the final paycheque] as accurate. In both the employer's and the employee's submissions, statements of earnings have been included. There is no reason to believe that Schittek did not receive earnings statements. Schittek herself has stated in correspondence with the employer that the amounts paid are correct.

4. Schittek has never provided information that suggests that she has been required to pay any of the costs of the employer doing business. No expense claim, other than a dollar amount was put forward with her complaint, and despite requests that she identify what the claim was for, she did not do so.

On the argument relating to continuation of the pension benefit, the Director also referred to *Re John Chorney*, BC EST #104/00. On the identity of the employer, the Director says nothing turns on the proper naming of the employer. I will return to this issue later, as it seems to me the importance of it is to a large extent dependent on whether, at the end of the day, there is any need to ensure the correct identity of the employer for the purposes of the *Act*.

I can quickly dispose of this appeal as it relates to the claims for improper deductions and for reimbursement of expenses.

Schittek has requested in this appeal that the Tribunal "take a second look at the information provided and reverse the . . . determination". That request, however, misapprehends the nature of an appeal to the Tribunal. It is not a re-investigation of the complaint. It is a proceeding to decide whether there is any error in the Determination, as a matter of fact, as a matter of law or as a matter of mixed fact and law, which is sufficient to justify intervention by the Tribunal under Section 115 of the *Act*. There is a burden on an appellant in an appeal to the Tribunal. The nature of the burden has been described by the Tribunal in *Re World Project Management Inc.*, BC EST #D134/97 (Reconsideration of BC EST #D325/96) as the "risk of non-persuasion":

> Rules about the legal burden, called by Wigmore "the risk of non-persuasion", define who is to lose if at the end of the evidence the Tribunal is not persuaded. Various tests have been advanced over the years in various situations but as one writer (E.M. Morgan, "How to Approach the Burden of Proof and Presumptions" (1952-53) 25 Rocky Mountain L. Rev. 34 puts it, "the allocation (of the burden of proof) is determined according to considerations of fairness, convenience and policy". In most cases, convenience suggests that the party with the most ready access to the means of proof should have to produce it. One of the goals of proof is the production of reasonably accurate information and therefore there should be an obligation on the party having most access to such information to provide it or bear the risk of non-persuasion. Considerations of fairness suggest also that the

> party seeking change should bear the risk of non persuasion in that the status quo would otherwise prevail. Of course concerns of convenience and fairness may be affected by particular circumstance and, for example, may depend upon an assessment of the respective resources of the parties. Ultimately the notion of "burden of proof" is only of significance where the tribunal has not been persuaded.

The Determination and the reply of the Director both indicate that Schittek failed to provide any evidentiary support for her claim of improper deductions and reimbursement for expenses. Nor has she provided anything in the way of "reasonably accurate information" to this Tribunal that would justify a conclusion that the Director erred in concluding her claim was not established. She had a burden in this regard that has not been met.

The balance of this appeal can be decided by answering two questions. The first question is whether the severance payment is wages under the *Act*. If it is, then Malibu would be required to pay annual vacation pay on that severance package. The second question is what was the agreement on wages between Malibu and Schittek.

On the first question, I agree with the Determination. The severance payment is not wages under the *Act*. Schittek suggests this may be treated as wages under the *Act* because it is, like length of service compensation in Section 63, compensation for loss of employment. That ignores the statutory provisions which identify length of service compensation as wages:

> ***"wages"*** *includes . . .*
>
> *(c) money, including the amount of any liability under section 63, required to be paid by an employer to an employee* ***under this Act****,*
>
> (emphasis added)

The severance payment made to Schittek was not an amount required to be paid under the *Act*. Nor does it fit within any of the other matters that would be included in the definition of wages under the *Act*. It was not paid for work, it was not paid as an incentive for work, it was not money that was required to be paid under a contract of employment (see *Re John Chorney*, *supra*). The foregoing conclusion in large measure determines the appeal on the claim for pension benefits for the 2½ months covered by the severance payment. The employment contract was brought to an end on September 15, 1999. The severance payment was not a part of the employment contract. Schittek would have had no claim under the *Act* to 2½ months severance contained in the severance payment. That amount was offered by Malibu and accepted by Schittek as one of the terms of an agreement upon which the employment relationship would be ended. Not only was that agreement outside of the employment contract, it was outside of the *Act*. Malibu's obligation under the *Act* in respect of Schittek's termination of employment was satisfied by the payment of two weeks wages, together with annual vacation pay and benefit contributions on that amount.

