An Application for Reconsideration

- by -

Michael Nicholas Hills carrying on business as Summerland Taxi
("Hills")

- 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, Panel Chair
Brent Mullin, Chair
Carol L. Roberts

FILE No.: 2011A/59

DATE OF DECISION: August 30, 2011

DECISION

SUBMISSIONS

Michael Nicholas Hills	on his own behalf, carrying on business as Summerland Taxi
Maclean Kew	on his own behalf
Joe LeBlanc	on behalf of the Director of Employment Standards

INTRODUCTION

1. This is an application filed by Michael Hills ("Hills") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of BC EST # D024/11 issued on March 4, 2011 (the "Appeal Decision"). By way of this decision, the Tribunal cancelled a Determination issued by a delegate of the Director of Employment Standards (the "delegate") on November 26, 2010. We are adjudicating this application based on the parties' written submissions and, in that regard, we have submissions from Mr. Hills, Maclean Kew (the original complainant; "Kew") and from the delegate. We have also reviewed the entire file that was before the Tribunal at the time the Appeal Decision was issued including the section 112(5) record.

2. The delegate supports Mr. Hill's application for reconsideration and seeks the cancellation of the Appeal Decision and a confirmation of the original Determination.

3. This application principally concerns the proper interpretation and application of the section 1 definition of "work" contained in the *Act* and, in particular, the "on call" provision. "Work" is defined in section 1 of the *Act* as follows:

> "work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.
>
> (2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.

PRIOR PROCEEDINGS

The Determination

4. Mr. Hills is the proprietor of "Summerland Taxi", a taxi service operating in and around Summerland, B.C., and Mr. Kew worked for this firm as a taxi driver from November 11, 2009, to January 2, 2010. Mr. Kew's pay was based on a 40%/60% split of all taxi fares with Mr. Kew retaining 40% (with the further proviso that the driver's commission equal at least the minimum wage for all hours worked during the bi-weekly pay period). On May 13, 2010, Mr. Kew filed a complaint alleging that he had not been paid for all hours worked. Although Mr. Kew was paid in accordance with his agreement with Mr. Hills, he claimed that this agreement contravened the *Act*. In essence, Mr. Kew claimed that he was not paid for all of the hours that he was "on shift" but rather was only paid for his actual driving time during each scheduled shift.

5. The delegate presided at a complaint hearing on August 25, 2010, at which both Messrs. Kew and Hill testified, and issued the Determination and accompanying "Reasons for the Determination" (the "delegate's

reasons") on November 26, 2010. The delegate dismissed Mr. Kew's complaint finding that Mr. Kew had been paid for all hours worked at a rate at least equivalent to the minimum hourly wage.

6. The delegate made the following findings. First, he determined that Mr. Kew was a "taxi driver" as defined in section 1 of the *Employment Standards Regulation* (the "*Regulation*") – "taxi driver" means a person employed to drive a taxi. As a consequence of this finding, Mr. Kew was excluded, by subsection 37.1(2) of the *Regulation*, from certain *Act* overtime provisions (sections 35, 40 and 42). Second, the delegate determined that Mr. Kew was not "working" but, rather, was "on-call" when he was awaiting calls from prospective customers.

7. The evidence before the delegate regarding this second finding was as follows. Mr. Hills provided Mr. Kew with a two-way radio that he was obliged to keep with him at all times during his scheduled shift and dispatch calls came directly to the driver via the two-way radio. Mr. Kew provided the following testimony (delegate's reasons, page 4):

> …Mr. Kew admitted that there was a certain amount of freedom of movement. He could go to a restaurant, shopping, to a movie and just about anywhere as long as he was within 20 minutes of town (Summerland BC). When asked if he could go home and sleep he said that while he did go home sometimes he would not sleep as he might miss a call.

8. The delegate framed the issue before him regarding Mr. Kew's unpaid wage claim as follows (page 6):

> The salient issue in [this] case is the claim by Mr. Kew that all hours spent "on call" should be considered as work for purposes of applying [the] minimum wage. The position of the parties differs significantly on this point. Mr. Kew states that all hours of his shift are work and Summerland [Taxi] owes at least [the] minimum wage for those hours regardless of whether he is on call or driving. Summerland [Taxi] takes the position that only the hours Mr. Kew spent actually driving constitute work and would be subject to [the] minimum wage. The time Mr. Kew spent on call he was free to do what he wanted and therefore it is not work.

