

An application for Reconsideration

- by -

432623 B.C. Limited  
(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* (as amended)

**TRIBUNAL MEMBER:** Kenneth Wm. Thornicroft

**FILE No.:** 2006A/7

**DATE OF DECISION:** March 20, 2006

## DECISION

### SUBMISSIONS

Kulwant Sangha	for 432623 B.C. Limited
Leigh Heska	on her own behalf
J. Ross Gould	for the Director of Employment Standards

### INTRODUCTION

1. This is an application filed by 432623 B.C. Limited, doing business as the “Alpine Motel” (the “Employer”), pursuant to section 116 of the *Employment Standards Act* (the “Act”). The Employer applies for reconsideration of a Tribunal Member’s decision issued on November 22nd, 2005 (B.C. E.S.T. Decision No. D182/05).
2. The Tribunal Member confirmed a Determination that was issued by a delegate of the Director of Employment Standards on July 21st, 2005 (the “Determination”) pursuant to which the Employer was ordered to pay its former employee, Leigh Heska (“Heska”), \$874.27 being the amount of unlawful wage deductions made by the Employer together with section 88 interest. Further, and also by way of the Determination, the Employer was assessed three separate \$500 administrative penalties [see section 98 of the *Act* and section 29(1)(a) of the *Employment Standards Regulation*]. Accordingly, the total amount payable under the Determination is \$2,374.27.
3. The Tribunal’s Vice-Chair wrote the parties on March 3rd, 2006 and advised that this application would be adjudicated based solely on their written submissions. I have before me the original submission that was appended to the Employer’s “Reconsideration Application Form” and a brief submission from Ms. Heska. The Director’s delegate decided not to file any further submission as he was content to rely on his previously filed material.
4. As will be seen, although this application is timely, in my view, it is wholly without merit.
5. I shall first briefly summarize the adjudicative history of this matter and then I will address merits of the instant application.

### PREVIOUS PROCEEDINGS

#### *The Determination*

6. Ms. Heska, who worked at the Alpine Motel in Kamloops from October 1st to November 14th, 2004, filed an unpaid wage complaint against the Employer. This latter complaint was the subject of a “Complaint Hearing” (conducted by teleconference) on March 9th, 2005. At the hearing, Ms. Heska testified on her own behalf and also had another witness to corroborate her testimony. The Employer was represented by its principal, Mr. Paul Sangha.

7. Following the hearing the delegate issued “Reasons for the Determination” (the “delegate’s Reasons”) summarizing the parties’ evidence and setting out his findings. The delegate’s Reasons, dated July 21st, 2005, are appended to the contemporaneously issued Determination. After considering the conflicting evidence before him, the delegate reached the following conclusions:
- The records of both the Employer and Ms. Heska were unreliable and based on the evidence before him he was unable to determine if Ms. Heska had been “underpaid”. Accordingly, he dismissed her claims for unpaid regular wages, overtime pay, vacation pay and statutory holiday pay;
  - The Employer unlawfully deducted \$850 from Ms. Heska’s pay on account of “staff accommodation” contrary to section 21 of the *Act*;
  - The Employer also contravened sections 27 and 28 of the *Act* by failing to provide wage statements to Ms. Heska and by failing to keep payroll records.

### ***The Appeal Proceedings***

8. The Employer appealed the Determination to the Tribunal on the ground that “evidence has become available that was not available at the time the Determination was being made” [section 112(1)(c)], however, and as was noted by the Tribunal Member in his Reasons (at page 4), the Employer’s appeal primarily raised a “natural justice” issue [see section 112(1)(b)]. Indeed, the Employer did *not* tender any new and *relevant* evidence in support of its appeal. The Employer asserted that the three administrative penalties totaling \$1,500 were “unconscionable and unwarranted”.
9. The Employer’s appeal was adjudicated based on the parties’ written submissions.
10. The Tribunal Member, relying on previous Tribunal decisions (including *Marana Management Services Inc.*, B.C.E.S.T. Decision No. D160/04 and *Summit Security Group Ltd.*, B.C.E.S.T. Decision No. RD 133/04) rejected the submission that the Tribunal could cancel administrative penalties solely on the basis that the penalty was “excessive” or “unfair” (relative to the amount of the unpaid wage claim). I entirely agree with the Tribunal Member on this particular point.
11. The Tribunal Member also noted that the evidence before him clearly showed that the Employer failed to provide regular wage statements to Ms. Heska—a clear contravention of section 27—and also did not keep the payroll records mandated by section 28 of the *Act*. That being the case, two \$500 administrative penalties were mandated. As for the third \$500 penalty—levied in relation to the unlawful wage deduction (section 21)—the Tribunal Member noted, at page 5 of his Reasons, that since the Employer was not able to produce any written authority authorizing the wage deductions in question (which the Employer conceded it made), the section 21 contravention was clear and obvious and, thus, a third \$500 penalty was mandated.
12. As noted above, the Employer’s appeal documents raised a natural justice issue. This latter matter concerned whether or not the delegate improperly refused to hear certain evidence from the Employer. Although Mrs. Bal Sangha (Paul Sangha’s wife) attended the hearing, she did not testify. The Tribunal Member had to address a dispute between the Employer and the delegate regarding Mrs. Sangha’s evidence.

