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: October 1, 2001

DECISION

OVERVIEW

This decision completes 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") of a Determination. In an earlier decision, BC EST #D414/01, I concluded that the Determination had not adequately addressed the terms of agreement on salary between Schittek and her former employer, Young Life's Malibu Club ("Malibu") and the correct identity of the employer. I requested further submissions on those matters and the Tribunal has received the following correspondence from Schittek: correspondence dated August 13, 2001; documents with a cover letter dated August 22, 2001; two submissions dated August 21, 2001, with attachments; an undated submission, received by the Tribunal August 22, 2001; correspondence dated August 23, 2001 and August 28, 2001; a submission enclosing documents dated September 4, 2001; three sets of documents with cover letters dated September 6, 2001; and a submission dated September 6, 2001. The Tribunal has also received a fax cover, with a letter attached, and a submission from Mr. Darryl Holien, Personnel Manager for Young Life Properties, both dated August 14, 2001; a submission from the Director dated August 21, 2001; and a submission from Mr. Harold Richert, the Property Manager for Malibu Club in Canada, dated August 21, 2001 I have reviewed and considered them.

ISSUE

The only issues remaining to be decided in this decision are whether Malibu paid Schittek all of the wages she was owed and whether the Determination had correctly identified the employer, and if not, who is the employer.

FACTS

Most of the facts are set out in the earlier decision. The submissions have added or confirmed the following:

1. Schittek was hired by Malibu in March, 1997 in the job classification of Administrative Assistant I on the Young Life (US) salary scale. As Young Life (US) had no Canadian salary scale, the US salary scale was used and the applicable dollar amount was converted to Canadian funds at an exchange rate of 1.30 CAD to each USD (also characterized as a 30% exchange rate or factor). The terms on which she was employed are clearly set out in the welcome letter from Mr. Don Prittie dated March 11, 1997.

2. According to a submission from Mr. Prittie, who was the Property Manager for Malibu from January, 1986 to May, 1998, the exchange rate of 1.30 was set in the fall of 1987 by

Mr. Dave Carlson, Vice President, Property Management, for Young Life. Mr. Prittie has also indicated that he and Mr. Carlson had some discussion in the fall of 1996 and spring of 1997 about adjusting the rate, but the discussions were suspended when it became apparent that Mr. Prittie would be leaving Malibu.

3. There is a suggestion in a submission from Young Life that the adjustment from USD to CAD for Canadian based employees was a "cost of living adjustment" that was not tied to the exchange rate between the USD and the CAD. Mr. Prittie says that suggestion is not true and has provided a copy of a communication to him from Mr. Carlson in 1987, where Mr. Carlson says, in part:

> I am pleased to inform you of your salary of Range 22, Manager III, for $2788 U.S. dollars. I have taken that times a 30% exchange factor which adds $836 for a Canadian salary of $3624. I hope this speaks to the issue of the exchange rate. This exchange will be evaluated annually in conjunction with the evaluation of your range and step.
>
> Mr. Prittie adds that while the above note referred specifically to his position, the application of a 30% exchange factor was the policy for all Canadian staff, and had been since it was implemented by Mr. Carlson in 1987.

4. Schittek says she understood at the time of hiring that her salary, expressed in CAD, was an approximate equivalent of $1668 USD "merely as a matter of notation". The actual foreign exchange rate in March, 1997, according to information provided by Shittek, was 1.3725.

5. Schittek received two wage increases during her term of employment, a 4% wage increase effective October 1, 1997 and a 4.5% wage increase effective October 1, 1998.

6. Schittek raised the matter of the exchange rate several times during her 2½ years of employment with Mr. Prittie, Mr. Stephen Fisher, currently the Western Properties Coordinator for Young Life, and Mr. Harold Richert, the current Property Manager for Malibu. Her objective in each of those discussions was to have the exchange rate adjusted to more accurately reflect the actual rate of exchange between the USD and the CAD. In October, 1998, Schittek submitted a report to Young Life, part of which addressed the exchange rate issue and in respect of which she stated:

> My salary does not reflect a fair rate of exchange.
> To date, my salary at $2355 $CAD converted at a fair rate of exchange, 1.5111 @ July 31/98, is equivalent to **$1558.47 USD**.
> This is **less** than what I was hired at.

Schittek says her report, including her submission on the exchange rate issue, was ignored.

7. Young Life is an organization based in Colorado Springs, Colorado. It is involved in youth camps throughout the United States. It operates at least one camp property in Canada, the Malibu Club, in Egmont, B.C. Schittek was employed at this property. In British Columbia, Young Life is an extra provincially registered society. Young Life of Canada Foundation has no legal connection with Young Life's Malibu Club and has never employed any person to work at the Malibu Club.

ARGUMENT AND ANALYSIS

I shall first address the issue relating to the identity of the employer. It is generally conceded that the correct identity of the employer is Young Life operating as Malibu Club in Canada. The appeal on this point is successful and the Determination will be varied to show employer as Young Life operating as Malibu Club in Canada.

Turning to the issue of whether Schittek is owed any wages. I will say at the outset that in deciding this issue I have given little credence to the explanation provided by Mr. Fisher and Mr. Richert. Conversely, I have found the submissions and correspondence of Mr. Prittie to be quite helpful.

The relationship between employee and employer is one of contract, and the effect of the *Act* is to prescribe minimum conditions for contracts of employment. The interpretation of an employment contract is a question of law. The entitlement of an employee to employment conditions beyond those prescribed by the *Act* depends on the facts and the interpretation of the employment contract.

There is no doubt that the terms of the employment contract, including the salary to be paid to Schittek, are those found in the March 11, 1997 letter from Mr. Prittie to Schittek. What I must determine is whether it was a term of that contract that Schittek's salary

Based on all of the submissions and material in the file, I find Schittek clearly understood that the wage rate for the position she was being hired to was determined by converting the monthly pay for the Administrative Assistant I position on the Young Life (US) scale, which was at the time expressed only in USD, to CAD using an exchange rate of 1.30, or 30%. The same rate of exchange was used for determining other Canadian salaries and all internal accounting between Malibu and Young Life head office. In respect of how that rate, at least for salaries, was established, Mr. Prittie said, in his letter of April 23, 2001:

> . . . 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 Colorado Springs head office). At the time the exchange rate was agreed upon, Mr. Carlson confirmed that the rate would be re-visited on an annual basis.

It bears noting that the "time the exchange rate was agreed upon" in the above reference was October, 1987 and had not changed at the time Schittek was hired. An August 22, 2001 letter from Mr. Prittie provided some further detail:

> . . . in the Fall of 1987 . . . [t]he rate of exchange was decided at 30%, so all of my staff's pay would be adjusted by that amount based on the bank rate at the time. Mr. Carlson and I agreed that we would evaluate this exchange rate annually.
>
> We did meet for the next few years to address the exchange rate and at those meetings, we decided to leave the rate the same rather than roll people back, as the exchange rate had fallen below the 30% rate. . . .
>
> The rate did stay the same for a number of years because of the fluctuations in the bank rate, and we were having discussions about adjusting the rate in the fall of 1996 and spring of 1997.

Mr. Prittie does not indicate or suggest that Schittek's salary was in any respect based on or tied to the prevailing USD/CAD exchange rate.

In effect, Schittek asks the Tribunal to reach that result. I am unable to do that.

I can find nothing in any of the evidence or material on file to suggest that there was an agreement to tie Schittek's monthly salary to the prevailing USD/CAD exchange rate. If there were such agreement, there is really no reason to have used a factor of 1.30 to determine her salary in CAD, rather than something more closely approximating the actual rate of exchange at the time she was hired, which according to information provided by Schittek, averaged 1.3725 during March, 1997. Using some of Schittek's logic, her actual starting monthly salary of $2170 CAD, was, applying the prevailing exchange rate, only $1581.06 USD. One would also have expected some reference, either in the letter or in discussions between Mr. Prittie and Schittek leading up to her accepting employment, to the timing and the process for determining and changing the exchange rate and making adjustments in her CAD wage rate, but there is none of that.

I accept that Mr. Prittie indicated to her, probably on more than one occasion, that he was actively seeking to have the exchange rate reviewed and changed. The fact they discussed the efforts he was making to have the exchange rate adjusted suggests strongly that there was no actual commitment that they would be adjusted. It is also apparent from the letters of Mr. Prittie that Mr. Carlson had the last word on any change in the exchange rate. It is improbable Mr. Prittie would have agreed to matters with Schittek which Mr. Carlson had not approved or accepted. Mr. Prittie never succeeded in getting the agreement of Mr. Carlson to any adjustment in the exchange rate before he left the employ of Malibu. I accept that Schittek also made several requests to Mr. Fisher and Mr. Richert to adjust the exchange rate to more accurately, and equitably, reflect the true rate of exchange between the USD and the CAD, but her requests apparently fell on deaf ears. In her October, 1998 report, she was pleading her case for an

adjustment to the exchange rate. The very fact she was making such requests, and they were being ignored, indicates the absence of any concession by Malibu to adjusting the exchange rate.

In her submission of September 4, 2001, Schittek says:

> I am entitled to a fair and equitable exchange rate from the US salary.

I certainly agree with Schittek that it seems unfair and inequitable to have Malibu's Canadian employees' salaries converted from USD to CAD using a rate of exchange that is significantly less than the actual rate of exchange. However, her entitlement to wages cannot be based on whether her salary was calculated in a manner that was fair or equitable. What I have to decide is whether the employment agreement supports her claim for unpaid wages based on the actual USD to CAD exchange rate prevailing throughout her period of employment. In the same submission she goes on to say:

> Since none was determined by annual review and none was agreed to at the point of hiring, the only rate possible to use would be the actual exchange rate factor.

Schittek is incorrect on one point in the above statement. She did agree to a rate of exchange at the point of hiring. Even if, as she now contends, there was no specific discussion at the time of hiring on the exchange rate issue, the letter of March 11, 1997 clearly sets out the terms of employment for the job she was being offered. That letter includes a term that her monthly salary would be $2170 CAD, and that it was determined by converting the monthly salary of her position on the Young Life (US) salary scale, expressed in USD, to CAD using an exchange factor of 1.30. She agreed to that by accepting the position and commencing her employment on March 17, 1997. In other words, she agreed to take the position on the terms proposed, which included accepting that her salary would be converted from USD to CAD at an exchange rate of 1.30, or 30%. She cannot now be heard to say there was no agreement on the exchange rate. Her submissions indicate very clearly that she was aware, if not at the time of her hiring, then soon after, that the rate of exchange being applied did not reflect the actual exchange rate between the USD and the CAD. Her efforts to have Malibu make adjustments to the rate of exchange were unsuccessful. There was never any change to that term during while she was employed.

In the circumstances, Schittek has the burden of showing that her agreement with Malibu included a term requiring them to periodically adjust her salary to reflect the actual rate of exchange between the USD and the CAD. She has not been able to show there was any agreement to such a term.

In conclusion, I find no support for the claim by Schittek that she was entitled to be paid based on her salary as expressed in USD converted at the actual rate of exchange between the USD and the CAD prevailing from time to time.

The appeal on this point is dismissed.

ORDER

Pursuant to Section 115 of the *Act*, I order the Determination dated February 19, 2001 be varied to identify the employer as Young Life operating as Malibu Club in Canada. The remainder of the Determination is confirmed.

David B. Stevenson
Adjudicator
Employment Standards Tribunal