9. As previously noted, the delegate dismissed Mr. Kew's complaint and the key aspects of the delegate's reasons are set out, below (pages 7 – 8):

> There is no question that Mr. Kew is on call. Equally there is no question if the employer instructed Mr. Kew to go to his residence after every call, the time spent in his residence would be captured by the exclusion in the definition and would not be work. The question that arises here is whether the requirement for Mr. Kew to be within a 20 minute radius of town constitutes being "<u>at a location designated by the employer</u>"?... (<u>underlining</u> in original text)
>
> … It would be an unreasonable interpretation of the definition of work in my view to consider an unspecified area within a twenty minute radius to be a designated location as contemplated by the legislation. The employer must designate the location and thus restrict the employees' freedom of movement for the on call time to be considered as work.
>
> This is fundamentally different from other types of employment where employees are not at liberty to go where they choose when there are no customers such as a retail store or a restaurant. In those situations employees must stay at the business on the off chance that a customer comes in. Even though they may not be providing labour or services to the employer in the conventional sense of those words it is deemed to be work because they are still under the direction of the employer when they are at the designated location and are not free to move about at will …
>
> When not driving a fare Mr. Kew was not providing labour or services for the employer and was not at a specific location designated by the employer. He did not come under the direction of the employer until a call came in from a customer. Once the task was completed he was free to do as he wished within the 20

> minute radius. When he ceased to provide labour or services for the employer his status at that point changed to on call. Since he was not at a location designated by the employer the on call time does not fall under the definition of work [and] thus it does not attract the payment of [the] minimum wage as set out in section 37.1(4)(a) of the [*Regulation*].

The Appeal Decision

10. Mr. Kew appealed the Determination on the ground that the delegate erred in law (subsection 112(1)(a)). Mr. Kew alleged that the delegate erred in finding that he was a "taxi driver" and further erred in determining that he had been paid for all hours worked. Mr. Kew also raised some other issues that had not previously been part of his claim (or argued at the hearing before the delegate) and, accordingly, the Tribunal refused to deal with these matters. We note that Mr. Kew raised other new matters in his submissions filed in response to Hills' reconsideration application.

11. The Appeal Decision was issued on March 4, 2011. The delegate's determination that Mr. Kew was a "taxi driver" was confirmed (para. 23). The Tribunal Member reviewed the record and concluded that "there were very rarely less than eight 'on call' periods in a day…and there were frequently more than fifteen such periods a day" (para. 29). The Tribunal Member concluded that it was "unreasonable" to conclude that Mr. Kew "could be considered to be off work and 'on call' while working a scheduled shift". The Tribunal Member allowed the appeal and the key aspects of the reasons for his decision are reproduced below (paras. 32 – 33):

> An employee has an expectation that when he or she has been assigned to work a scheduled shift, reports to work that shift, remains available throughout that shift to perform whatever labour and services are required and completes the shift, that employee will be appropriately compensated for committing his or her time and efforts on behalf of the employer for that shift and not simply for spurts of activity that occur during that shift. In the circumstances of this case the evidence shows Summerland Taxi expected Kew to report for each shift, accept and maintain care and control of the taxi through his shift, carry the radio phone throughout his shift, receive customer calls, respond to each call received and, at the end of his shift, pass care and control of the taxi and radio phone to another driver. Even if Summerland Taxi indicated to Kew he had some freedom of movement between calls, such freedom of movement was, in my view, illusory since it was bounded by geographic limits and by the requirement that Kew would be available to take and respond to every call throughout his shift.
>
> It is inconsistent with the purposes of the *Act* stated in section 2, specifically those stated in paragraphs (a), (b), (e) and (f) to find an employee who reports for his or her scheduled shift, as that employee is obligated to do, and is required to remain on the job for the entirety of that shift, performing whatever work is available, may at the end of the day receive wages for only a fraction of the time the employee has, as the employee was required to do, committed to the employer.