13. The Employer's position was that the delegate simply refused to hear Mrs. Sangha's testimony whereas the delegate's position was that the Employer never requested that Mrs. Sangha be permitted to testify. It was not disputed that: i) Mrs. Sangha did not testify and ii) she was not present during the hearing since the delegate excluded her from the teleconference hearing on the basis that she was not an "instructing witness". Since the reason why Mrs. Sangha did not testify is squarely raised in the Employer's reconsideration application, I have reproduced the Tribunal Member's Reasons (at page 5), in their entirety, as they relate to this question, below:

The company's appeal respecting the administrative penalty for its illegal deductions from Heska's wages raises the secondary issue, whether [Mr. Paul] Sangha was prevented from calling the evidence he wished to present at the complaint hearing. No recording is made of the complaint hearing, which renders it extremely difficult to determine whether 432623 B.C. Ltd. is correct in saying it was not allowed to present the evidence of Mrs. Sangha, or whether the delegate is correct in saying Sangha expressed no desire to call that evidence at the appeal hearing. I must say it seems implied in the delegate's submission that Sangha was told he could not call evidence from Mrs. Sangha because he had not identified her as a witness or provided a will-say statement of her intended evidence. The delegate also admits that he had excluded Mrs. Sangha from the hearing as she was not an instructing witness. To that extent, the delegate's submission confirms the company's submission that something happened at the hearing to prevent the calling of evidence from Mrs. Sangha, whom the company considered to be an important witness.

While it is an excellent practice at a pre-hearing conference to require parties to identify in advance the witnesses they intend to call at the complaint hearing, and to exchange will-say statements, I do not agree that a party's failure to do so ought to prevent them from calling that witness at the complaint hearing. The solution to such a problem is to adjourn the hearing, require production of the will-say statement and then convene at a later date, when the other parties are prepared to deal with that witness's evidence. It is not clear, however, that the delegate actually prevented Sangha from calling Mrs. Sangha – it may be that Sangha was admonished for failing to identify her as a witness and exchange her will-say statement, which caused Sangha to feel he was unable to present her evidence.

In any event, I am of the view that the result would not have been any different had the delegate heard from Mrs. Sangha. I come to that conclusion, because 432623 B.C. Ltd. does not present any evidence or argument that calls into question the delegate's conclusion on the company's contravention of section 21 of the *Act*, that it could not make any deduction from Heska's wages without her written authorization. Had the company possessed such authorization and had Mrs. Sangha been unable to tender it in her evidence, I would have concluded a breach of the principles of natural justice occurred and the company ought now to be able to tender such written authorization into evidence. In the absence of any written authorization, however, the deductions from Heska's wages were contrary to the *Act*, no matter what Mrs. Sangha might have wished to say in her evidence. For all of the above reasons, I have concluded 432623 B.C. Ltd.'s appeal must be dismissed.

14. In other words, whether or not there the Employer was prevented from calling Mrs. Sangha as a witness (and the Tribunal Member did not make an affirmative finding on this point), the Employer was nonetheless unable to show that it had the legal authority (say, in the form of a written direction from Ms. Heska) to deduct \$25 per night from her wages on account of a "guest room" in the motel that was apparently made available for her use (Ms. Heska, for her part, denied needing staff accommodation since she had arranged for "room and board" at a friend's home in Kamloops).

## THE APPLICATION FOR RECONSIDERATION

15. The Employer's application for reconsideration was filed on January 3rd, 2006. The application is supported by a 7-page partly typed, partly hand-printed, submission. The application is principally founded on the assertion: "We are filing this reconsideration on the basis of lack of evidence supporting the decision that was made".
16. The Employer makes the following assertions:
- The Employer never conceded that it made any deduction from Ms. Heska's wages on account of staff accommodation and "there is no evidence that these deductions had ever taken place"
  - The Employer reiterates its previously advanced argument that Mrs. Sangha was improperly denied an opportunity to testify at the teleconference hearing conducted by the delegate; and
  - The Employer also appears to take issue with the two administrative penalties levied based on its failure to provide wages statements to Ms. Heska (section 27) or to keep proper payroll records (section 28).
17. The Employer's application was provided to both the Director's delegate and Ms. Heska for their reply. The Director's delegate, in a brief letter dated February 3rd, 2006, indicated that he did not wish to file any submission in reply to the Employer's application. Ms. Heska, for her part, filed a 1-page submission in which she briefly summarized the adjudicative history of this matter and also responded to some other allegations that are not germane to this application.

## ANALYSIS

18. As noted at the outset, although this is a timely application, I do find it to be meritorious.
19. Mr. Sangha's evidence, as recounted in the delegate's reasons, plainly indicates that the Employer contravened various sections of the *Act*. I shall briefly deal with each aspect of the Determination that is now being questioned.

### *Unlawful Wage Deduction*

20. As recounted in the delegate's reasons (at page 5) "a specific suite [was] provided for staff accommodation at the motel but...Ms. Heska did not share that room...[so] instead, a normal guest room was prepared and set aside for her use". Mr. Sangha testified that the Employer "deducted about \$25.00 to \$29.00/day" from Ms. Heska's wages. Thus, based on the foregoing testimony from the Employer's representative, the delegate awarded Ms. Heska the sum of \$850 representing 34 days x \$25 per night. Clearly, this latter decision was derived from a proper evidentiary foundation and the Tribunal Member rightly confirmed this aspect of the Determination. The notion that this latter finding was made in the absence of any evidence is patently absurd.

***Wage Statements and Payroll Records***

21. I have reviewed the record that was before both the delegate and the Tribunal Member. The record contains some wage statements (which were apparently never provided to Ms. Heska along with her paycheques) and a copy of at least one payroll cheque all of which were prepared by the Employer.
22. The wage statements were not provided to Ms. Heska contemporaneously with her paycheque. Indeed, Mr. Sangha testified before the delegate that since Ms. Heska was paid a monthly salary “there was no need to issue pay stubs each pay period” and that “he did not issue any pay stubs until recently as a result of this complaint”. Section 27(1) of the *Act* is a mandatory requirement: “On every payday, an employer *must* give each employee a written wage statement for the pay period stating [certain information such as pay rate and hours worked]” (my *italics*).
23. Even if the wage statements that are contained in the record were issued to Ms. Heska (and the overwhelming evidence is that she was not given those statements along with her paycheques), those statements do not comply with section 27 of the *Act*—among other things, the statements do not identify the hours worked and the applicable wage rate.
24. With respect to the penalty issued based on the section 28 contravention, Mr. Sangha testified that he kept such records (although they were, in his words, “not perfect”). However, those records (if they exist) were never produced pursuant to a valid section 85 Demand for Production of Records; the Demand was issued on February 2nd, 2005 and the records were to be produced by no later than 4:00 P.M. on February 18th, 2005. Further, although very sketchy records were apparently produced prior to the Complaint Hearing (and marked as Exhibit 12), those records clearly do not comply with section 28 of the *Act*.
25. Thus, even if Mrs. Sangha had testified at the original Complaint Hearing (and it is not at all clear what *relevant* evidence she might have provided), the Employer would nonetheless have been held liable for three separate administrative penalties since the contraventions in question are so clear and obvious.
26. To summarize, there is absolutely no basis for disturbing the original Determination as confirmed by the Tribunal Member. Accordingly, this application is refused.

**ORDER**

27. The Employer’s application to vary or cancel the decision of the Tribunal Member in this matter is **refused**. Pursuant to section 116(1)(b) of the *Act*, the Tribunal Member’s decision (B.C.E.S.T. Decision No. D182/05) is **confirmed**.

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**Kenneth Wm. Thornicroft**  
**Member**  
**Employment Standards Tribunal**