Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

The Director of Employment Standards
(the "Director")

- 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

ADJUDICATORS: Kenneth Wm. Thornicroft
Ian Lawson
Norma Edelman

FILE No.: 2003A/261

DATE OF DECISION: January 29, 2004

DECISION

INTRODUCTION

This is an application filed by the Director of Employment Standards ("Director") pursuant to section 116 of the *Employment Standards Act* ("Act") for reconsideration of an adjudicator's decision issued on September 2, 2003 (BC EST #D266/03).

In that decision, the adjudicator cancelled a Determination that was issued on December 11, 2002, pursuant to which Small Town Press Ltd. (operating as "The Similkameen Spotlight") was ordered to pay Ms. Katherine Wills the sum of $4,461.38 on account of unpaid wages and section 88 interest. The Director asserts that the adjudicator's decision should be set aside since it was based on fundamentally incorrect findings of fact and otherwise contains several errors of law.

We hereafter refer to Small Town Press Ltd. as "Employer," and to Ms. Wills as "Employee."

PREVIOUS PROCEEDINGS

The Determination

As recorded in the Determination (which was issued following an investigation by an Employment Standards Officer pursuant to authority delegated to her by the Director), the Employee was an editor/reporter who worked for the Employer from July 2 to September 24, 2001; her rate of pay was $2,000 per month. The Employee filed a complaint alleging, among other things, that she was not paid for all of her overtime hours.

The Employee apparently kept track of her working hours in a journal on a daily basis; the Employer, in breach of its obligations under the Act, did not have any record of the Employee's working hours. The Director's delegate accepted the Employee's journal record "as an accurate reflection of her hours of work" and awarded her wages based on her recorded working hours. The Employee's unpaid wage claim, as determined by the delegate, consisted largely of unpaid overtime but also included two unpaid statutory holidays.

The Appeal and Referral Back

The Employer appealed the Determination and that appeal resulted in an initial decision by the adjudicator to refer the matter back to the Director for further investigation (BC EST #D096/03, issued March 18, 2003). Although the Employer alleged bias on the part of the Director's delegate, the adjudicator held that this allegation was "unfounded." However, the adjudicator was concerned whether the Employee's claim for overtime was well-founded in law since the delegate never made a specific finding that the Employer authorized the overtime in question. The relevant portions of the adjudicator's decision are set out below (at pp. 2-3 of his reasons):

> ...the delegate noted that the employer had a policy that overtime could not be worked without prior approval. The delegate notes, in setting out the complainant's position, that she claims she was unaware of the policy. Nevertheless the delegate did not make any findings of fact on this issue.

> The Tribunal has held that an employee cannot create a liability for the employer to pay overtime by working hours that are not authorized or knowingly acquiesced in by the employer [case citations omitted]. It appears that Wills did not submit a claim for overtime until her employment was terminated so it appears that this overtime was not pre-approved or knowingly acquiesced in by the employer. An employee cannot unilaterally choose to work overtime and then at some date subsequent to termination make a claim for payment of overtime not authorized or approved by the employer. An employer has the inherent right to manage its workforce and to control the hours worked by employees. If overtime is authorized or knowingly acquiesced in by the employer then the legislation requires payment for that overtime but there is no obligation for an employer to pay overtime that is not authorized.
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> The delegate did not address this fundamental issue in the analysis portion of the determination. I have concluded therefore that this matter must be referred back to the director to fully investigate and determine this issue.

The Delegate's Further Investigation

The adjudicator's order resulted in a report by the delegate (addressed to the Tribunal's vice-chair) dated May 27, 2003. In this report – which was prepared after further submissions were made to the delegate by the parties – the delegate noted several inconsistencies in the Employer's position. Although Mr. George Manning (an officer/director of the Employer) claimed that the Employer's policy was that overtime be approved in advance by the Publisher and then claimed "during the pay period in which it is worked," that policy was not, apparently, rigorously enforced.