12. The Tribunal Member expressed the view that if Mr. Kew were considered to be "off work" during his "on call" periods, this might trigger separate section 34 minimum daily hour payments and that "the way to avoid that result is to find Kew was not off work and 'on call' when he was not attending to customers, but throughout his shift remained at work" (para. 34). The Tribunal Member concluded (at paras. 35 – 36):

> … the use of technology has significantly expanded the workplace. Kew was required to respond to customers' calls wherever he was. In meeting this requirement of his job, in my view, Kew was doing nothing more away from the workplace than providing the services – waiting for, receiving and responding to calls from customers – that a dispatcher would provide at the workplace and for which the dispatcher would be paid wages for the entire time spent performing those services.
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> For the above reasons, I find the Director erred in law in concluding Kew, in the circumstances, was not at work, as that term is defined in the *Act* in those periods during his shift where he was not attending customers. Rather, I find Kew was at work when he was on shift, except during designated breaks (meal

and coffee breaks) where it is shown he was not required to respond to customer calls.

13. The Tribunal Member issued an order cancelling the Determination and referring "the matter back to the Director to address in accordance with this decision".

THE RECONSIDERATION APPLICATION

14. Mr. Hills seeks reconsideration on the ground that the Appeal Decision is plainly wrong. Mr. Hills says that a taxi driver cannot be considered to be at work when he is at his private residence awaiting a call for service or when he or she "has left the taxi to attend to personal matters". Mr. Hills says that if the Appeal Decision stands, small and medium taxi firms such as his own will be "unviable if they had to pay their employees while they are at home or else ware [sic] waiting for calls" (March 16, 2011, submission, page 2). Mr. Hills' application also contains a number of new factual assertions relating to the employment arrangements between the parties that are not germane to this application. Mr. Kew's submissions also contain allegations that are presented to the Tribunal for the first time and, accordingly, similarly will not be addressed in these reasons for decision (see para. 16, below).

15. As previously noted, the delegate supports the application for reconsideration. The delegate says that the Appeal Decision is inconsistent with previous Tribunal decisions dealing with the "on call" provision and the Employment Standards Branch's interpretation guidelines. The delegate says that the Appeal Decision might have unforeseen significant economic consequences for other employment arrangements where employees must carry communication devices when they are not formally "on duty" (for example, search and rescue, auxiliary fire fighters and power/utilities operators). The delegate says that the Tribunal Member ought not to have referred to section 34 of the *Act* in his reasons since none of the parties raised the possible application of the section in the case at hand and, further, the Member's interpretation was incorrect in any event.

16. Mr. Kew, in his two submissions filed in this matter, generally supports the Appeal Decision. In addition, he raises a number of matters that are not properly before us since they were not raised in the initial complaint or have been finally determined (for example, Mr. Kew now says he did not quit his employment but was unlawfully terminated; he advances a new claim under section 8 of the *Act* partially on the ground that he never understood that his 40% share of the taxi fares would be subject to source deductions for income tax and other remittances; he continues to assert that he was not a "taxi driver" as defined in section 1 of the *Regulation*). He also asks us to make orders we do not have the jurisdiction to make (for example, ordering his former employer to issue an amended Record of Employment under the federal *Employment Insurance Act*). We do not propose to address any of these matters in these reasons for decision.

FINDINGS AND ANALYSIS

17. The Tribunal evaluates reconsideration applications utilizing the two-stage analytical framework set out in *Director of Employment Standards (Milan Holdings Inc.)*, BC EST # D313/98. At the first stage, the Tribunal considers whether the application is timely, relates to a preliminary ruling, is obviously frivolous, or is simply a clear attempt to have the Tribunal re-weigh issues of fact that have already been determined. If the application can be so characterized, the Tribunal will summarily dismiss it without further consideration of the underlying merits. On the other hand, if the application raises a serious question of law, fact or principle, or suggests that the decision should be reviewed because of its importance to the parties and/or because of its potential implications for future cases, the Tribunal will proceed to the second stage at which point the underlying merits of the application are given full consideration.

