

EMPLOYMENT STANDARDS TRIBUNAL
In the matter of an appeal pursuant to Section 112 of the
Employment Standards Act R.S.B.C. 1996, c.113

-by-

Edward Reisner
("Reisner")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: C. L. Roberts

FILE NO: 1999/407

DATE OF DECISION: October 14, 1999

DECISION

This is a decision based on written submissions by Edward Reisner and Arthur West, counsel for Merrill Lynch Canada Inc.

OVERVIEW

This is an appeal by Edward Reisner ("Reisner"), pursuant to Section 112 of the *Employment Standards Act* ("the Act"), against a Determination of the Director of Employment Standards ("the Director") issued April 16, 1999. The Director's delegate, Victor Lee ("Lee"), found that Reisner was not entitled to a bonus as claimed, and dismissed his complaint.

ISSUE TO BE DECIDED

Whether Reisner was an employee excluded from the provisions of the *Act* under Section 3. If he was not, the issue is whether the Director erred in dismissing Reisner's complaint.

FACTS

Reisner worked for Midland Walwyn Capital Inc., now Merrill Lynch Canada Ltd. ("Merrill Lynch") from June 1995 until October 1995 in various temporary positions. From January 1996 to January 8, 1998, Reisner was employed as a branch manager's assistant. As part of Merrill Lynch's remuneration package, employees who worked for the firm through to January 31, 1998 were paid a bonus for the 1997 year. Reisner was not working for Merrill Lynch on that date.

Merrill Lynch informed Lee during the investigation that it was company policy that an employee had to be employed by the firm at the time the bonus payment was made. This policy was referenced in the Employee Handbook, which Reisner was given at the commencement of his employment, and reiterated to branch managers in a memorandum dated November 19, 1998.

Reisner advised Lee that he was not aware of this policy until after he had left his employment.

Lee found that it was Reisner's responsibility to familiarize himself with the terms and conditions of his employment. Lee found, on a balance of probabilities, that Reisner was, or ought to have been aware of the policy, either through the employee handbook, or from references made by other employees. Lee determined that Merrill Lynch was entitled to strictly enforce the condition, and found no violation of the *Act*.

ARGUMENT

Merrill Lynch contended that because Reisner was registered under the *Securities Act* to buy and sell securities, he was excluded from the provisions of the *Act*. Counsel for Merrill Lynch submitted a copy of a *Securities Act* Certificate registering Reisner as an investment representative for the period April 30, 1996 to April 29, 1998.

Reisner states that the first time he heard he had to be an employee on January 31 to receive the bonus was after he had left the firm. He contended that he never received an employee handbook when he began work with Merrill Lynch, and thus could not have known about the policy. In support of this contention, Reisner enclosed a letter from a fellow employee, Anita Godin-Watt. Ms. Godin-Watt stated that she also did not receive a handbook when she began work. She also indicated that her understanding of the bonus structure was that it would be paid to any employee who worked full time during the course of a calendar year (January 1 to December 31). She stated that the requirement that an employee had to be employed on January 31 of the following year was not made known to her, either in writing or verbally.

Reisner also contended that the branch manager told him that he would be receiving the bonus regardless of his employment, after the manager supposedly received the memorandum stating that employees had to be employed on January 31 to receive it.

Reisner also suggests that Lee erred in concluding that he ought to have been aware of the policy through comments of other employees, and refers to the statement of Ms. Godin-Watt.

ANALYSIS

I have not addressed the substance of Reisner's arguments, as I find that he is not entitled to the protection of the *Act*.

The intent and purpose of the *Act* is to establish certain minimum standards for all British Columbia workers. Section 3 expressly excludes certain employees from some or all of those minimum standards.

Section 3(1)(n) of the B.C. *Employment Standard Regulations* provides that the *Act* does not apply to an employee who is a person registered under section 21 of the *Securities Act*, so long as that person is carrying on the occupation governed by that *Act*.

The evidence is that Reisner was registered under the *Securities Act* during the period in question. Merrill Lynch also contended that Reisner carried on the occupation governed by the *Securities Act* throughout the material period. Reisner did not dispute this contention. I accept that, as the assistant to the branch manager in 1997, Reisner did buy and sell securities.

Consequently, I find that the Director's delegate had no jurisdiction to investigate the complaint, and dismiss the appeal of his determination.

ORDER

Pursuant to Section 115 of the *Act*, I cancel the determination.

Carol Roberts
Adjudicator
Employment Standards Tribunal