Mr. Chad Graham, the Publisher, provided a statement to the delegate in which he appeared to concede that the Employee did work some overtime hours. Further, another employee's statement, as well as Mr. Graham's, indicated that overtime was calculated and recorded by the individual employee and that when too many hours had accumulated, the employee would be given time off in lieu of overtime pay. The delegate concluded:

> By statements of [the Employer's] own witnesses, overtime was worked in the workplace and was casually recorded and administered by the worker herself. No evidence was presented [to] show a formal approval process for overtime was in place. In the alternative, no evidence was presented the Ms. Wills, being aware of the overtime policy according to Mr. Manning, was ever disciplined for not adhering to the policy...
>
> I find that there is no evidence to support Mr. Manning's position that there was an Overtime Policy in effect, nor that it was enforced. In the alternative, there is no evidence that Ms. Wills was ever made aware of the existence of an Overtime Policy at the workplace.

The Adjudicator's Final Decision

The adjudicator, as noted above, cancelled the Determination. The adjudicator held that the delegate erred by concluding there was "no evidence" of an overtime policy in effect since the Employer made that very assertion. The adjudicator stated (at p. 3 of his reasons):

> The delegate confirms that there was an overtime policy in place at Small Town Press that stated:
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> > *All overtime must be approved by the Publisher in advance and must be claimed during the pay period in which it is worked.* (*Italics* in original).

The adjudicator also noted that the absence or presence of an overtime policy is not determinative since the fundamental issue is whether or not the overtime in question was authorized, either expressly or by reasonable implication based on the Employer's acquiescence.

The adjudicator further observed that the Employee conceded she never sought approval of her overtime hours and that there was no acquiescence by the Employer since the Employee did not advance an overtime claim while she was employed. The adjudicator did not find that the Employee never worked any overtime hours but, to the extent overtime hours might have been worked, he held that the Employer was not responsible for payment. The adjudicator concluded:

> Overall the employer has met the onus of establishing that the delegate made substantial errors in law and did not properly comply with the principles of natural justice in issuing the determination herein. Accordingly, the determination is cancelled.

ISSUES

In any application for reconsideration there is a threshold issue whether the Tribunal will exercise its discretion under section 116 of the Act to reconsider the original decision.

If we are satisfied that the case is appropriate for reconsideration, the substantive issue raised in this application is whether the Employer is liable to pay overtime wages to the Employee.

ANALYSIS OF THE THRESHOLD ISSUE

Section 116 is discretionary. The Tribunal has developed a principled approach to the exercise of this discretion. The rationale for the Tribunal's approach is grounded in the language and the purposes of the Act. One of the purposes of the Act, found in subsection 2(d), is "to provide fair and efficient procedures for resolving disputes over the interpretation and application" of its provisions. Another stated purpose, found in subsection 2(b), is to "promote the fair treatment of employees and employers." The general approach to reconsideration is set out in Milan Holdings Ltd., BC EST #D313/98 (Reconsideration of BC EST #D559/97). Briefly stated, the Tribunal exercises the reconsideration power with restraint. In deciding whether to reconsider, the Tribunal considers factors such as timeliness, the nature of the issue and its importance both to the parties and the system generally. An assessment is also made of the merits of the Adjudicator's decision. Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two-stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application warrant reconsideration. Circumstances in which the Tribunal's discretion will be exercised in favour of reconsideration are limited and have been identified by the Tribunal as including:

- 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.

If the Tribunal decides the matter is one that warrants reconsideration, the Tribunal proceeds to the second stage, which is an analysis of the substantive issue raised by the reconsideration.

We are satisfied that the Director's application was made in a timely manner, having been filed with the Tribunal on September 26, 2003. After reviewing the original and final decisions, the Determination, the delegate's further investigation upon referral-back and the other material on file, we are satisfied this is a case in which mistakes of law and fact were made in the adjudicator's decisions that warrant reconsideration.