18. In our view, the present application passes the first stage of the *Milan Holdings* test inasmuch as it raises an important issue of statutory interpretation, namely, the scope of the "on call" provision contained in the section 1 definition of "work". It is asserted that the Appeal Decision is inconsistent with previous Tribunal decisions and may produce, at least in some employment contexts, an unworkable result. Finally, it is also asserted that the Tribunal Member erroneously relied on section 34 of the *Act* in rendering his decision where the possible application of that section was not raised by any of the parties and where the parties were not afforded an opportunity to make submissions on the point.

19. Since the delegate says that the Appeal Decision represents a departure from the Tribunal's prior case law interpreting the "on call" provision, we first turn to that matter.

Previous Tribunal Decisions Interpreting the "On-Call" Provision

20. At the outset of this discussion, we wish to observe that this is not a case such as *Hands On Car Wash Inc.*, BC EST # D425/00, where the employee was placed on "stand-by" at the employer's business premises during slow periods when there were no customers. In that situation, the employer designated a specific location, and this was not the employee's residence, where the employee had to remain while waiting for the next customer to arrive. Accordingly, the subsection (2) provision in the definition of "work" clearly applied. Nor is this a case, such as *Double 'R' Safety Ltd.*, BC EST # D192/01 (reconsideration refused: BC EST # RD529/01), where the issue before the Tribunal concerned whether the designated location was a "residence". The delegate, at page 7 of his reasons, made the following findings of fact that, in our view, are critically important to the outcome of this case:

> The evidence was that the drivers operated from a two way radio and responded to calls directly from the customers. When they responded to the calls they were providing labour and service to the employer…
>
> However, when there were no customers to attend to Mr. Kew was free to engage in his own pursuits provided he was within 20 minutes of town. The Employer did not designate a location where he had to be as long as it was within a 20 minute radius [of Summerland].

21. Thus, the evidence before the delegate was that Mr. Kew was intermittently "working" and "on call" during the course of a scheduled shift. Mr. Hills did not require Mr. Kew to remain at his home while on call but, rather, Mr. Kew was free to travel anywhere he wished (and do whatever he wished) provided he remained within 20 minutes of Summerland.

22. Although the Tribunal has issued a number of decisions addressing the "on call" provision, the four decisions briefly discussed, below, are particularly relevant.

23. In *Labour Ready Temporary Services Ltd.*, BC EST # D457/99, the complainant worked for a temporary employment agency. The complainant (and other employees) would regularly be assigned to "pager duty". While on "pager duty", the employees were required, after normal business hours, to respond to client calls received on a pager provided by the employer. The evidence was that dealing with each call could take anywhere from a few minutes to 30 minutes or more and each call required, on average, about 15 minutes of the employee's time. The time spent on each call included both dealing with the client and then arranging for someone to be dispatched to the client. The complainant received calls at home and when she was away from her home and the issue in the case was whether she was entitled to be paid for her "on call" hours. The Tribunal, at pages 12 – 13, made the following findings that are relevant to the case at hand:

> It is clear that the Complainant was required to perform work at home by her Employer. The Employer required the Complainant to be on call, although it did not specify where she had to remain while on call.

> It required her to take pages and perform work in connection with those pages as those pages were received and in accordance with the demands of the pages. These duties were a necessary and integral part of the duties the Complainant was required to perform for her Employer and were a necessary and integral part of the business of the Employer. …
>
> In the typical cases where minimum daily pay is at issue, employees have been required to report to work or be on call at a location other their residences. As noted in s. 1(2) of the *Act*, an employee is deemed to be at work while on call at a designated location other than their residence. This is different in a case where an employee, such as the Complainant, is required to be on call, but the location is not designated and can include their residence. In those cases, there is an automatic reversion once the work is completed to being back on "on call" status.
>
> In my view, both the Employer and the employee were aware that neither could predict when a page would occur or how long the work associated with the page would last. All of that was contingent on the requirements of the caller. The evidence was that a page could require as little as one minute's work. As noted, once the work associated with the page was complete, under the *Act*, the employee would no longer be deemed to be at work. The employee would automatically revert to a state of being on call during which she would suffer no inconvenience beyond that of anyone else who was on call at a location not designated by their employer.
>
> (our underlining)

24. *Labour Ready* thus stands for the proposition that within a defined period of time an employee may be "on call" (which may be non-compensable time if the employer has not required the employee to remain at a designated location or has designated the employee's residence as the location), "on-duty" dealing with "calls" that require the employee's immediate attention (which is compensable time) only to revert back to non-compensable "on-call" status once the work associated with the call has been completed. This pattern of being "on call", followed by "on duty", followed by "on call" may continue intermittently throughout the entire time frame that the employee is required to be available to perform work.