The second question is more troublesome and I part company with the Director on it. I agree with Schittek that the Director did not correctly identify the issue in respect of her claim for the amount represented by the difference between the salary she says she accepted, $1668.00 (US), and the salary she was paid. It is apparent from the Determination, and the responses of the Director to the appeal, that she viewed the issue as being whether the exchange rate between the American and Canadian dollar met the definition of wages under the *Act*. In her reply to the appeal, the Director says wages cannot be pegged to a foreign exchange rate. No authority is given for that proposition, and I am aware of none.

There can be no disagreement or dispute that the monthly salary paid or payable to Schittek by Malibu was wages under the *Act*. The only question on this part of her claim is whether she was paid all the wages she was owed. That question is not one which relates to whether the exchange rate is wages, but whether there was an agreement to pay Schittek wages in the amount of the Canadian equivalent of $1668.00 (US). The Determination did not address that question. The reply does make some reference to that matter, stating:

> There is nothing to suggest that fluctuation in the exchange rate will raise or lower her wage.

With respect, that is an incorrect statement. There is material in the file and in the appeal that suggests exactly that. First, Schittek says there was an agreement to pay her the Canadian equivalent of $1668.00 (US). The PAR indicates her salary as $1668.00 USF. There is additional support for that suggestion in a letter from Mr. Prittie, who as the Property Manager of Malibu, settled the terms of employment with Schittek in March of 1997. In that letter, he says:

> I would like to confirm that Ms. Schittek was hired in US dollars translated at the time at a 30% exchange rate. This rate was a negotiated rate by the Vice President of Properties, Mr. Dave Carlson (based in the Colorado Springs head office). At the time the exchange rate was agreed upon, Mr. Carlson confirmed that the rate would be revisited on an annual basis.

There is nothing in any of the material where Malibu has directly denied the existence of such an agreement. It is trite that an employer and an employee may agree to standards of compensation and conditions of employment that exceed the minimum requirements of the *Act*. The Director has the authority to enforce such agreements. In *Dusty Investments Inc. d.b.a. Honda North*, BC EST #D043/99; (Reconsideration of BC EST #D101/98), the Tribunal made the following statement:

> The Director has authority under the Act to regulate and enforce the employment relationship, including elements of the employment relationship that exceed minimum standards. There is no doubt that a primary purpose of the Act is to ensure employees receive "at least basic standards of compensation and conditions of employment", but the application of the Act is not limited to enforcing only minimum standards.

In the circumstances of this appeal and the conclusion upon which the Determination was grounded, the *Act* requires only that an employer pay all wages in Canadian currency. That is found in Section 20(a) of the *Act*. There is nothing in the *Act* that expressly or implicitly prohibits an employer and an employee from agreeing to base the employee's wage rate on something other than Canadian currency, provided the resulting wage rate is capable of being converted to a regular wage for the purposes of administering the requirements of the *Act*. The value of $1668.00 (US) is easily converted to a Canadian equivalent.

The appeal succeeds on this ground. This decision also makes the correct identity of the employer at least potentially relevant. I turn now to consider the appropriate remedy.

Under Section 115 of the *Act*, I have the authority to confirm, vary or cancel the Determination under appeal or refer the matter back to the Director. In most cases where appeal is successful because the Director has failed to consider a matter of fact or law that is central to the Determination, it is appropriate and consistent with the scheme of the *Act* to refer the matter back to the Director. In such case, the appeal process would be completed by the Tribunal and our decision would be final and conclusive on all maters raised in the appeal. That is not always the case, however. Where the investigation of the complaint is substantially complete, as it is here, the statutory objective of achieving an efficient resolution of disputes may compel the Tribunal to exercise its authority under Sections 108 and 109 of the *Act* for the purpose of completing the appeal proceeding. That is the course I have decided to take in this case.

The parties will be requested by the Tribunal to address two matters arising from this appeal: first, the identity of the employer; and second the terms of agreement on salary between Malibu and Schittek.

Those are the only two matters on which I will hear any further submission. While this appeal decision is not yet concluded, I have decided that the remainder of the issues and arguments raised by this appeal are without merit and they are dismissed. They will not be considered any further by me. Any disagreement with this decision in respect of those matters may be challenged in the manner prescribed by the *Act* once this appeal decision is concluded.

ORDER

I reserve making any final order on the Determination pending receipt and consideration of the submissions contemplated by this decision.

David B. Stevenson
Adjudicator
Employment Standards Tribunal