ANALYSIS OF THE SUBSTANTIVE ISSUE

At the outset, the Director properly notes the adjudicator's decisions focused on the issue of overtime pay but did not address the secondary question of statutory holiday pay. The Determination ordered the Employer to pay for two statutory holidays. That aspect of the Determination was not challenged by the Employer and no error is apparent to us in that regard. The adjudicator's final decision cancelling the Determination, therefore, is in error to the extent the award of statutory holiday pay was cancelled.

The substantive issue raised by the Director relates to overtime pay. The Director submits the adjudicator erred in fact when he found the delegate concluded the Employer had a formal overtime policy in place. We must agree with the Director on this point – the Employer did assert there was a formal policy in effect, but the delegate did not accept that assertion as factual. Indeed, the delegate rejected the Employer's position on this point in her further investigation upon referral-back.

The Director submits the adjudicator erred in concluding the Employee "knew her authorized hours of work were 40 hours per week" (at p. 3 of his reasons). We again find merit in the Director's submission. We have reviewed the Employee's submission to the delegate and in that document the Employee emphatically states she was never provided with any formal "overtime policy" document, and that it was simply not possible for her to complete her duties within a 40-hour/week work schedule. She also notes in her submission that Mr. Graham conceded (in his January 8, 2003 statement) that she was working overtime hours while she was employed and that her overtime hours were recorded in a journal on her desk that was accessible to (and indeed, reviewed by) the Employer. The evidence in the record before us is inconsistent with the adjudicator's finding that the Employee "*knew* her authorized hours were 40 per week" (our *italics*).

The Director submits the adjudicator erred in holding, at page 3 of his reasons, that a final payment of 48 hours of overtime pay was a "settlement agreement" and thus ought not to have been taken as an admission by the Employer that the Employee did work some overtime hours. We agree that this payment – which was recorded in the Employee's payroll records – was not, nor was it intended to be, a final settlement of the Employee's overtime claim. The evidence is clear that this payment was, from the Employer's perspective, an *ex gratia* payment made in the (as it turned out, false) hope it would satisfy the Employee. The Employee, for her part, simply received the funds as a form of "payment on account" of her accumulated overtime claim.

The Director submits the adjudicator applied an incorrect legal "test" in determining whether the Employer was obliged to pay overtime pay. The adjudicator's reasons speak of "pre-approval of the employer" or the employer's "informed acquiescence" before an employer's obligation to pay overtime is crystallized. We again agree with the Director's submission.

Section 35(1) of the Act reads as follows:

> 35. (1) An employer must pay an employee overtime wages in accordance with section 40 if the employer requires, or directly or indirectly allows, the employee to work more than 8 hours a day or 40 hours a week.

In framing the test using language other than that found in section 35(1) of the Act, the adjudicator appears to have narrowed the governing statutory test. This Tribunal stated the following in *International Energy Systems Corp.*, BC EST #D189/97:

> I agree with the Director's delegate that the Act "...does not state that unauthorized overtime creates an exception to the requirement to pay overtime." I also agree that Section 35 places on the employer an onus to control and direct its employees' hours of work. That is, if an employer does not wish its employees to work overtime it must not only order them not to work but must ensure that they do not work any hours not scheduled by the employer.

The Tribunal further stated in *BCA Industrial Controls (1995) Ltd.*, BC EST #D245/97:

> Section 1(1) of the Act defines an "employee" as including "a person an employer allows, **directly or indirectly**, to perform work normally performed by an employee (emphasis added).
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> Section 35 of the Act requires an employer to pay overtime wages if "...the employer requires or, **directly or indirectly**, allows an employee to work" more than 8 hours a day or 40 hours a week (emphasis added).
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> The significance of the phrase "directly or indirectly," as it appears in Section 1(1) and Section 35 leads me to conclude that the responsibility rests with the employer to control when an employee works and to record overtime hours, he must not only order them not to work overtime, but must also supervise and record their hours of work to ensure that no overtime hours are worked."