25. At para. 11 of the Appeal Decision, the Member stated: "I find it unreasonable that Kew could be considered to be off work and "on call" while working a scheduled shift." However, this is similar to the situation in *Labour Ready* where the employees, on a rotating basis, were scheduled to be available for "on call" shifts during which they would be required to undertake certain work tasks and, after completing each task, they would revert back to "on call" status.

26. Accordingly, and applying *Labour Ready*, when an employee is scheduled to be "on call" for a particular period, that employee is not entitled to be paid for the mere fact of being "on call" unless the employer directs the employee to be "on call" at a specific location (other than the employee's residence). The Legislature could have drafted the *Act* so that all scheduled "on call" periods would have been deemed to be compensable "working" time but, in our view, the Legislature simply did not do so (perhaps, as is suggested by the delegate in his submission, because of the economic impact this would have for certain types of employment relationships where "on call" periods are common such as auxiliary firefighters and utilities service personnel). Nevertheless, as soon as an "on call" employee receives a call and must then attend to the employer's affairs, the employee is at "work" and that status continues until the requisite work is completed. In this latter circumstance, the employee must be paid for the greater of: i) their actual working hours, or ii) the daily minimum wage as specified in section 34 of the *Act*.

27. An application to reconsider *Labour Ready* was dismissed as untimely (see *Director of Employment Standards*, BC EST # D426/00); however, the 3-person reconsideration panel also made the following comments regarding the correctness of the original Tribunal decision (at page 5): "The original decision contained an extensive and well-reasoned analysis of the respective merits of the parties' positions in the context of the

relevant provisions of the *Act* and provided an equitable response to a unique set of circumstances [and] such a decision would not be lightly disturbed on reconsideration."

28. We do not see any meaningful factual distinctions between *Labour Ready* and the case at hand. The two-way radio that Mr. Kew was required to keep in his possession is not materially different from the pager provided to the complainant in *Labour Ready*. In each case, the employee was required to respond directly to incoming client calls and to provide services to those clients. While it is true that during his "on call" status and throughout his entire shift, Mr. Kew was required to maintain custody of the employer's taxi (undoubtedly a service that benefited Mr. Hills, as the employer), Mr. Kew also benefited from this arrangement in that he could make personal use of his employer's vehicle during his "on call" periods. It is perhaps also important to note that Mr. Hills, as employer, could presumably have directed Mr. Kew to remain in the taxi throughout his shift (subject to meal or other breaks) and had that been the situation, the taxi cab itself could have been characterized as a "location designated by the employer" in which case Mr. Kew would have been "working" throughout his entire shift. However, that is a separate situation from the facts of this case; Mr. Kew was free to park the taxi at anytime and attend to his own affairs and the evidence was that he routinely did so.

29. In *Ashley Home Care Cleaning Centre Ltd.*, BC EST # D044/02 (see also BC EST #s D280/02 and D417/02 for subsequent proceedings), the complainants were employed by a residential cleaning service and, during the course of their typical workday travelled from one home to the next (and were allotted 30 minutes paid travel time between appointments) in the Richmond area. The employees maintained that they should have been paid for the entire time from the commencement of their shift in the morning to the conclusion of their last appointment at the end of the day. The Tribunal rejected their position. The key aspect of the Tribunal's decision (at pages 4 – 5) are set out, below:

