An Application for Reconsideration

\- by -

Howard C. Chui o/a Label Express
(“the Employer”)

\- 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: M. Gwendolynne Taylor

FILE No.: 2003A/226

DATE OF DECISION: January 27, 2004

DECISION

OVERVIEW

By Determination dated March 31, 2003, a Delegate of the Director of Employment Standards (the "Delegate") ordered Howard C. Chui, operating as Label Express (the "employer") to pay $127.06 plus $5.93 interest, to a former employee (the "employee"). The employer appealed to the Employment Standards Tribunal (the "Tribunal"). In a Decision dated July 23, 2003, the Tribunal Adjudicator (the "Adjudicator") confirmed the Determination.

This is an application by the employer pursuant to section 116 of the *Employment Standards Act* (the "*Act*"), for reconsideration of that Decision. The grounds for the application are that the Adjudicator's decision was based on a wrong assumption. The employer provided new evidence in the form of witness statements and photographs.

I have concluded that the employer has not established the threshold grounds for the tribunal to reconsider the adjudicator's decision, for the reasons set out below.

ISSUE

Are there grounds for the Tribunal to exercise its discretion under Section 116 of the Act to reconsider the original decision?

BACKGROUND

The employer operated a retail business which was open between 10:00 am to 6:00 p.m. The employee worked as a salesperson at the store from October 1, 2000 to February 21, 2002, at minimum wage, plus 2 % commission on daily sales. She was laid off by the Employer and she filed a complaint under the Act on June 12, 2002 alleging that she was entitled to vacation pay and statutory holiday pay. Following an investigation, the delegate issued a Determination on March 31, 2003. The delegate calculated the total wages, vacation pay and statutory holiday pay owing to the employee, deducted the amount paid by the employer, and ordered the employer to pay $127.06, plus interest.

By letter dated April 15, 2003, the employer asked the delegate to reconsider, submitting that the employee had in fact been overpaid and that overpayment should be credited to the employer. The employer submitted that the 2% commission on daily sales, which was in addition to the $7.15 hourly wage, was not required by the Act and was to compensate for vacation pay and statutory holiday pay. Additionally, in the attached calculations, the employer deducted an amount equal to .5 hours per day, for a meal break.

The employer appealed this to the Tribunal, reiterating the April 15 submissions and stating:

> [the employee] had worked quite a while receiving 6.7% overpayment (0.5 hour overpaid) and 2% of daily sales if it is more than $330 per day without any complaint. (If she ever had she would have already filed on earlier.) because this is definitely better than being paid 7.5 hours at minimum rate with 4% vacation which was guaranteed by the company and Employment Standard

> Act. After she was laid off finally, she filed the complaint and probably this is the only way to get more money than just receiving her EI. The company pay them more to cover the basic required by the Employment Standard Act and not the extra without the basic being covered. ...

In response to the appeal, the employee submitted a letter from herself and another employee in which they stated that they worked alone at the shop without any back up assistance or breaks for meal time. They both stated they worked through their breaks as was required by the employer.

Section 32(2) reads as follows:

> (2) An employer who requires an employee to work or be available for work during a meal break must count the meal break as time worked by the employee

Section 58(1) of the Act sets out the entitlement of the employee to vacation pay as follows:

> (a) after 5 calendar days of employment, at least 4 % of the employee's total wages during the year of employment entitling the employee to the vacation pay

"Wages" is defined in section 1 of the Act as including:

> (a) salaries, commissions, or money, paid or payable by an employer to an employee for work,
>
> (b) money that is paid or payable by an employer as an incentive and relates to hours of work, production or efficiency, [...]

The adjudicator found that the Director had not erred as the employer alleged:

> … the Employer expected and required the Employee to be available for work for the entire eight hour shift. There is no evidence of any direction given by the Employer to [the employee] to close the store down during her break. There was no provision made by the Employer for relief of the Employee during a meal break. The Employer provided facilities to enable the Employee to remain at the work place, and be available to serve customers. In my view, there is ample support for the finding that the Employer indirectly required the Employee to work throughout her meal break, and the reality of this was recognized by the Employer in payment for the entire eight hour shift…
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> …
>
> In my view, the amount of the bonus, together with the hourly rate constitutes the wages of the employee. Vacation pay is calculated on wages, and wages includes the minimum wage paid or payable, as well as any bonus paid as an incentive by the Employer. It is clear that the bonus in this case was paid as an incentive.
>
> It is apparent that the correct interpretation of section 58, is that vacation pay may not be included in a commission structure…

In applying for reconsideration, the employer submitted that the "decision was based on a wrong assumption that [the employee] was required to work on standby position." The employer submitted statements signed by other employees confirming that they get paid for the lunch hour even though they are not required to work through the lunch break. The employer also submitted photographs showing hand written signs on doors advising that the shop is closed for lunch, back at 1:00, back in 30 min. etc.

RECONSIDERATION ANALYSIS AND DECISION

Section 116 does not set out the grounds on which the Tribunal may reconsider a decision. The Tribunal does not grant applications for reconsideration as a matter of course. Rather, the Tribunal uses its discretion to reconsider with caution, to ensure finality of its decisions and to promote efficiency and fairness of the appeal system to both employers and employees. This supports the purposes of the *Act* detailed in Section 2 "to provide fair and efficient procedures for resolving disputes over the application and interpretation of this Act."

In *Milan Holdings* (BC EST # D313/98) the Tribunal set out a principled approach in determining when to exercise its discretion to reconsider. At the first "threshold" stage, the Tribunal determines whether the matters raised in the application warrant reconsideration. One factor that weighs against reconsideration is if the application requests the Tribunal to "re-weigh" or re-hear evidence already tendered before the adjudicator. In this case, the appellant is submitting new evidence, but on an issue that was before adjudicator. Clearly, the issue of whether the employee was required, as part of the contract of employment, to be at work during her meal break, was before the adjudicator. The employer could have submitted additional evidence then. The Reconsideration process was not meant to allow parties another opportunity to re-argue their cases.

I have determined that the application should not be granted because the employer is attempting to have the Tribunal 're-weigh evidence already tendered before the adjudicator' and to have the Tribunal consider evidence that could have been presented to the adjudicator.

For the benefit of the employer, I note that regardless of whether there is requirement for employees to work the meal break, it appears that the contract of employment provides for payment for that break. There would be no entitlement for the employer to be credited with an 'overpayment' for something the employer contracted to provide. The requirements in the *Act* are minimum requirements, not maximum requirements. So, even if the employer had brought all of the evidence before the Tribunal initially, it is likely the decision would have been same, based on contract rather than s. 32. I mention this so the employer can seek further guidance, if necessary.

ORDER

Pursuant to s. 116 of the *Act*, I order that the application for reconsideration be dismissed. The original decision BC EST #D239/03, dated July 23, 2003, is confirmed with the result that the Determination dated March 31, 2003 is confirmed.

M. Gwendolynne Taylor
Adjudicator
Employment Standards Tribunal