The adjudicator stated the following in the final decision (which repeats a similar statement made in the original decision):

> The delegate has also made a significant error in law in reversing the onus of proof by requiring the proof of an overtime policy and knowledge by the employee. As stated in the previous decisions of the Tribunal noted above, an employee is not entitled to unilaterally create an overtime liability without the pre-approval of the employer or without the informed acquiescence of the employer. Thus the existence of a policy is not an essential element to be established. Even in the total absence of an overtime policy, the employee cannot unilaterally work overtime without approval or acquiescence.

We find this approach to the overtime issue to be incorrect and that no previous decision of the Tribunal supports the approach taken by the adjudicator. Section 35 imposes responsibility on the employer to control an employee's hours of work, if the employer wants to avoid liability to pay overtime. Regardless whether there is an overtime policy in the workplace, if an employer "directly or indirectly" allows an employee to work more than 8 hours a day or 40 hours a week, that employer is liable to pay overtime wages.

We turn now to address the remedy that is appropriate, in view of the errors made in the adjudicator's decisions as set out above.

As another reconsideration panel noted recently (in *Re J.C. Creations Ltd.*, BC EST #RD317/03), the nature of employment standards legislation is to provide a relatively quick and cheap means of resolving employment disputes. We note the Employee's employment came to an end in September, 2001. The Determination was issued more than a year later, and it has taken another year for the matter to come to this panel. In our view, the purposes of the Act would not be well-served if the parties to this dispute were to be sent back to another adjudicator for a re-hearing of this appeal on the correct legal test. For that reason, we have treated the adjudicator's original decision as being subject to this reconsideration, in addition to the final decision.

We note that the appeals before the adjudicator were conducted on the basis of written submissions. This panel is therefore in as good a position as the Adjudicator to assess the merits of the case.

We also note that in all of the Employer's evidence and submissions both before the delegate and the adjudicator (as well as to this panel), little issue was taken with the delegate's calculation of the overtime hours which were the subject of the Employee's complaint. In particular, the Employee filed a detailed account of her hours worked, when she replied to the Employer's submissions on the appeal. We find the Employee's reply submission provides credible explanations for each issue raised by the Employer regarding her hours of work. We note that as the parties went through the referral-back process and then this reconsideration, the Employer has not challenged the Employee's detailed reply submission as to how she spent her overtime hours.

We further note the delegate made the following findings of fact in her Determination and in the referral-back investigation:

1. The Employee kept her own hours of work in a journal, and submitted a copy to the delegate. The Employer had no record of the Employee's hours of work.

2. The Employer provided "no evidence that [the Employee's record of hours worked] was not accurate other than generalized statements that he did not find the hours believable" (Determination, p. 4). The Employee's record was found to be an accurate reflection of the hours she actually worked.

3. Publisher Chad Graham stated the Employee's co-worker Geri Swanson also recorded her hours of work in a journal, which Mr. Graham said "was left open on her desk for me to check as I saw fit." Mr. Graham stated he would then discuss Ms. Swanson's overtime hours with the Employer, and grant time off to Ms. Swanson "so we could get her OT back down" (Referral-Back Memorandum, p. 3).

We are therefore satisfied the original findings of fact made by the delegate in her Determination are accurate. A proper application of section 35 of the Act renders the delegate's conclusions correct and we see no merit in any of the issues raised by the Employer, either in the two appeal decisions or before this panel. We find, therefore, the Determination should not have been disturbed, and both the original and the final decisions by the adjudicator should be cancelled.

ORDER

Pursuant to section 116 of the Act, we order the original decision (BC EST #D096/03) and the final decision (BC EST #D266/03) be cancelled and the Determination #ER086629 be confirmed, with interest pursuant to section 88.

Kenneth Wm. Thornicroft **Adjudicator, Panel Chair** **Employment Standards Tribunal**	**Ian Lawson** **Adjudicator** **Employment Standards Tribunal**	**Norma Edelman** **Vice-Chair** **Employment Standards Tribunal**