> … I have difficulty with the suggestion that the Employees are entitled to be paid from the commencement of the first job of the day [until] the completion of the last job of that day.
>
> First, clearly the actual time spent cleaning the homes of the Employer's clients count[s] as "work" under the *Act* …
>
> Second, in my opinion, travel time between jobs is "work". I find that the "flat rate" of .5 [hour] for travel does not meet the requirements of the *Act*. While there are exceptions, for example, the daily minimum hours, an employee is generally entitled to be paid only for time actually worked. I can appreciate that it is simpler from an administrative point of view, and perhaps in many cases is sufficient, if actual travel time exceeds the .5, the employees must be paid for such time…
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> Third, and this is perhaps where the real difference is between the parties, I accept that where the time between jobs is of short duration, the Employees should be given credit for that time as if [it] were "worked". Such time is likely to include travel time from one job to the next, getting ready for the next job, delays and other factors that invariably "sneak" into any schedule, etc. Church's own evidence was that she always scheduled .5 hours between jobs. In other words, this is at the Employer's discretion. As noted above, "[a]n employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence". The .5 hours between jobs is effectively time the Employees are "on call". Common sense indicates that there is little meaningful work they can do apart from waiting for the next job to start, and I accept that they are not on their "own time". (Amounts already paid on account of the .5 travel time must be considered in this context.) I emphasize that there is, in my opinion, generally nothing magic about the .5 hour. On the facts of this case, this is the time designated by the Employer. The Employer could organize its affairs to minimize this time and, hence, reduce its labour costs.
>
> Fourth, in the circumstances of this case, where the time between jobs exceed[s] the .5 hour, I am of the opinion that the Employees are not entitled to be paid for that time. In my view, the Employees are on their own, and not subject to the Employer's control, and can meaningfully do what they wish to do.

> There is nothing before me to indicate that the employees were required to be available, or on call at a location designated by the Employer.
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> (our underlining)

30. The Appeal Decision holds, at para. 36, that Mr. Kew must be paid for the entire duration of his shift (save meal and coffee breaks) and, in our view, that holding is contrary to the Tribunal's decision in *Ashley Home Care*. We prefer the reasoning set out in *Labour Ready* and *Ashley Home Care*, namely, that on-call employees who are not required to remain in a location designated by their employer are not "working" and thus their "on call" time is not compensable "work" as defined by section 1 of the *Act*. So long as the employee is not required to remain at a designated site (other than their residence) and thus has some freedom to attend to their own affairs during their "on call" periods, they are not at "work".

31. This is so even where an employee's ability to attend to his own affairs is, in a practical sense, compromised to a degree. For example, in *Svisdahl*, BC EST # D068/03, the Tribunal confirmed a determination that the complainant was not at "work" even though he felt compelled to remain at the job site while the other operator of a "laydown truck" (used in the natural gas industry) was working (page 3):

> … The job site is not the complainant's residence. The employee claims he had to be available to work at the site 24 hours and the employer claims he was free to do what he wanted to while the other operator was working.
>
> Often the location of the jobs made it difficult to leave and given the given [sic] the complainant drove out in the work truck; he did not have a method of leaving the job site. However, inconvenience and circumstances affecting the ability to leave is not the same as being required by the employer to stay. While the complainant may have felt responsible for the work being done on the job and an obligation to stay, there is no evidence of direction from the employer that the complainant had to remain on site.

32. Finally, and most recently, in *Hicks*, BC EST # D031/07, the Tribunal made the following observations about the nature of the "on call" provision (at page 4):

> In my opinion section 1(2) contemplates several situations. First, being on call at a location designated by the employer is generally considered being at work. Section 1(2) deems that to be so unless the exception applies. Second, an exception is created where the designated location is at the employee's residence. If the designated location is at the employee's residence then the deeming provision does not apply. Third, the deeming provision merely does not apply in such circumstances, so the legislature left it open whether work was being performed where a person was on call in their residence.
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> Since the deeming provision does not apply at the employee's residence, clearly the legislature intended that in such circumstances the employee must either be doing something more than merely being on call to perform work, or, perhaps, that the duties related to being on call were of a particular kind or nature. If merely being on call were sufficient for a finding that there was work, then the exclusion from the deeming provision would be unnecessary. Consideration of the deeming provision and the exclusion from it indicates, in my view, the true legislative intent, namely, that where a person is on call at their residence something more is required before there is compensable work as defined in the *Act*.

Conclusions Regarding the "On Call" Issue

33. This case turns on a question of statutory interpretation. Employment standards legislation must be given large and liberal interpretation consistent with its remedial nature (see *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 and *Re Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27). However, statutory provisions must not be stretched beyond reasonable limits. In *Bell ExpressVu Limited Partnership v. Rex*, [2002] 2 S.C.R. 559, the Supreme Court of Canada set out, in some detail, the principles governing statutory interpretation (see paras.

26 *et seq*.). If a statutory provision is clear and unambiguous, in the sense that the provision is not reasonably capable of being interpreted in more than one way in light of the overall scheme and purpose of the legislation, the provision must be interpreted in its grammatical and ordinary sense. In *Rizzo*, the Supreme Court of Canada reiterated two important principles of statutory interpretation. The first principle is that above-referenced rule that statutory provisions must be read in their entire context in their "grammatical and ordinary sense". This rule, taken from Elmer Driedger, *Construction of Statutes* (2nd ed., 1983) at page 87, has been repeatedly endorsed by the Supreme Court of Canada as representing the "preferred approach" to statutory interpretation and it recognizes that the words of a statute must be placed within a broader context that includes the nature and purpose of the legislation in question (*Rizzo*, para. 21; *Bell ExpressVu*, para. 26):

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

34. The second principle concerns the avoidance of absurd results (Rizzo, para. 27):

> … It is a well established principle of statutory interpretation that the legislature does not intend to produce absurd consequences. According to *Côté*, *supra*, an interpretation can be considered absurd if it leads to ridiculous or frivolous consequences, if it is extremely unreasonable or inequitable, if it is illogical or incoherent, or if it is incompatible with other provisions or with the object of the legislative enactment (at pp. 378-80). Sullivan echoes these comments noting that a label of absurdity can be attached to interpretations which defeat the purpose of a statute or render some aspect of it pointless or futile (Sullivan, *Construction of Statutes*, *supra*, at p. 88).

35. For convenience, we once again set out the section 1 definition of "work":

> "work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.
>
> (2) An employee is deemed to be at work while on call at a location designated by the employer unless the designated location is the employee's residence.

36. This definition contains two important concepts. Firstly, there is the broad notion of "labour or services" performed by an employee for an employer. Secondly, however, the Legislature clearly intended to qualify this broad language, and did so, by including subsection (2) dealing with "on call" work. Absent subsection (2), an "on call" employee could be characterized as undertaking compensable "labour or services" throughout their entire "on call" shift. The Legislature obviously intended to limit this latter potential consequence by establishing special rules for "on call" situations (see *Hicks, supra*). Presumably, the Legislature was motivated by a desire to balance employers' concerns about paying for unproductive labour or services (*i.e.*, when an employee is simply "on call" and not otherwise attending to the employer's affairs) against employees' legitimate concerns regarding their freedom of movement and action (see *Act*, subsections 2(b) and (e)).

37. We do not find any ambiguity in the section 1 definition of "work". If the employer designates a location (other than the employee's residence) where the employee must remain while "on call", the employee is deemed to be at work (as in *Hands On Car Wash Inc.*, *supra*). This result is consistent with the section 2(b) purpose of ensuring "fair treatment" for both employees and employers. If the employee is required to remain "on call" at a designated location (other than their residence), their freedom of movement is constrained and, in effect, they continue to be subject to the direction and control of their employer while "on call". If the designated location is the employee's residence, the employee is not deemed to be at work but nonetheless may be "working" for any period of time they are required to actually attend to the

employer's affairs following the receipt of a call (as in *Labour Ready*, *supra*). This latter result flows directly from the statutory definition since "work" may be undertaken at the employee's residence. While "on call" at one's residence, an employee has the freedom to attend to their own affairs, a freedom that is largely missing if the designated location is not their residence. Consistent with the ordinary meaning of the statutory language, if an employee is merely "on call" at their residence, they are not at "work".

38. Mr. Hills might have simply directed Mr. Kew to start his shift at home ("on call"), to respond to any dispatch calls received and then return to his residence to await the next call once the fare was completed. Had that been the case, Mr. Kew would not have been entitled to be paid for the time spent "on call" – his only compensable "work" would have been associated with receiving the customer's call, picking up the fare, driving the customer to their desired location and then driving back to his home. In fact, Mr. Kew was not required to remain at home and thus he had considerably greater freedom of movement during his "on call" time. It seems absurd to us that if Mr. Kew were required to remain at home "on call" (where his freedom of movement was significantly constrained), his "on-call" time would not have been compensable but, since he was not required to remain at home (and thus had significantly greater freedom of movement), his "on call" time would be compensable.

39. Further, we agree with the delegate that the geographic restriction imposed on Mr. Kew (namely, that he remain within 20 minutes of Summerland), did not constitute "a designated location". To conclude otherwise would be to unreasonably strain the plain and ordinary meaning of the statutory language. The notion of "a designated location" implies a significant restriction on the employee's freedom of movement and that sort of restriction is missing in the case at hand.

40. The evidentiary record indicates that Mr. Kew was scheduled to drive the taxi during a defined shift and, as is recorded in the Appeal Decision (at para. 29), was expected, during his shift, to perform the usual services provided by a taxi driver when a call came directly to him. During the interim periods between fares, Mr. Kew was "on call" but "he was free to do what he wished provided he remained within a twenty minute radius of town" (Appeal Decision, para. 29). The number of "on call" periods ranged from 8 to more than 15 during each shift (para. 29).

41. Clearly, Mr. Kew was "working" while driving a fare and also during that 20-minute (or less) period following the receipt of a call until he actually picked up the fare. The point of departure between the Determination and the Appeal Decision concerns Mr. Kew's status during the various "on call" periods during his shift. The delegate determined that Mr. Kew was not "working" during these "on call" periods since he was not required to remain at a designated location (for example, to remain in the taxi) and was, in essence, free to attend to his own personal affairs (and the evidence was that he did so) during these "on call" periods. In that sense, Mr. Kew's situation was similar to that of the complainants in *Labour Ready*, *Ashley Home Care* and *Svisdahl*. The Appeal Decision notes that Mr. Kew was expected to be available throughout his entire assigned shift – including the "on call" periods – and that his freedom of movement was constrained since, at all times, he had to be within a 20-minute radius of Summerland. While that is true, the very same thing could be said about the complainants in the other "on call" cases we have reviewed. For example, in *Labour Ready*, the Director unsuccessfully argued that the complainant was "working" (recall she was on pager duty during her "on call" periods) throughout her entire "on call" period since she was not free to leave town or go to the movies and faced inevitable interruptions and inconvenience associated with being "on call" (see page 11).

42. While it may be correct to say that Mr. Hills benefited from the services provided by Mr Kew while the latter was "on call" (for example, by not having to pay another employee to provide dispatch services), given the section 1 definition of "work", the simple fact of being "on call" does not equate to compensable "work"

unless the employee is required to remain at a designated location (other than their own residence). In this case, as in the other "on call" cases we reviewed, Mr. Kew was *not* required to remain at a particular location – he was free to be wherever he wished subject only to the 20-minute radius rule (which, as the delegate notes in his submission, effectively allowed Mr. Kew to be virtually anywhere within the greater Summerland region). In other words, Mr. Kew's freedom of movement was not, when considered in light of the statutory provision, "illusory" (as was suggested at para. 32 of the Appeal Decision).

43. At para. 33 of the Appeal Decision (previously quoted in these reasons), the Tribunal Member observed that technology has expanded the traditional notion of a "workplace" and for some employees modern communication technology such as portable cell phones, pagers and two-way radios may well be a mixed blessing. If the employer had engaged another employee to provide dispatch services from the employer's business premises, that individual would have been "working" during their entire shift. Similarly, if Mr. Kew had been required to provide his dispatch services from a specific location (other than his home) he clearly would have been at "work" during his entire shift. But that was not the situation. Rather, as in *Labour Ready*, Mr. Kew, while on call, had a significant degree of freedom of movement and thus was only at "work" when his "on call" status converted to "working" status when a call came in that required his immediate time and attention. Once the fare was completed, Mr. Kew reverted back to "on call" status and, as such, was no longer deemed to be "working".

The Application of Section 34 of the Act

44. As noted earlier in these reasons, the delegate submitted that the Appeal Decision is also incorrect insofar as it relates to section 34 of the *Act* – the minimum daily pay provisions. In the Appeal Decision (para. 34) the Tribunal Member suggested, in *obiter dicta*, that if Mr. