An application for Reconsideration

- by -

DSC Hotel Management Systems Ltd.
("DSC")

- 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: David B. Stevenson

FILE No.: 2008A/12

DATE OF DECISION: April 28, 2008

DECISION

SUBMISSIONS

Ken Honborg	on behalf of DSC Hotel Management Systems Ltd.
Adele Adamic	on behalf of the Director

OVERVIEW

1. DSC Hotel Management Systems Ltd. ("DSC") seeks reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision, BC EST #D082/07, made by the Tribunal on September 12, 2007 (the "original decision"). The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards on May 25, 2007. The Determination was issued following the investigation of complaints filed by three individuals, Brent Forbes, Robert Harvey and Pritpaul Jassal, which alleged each was owed wages by DSC.

2. The Determination found the individual were employees of DSC, rather than independent contractors, and that DSC had contravened Part 3, Sections 18 and 21, Part 7, Section 58 and Part 8, Section 63 of the *Act*. The Director ordered DSC to pay wages to the employees in the amount of $30,903.24, including interest, and imposed administrative penalties on DSC under Section 29 of the *Employment Standards Regulation* in the amount of $1500.00.

3. The appeal raised the following issues:

    1. Whether the evidence DSC sought to introduce on appeal was new evidence that could be introduced on appeal;

    2. Whether the Director erred in law or breach principles of natural justice in not holding an oral hearing of the issues;

    3. Whether the Director erred in law and misinterpreted CRA rulings;

    4. Whether the Director erred in law in finding the three individuals were employees of DSC, and had not become independent contractors;

    5. Whether the Director erred in finding the three individuals had not quit their employment;

    6. Whether the Director erred in law in failing to consider or offset amounts alleged to be due to the employer from the employees; and

    7. Whether the Director erred in law in determining the amounts due to the three employees.

4. The original decision canvassed each of the issues raised in the appeal, found there was no new evidence that could be introduced on the appeal, found no merit in any of other grounds of appeal and confirmed the Determination.

5. DSC says two matters considered in the original decision warrant reconsideration: whether, when calculating the wages owing to the complainants, the Director should have deducted Canada Pension Plan and Employment Insurance payments made by DSC to Canada Revenue Agency ("CRA") for the three employees for a period from January 1, 2006 to June 30, 2006, in the amount of $7,414.09; and whether vehicle lease payments on a vehicle driven by Mr. Forbes, should have been included as wages paid and subtracted from the amount of total wages the Director found were owed by DSC to Mr. Forbes. DSC also says the statement in the original decision, that DSC did not request an oral hearing before the Director on the complaints, is wrong and that "DSC requested oral hearings repeatedly throughout this process", once again raising whether the Director failed to comply with principles of natural justice in making the Determination.

ISSUE

6. In any application for reconsideration there is a threshold issue of whether the Tribunal will exercise its discretion under Section 116 of the *Act* to reconsider the original decision. If satisfied the case is appropriate for reconsideration, the substantive issues raised in this application will be considered. The application identifies three substantive issues: the first relating to the calculation of the wages found owing to the employees; the second relating more particularly to the calculation of wages owing to Brent Forbes; and the third relating to the Director not holding an oral hearing on the complaints.

ANALYSIS OF THE PRELIMINARY ISSUE

7. The legislature has conferred a reconsideration power on the Tribunal under Section 116 of the *Act*, which reads as follows:

> *116. (1) On application under subsection (2) or on its own motion, the tribunal may*
>
> *(a) reconsider any order or decision of the tribunal, and*
>
> *(b) confirm, vary or cancel the order or decision or refer the matter back to the original panel or another panel.*
>
> *(2) The director or a person named in a decision or order of the tribunal may make an application under this section*
>
> *(3) An application may be made only once with respect to the same order or decision.*

8. 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 original decision. The focus of a reconsideration application is the original decision.

9. 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 in fact warrant reconsideration. The circumstances where 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.

10. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively re-visit the original decision and come to a different conclusion.

11. 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.

12. After review of the original decision and the submissions of the parties on this application, I have decided this application does not warrant reconsideration.

13. I will first address the matter of the oral hearing. This matter was raised in the appeal as an allegation that the failure of the Director to have an oral hearing on the complaints was a breach of natural justice. That aspect of the appeal, which referred to both the statutory and policy considerations found in the *Act* and previous decisions of the Tribunal and the legal principles adopted by the Tribunal, was adequately and correctly dealt with in the original decision.

14. Further, a review of the Section 112 record, which is extensive, fully supports the reasoning and conclusion in the original decision. There appears to be a difference about whether DSC requested an oral hearing before the Director. DSC says they did, while the Director says they did not. In my view, that is a minor point and does not affect the analysis and conclusion in the original decision, which correctly notes the *Act* does not require the Director to hold an oral hearing on a complaint; the *Act* requires that the parties know the case they have to meet and be given the opportunity to respond to it. The conclusion in the original decision was that DSC had ample opportunity to produce evidence and make submissions concerning their position and exercised that opportunity.

15. I will next consider the matter of the vehicle lease payments. These payments were included in the argument made by DSC on appeal that certain costs were owed by Mr. Forbes to DSC and should be deducuted from any wages owed. In the appeal, DSC referred to the lease payments as "[p]ayments made by DSC following Mr. Forbes' Departure [sic] from Company while he retained and used the vehicle". There is no reference to these payments being wages. Once again, I can find no error in the original decision on that matter. The original decision correctly concluded that Section 21 of the *Act* was plain in its meaning: deductions from wages are not allowed unless authorized by an enactment.

16. DSC has taken a slightly different tack in this application on the lease payments, asserting those payments were part of 2002 salary increase given to Mr. Forbes. There is a simple answer to this assertion – there is no evidence supporting it.

17. The material does not indicate the cost of the vehicle lease was anything other than a benefit. As such, while it would likely be part of Mr. Forbes' "earnings" for income tax purposes, it would not be considered "wages" under the *Act*. The definition of "wages" in Section 1 does not include the value of a benefit. Section 20 of the *Act* requires all wages to be paid in negotiable Canadian currency. The *Act* does not contemplate payment of wages "in kind", or as asserted here, in the form of the cost to DSC of a lease vehicle.

18. Perhaps anticipating this deficiency, DSC argues, in a submission on this application dated March 6, 2008, that a form of compensation package for Mr. Forbes which included the value of leased vehicle was authorized under the *Act* because Mr. Forbes was a "high technology professional", as that term is defined in Section 37.8 of the *Employment Standards Regulation*. That submission is rejected. Quite apart from the fact this submission is raised for the first time in this application, there is no evidence that the circumstances of Mr. Forbes' employment satisfies that definition. Particularly, the "compensation package" contemplated in that definition must be *"set out in a written contract of employment"* and there is no indication or evidence that such a written contract exists.

19. Even if this argument had any evidentiary support of legal validity, accepting it would clearly not result in any reduction of the wage liability of DSC to Mr. Forbes under the *Act*. If, as argued by DSC, the lease amount could be considered wages, the material quite clearly shows that amount was not included in Mr. Forbes' salary, but was an addition to it. The result of accepting the argument being made by DSC would be to increase the total amount of wages payable over the relevant period and correspondingly increase their liability to Mr. Forbes for vacation pay and length of service compensation. Accepting their argument would clearly not provide any basis to "claw back" these amounts in the context of processing Mr. Forbes' complaint; Section 21 would continue to bar that result.

20. The final matter for which reconsideration is sought relates to amounts paid by DSC to CRA for Canada Pension Plan and Employment Insurance corrections covering to a period from January 1, 2006 to June 30, 2006. DSC says these were wage payments made by DSC on behalf of the three complainants. This is not a matter that was specifically addressed in the original decision nor, based on my review of the appeal and the supporting submissions, was it specifically raised in the appeal.

21. This matter was addressed in the original decision in that part of the original decision dealing with efforts by DSC to introduce new evidence on the appeal. The Tribunal Member who made the original decision found the evidence was not new, but was in the possesion of DSC well before the Determination was issued in May 2007. The particular information upon which this matter is based was the contained in a Trust Examination Report and had been provided to DSC in August 2006. It was correctly decided in the original decision that in such circumstances, the information did not qualify as new evidence within the meaning of Section 112(1)(c) of the *Act*, which says:

> *112. (1) Subject to this section, a person served with a determination may appeal the determination to the tribunal on one or more of the following grounds: . . .*
>
> *(a) evidence has become available that was not available at the time the determination was made.*

22. The general assertion that DSC had made CPP payments on behalf of each of the employees was made to the Director during the investigation. In that part of the Determination containing the wage summary for each employee is the following common statement:

> The employer also includes CPP payments in the total compensation paid even though they were apparently paid without the knowledge of or consent of the complainants. While the provisions of Section 21 permit such statutory deductions from an employee's wage and to do so would be in keeping with the findings [sic] that [employee's name] was an employee, I have no confirming documentary evidence before me that such a payment was made, the amount of such a payment and whether it was received.

23. It is apparent the Determination in respect of this matter was based on the facts, or perhaps more accurately the absence of facts, available to the Director at the time the Determination was made. The original decision correctly notes that the *Act* precludes a review under Section 112 of findings of fact, or findings of mixed fact and law, unless those findings give rise to an error of law. The Tribunal member in the original decision found the calculation of wages owing was based on findings of fact.

24. I can find no error in the original decision in respect of this matter.

25. The reconsideration application is denied.

ORDER

26. Pursuant to Section 116 of the *Act*, I order the original decision confirmed.

David B. Stevenson
Member
Employment Standards Tribunal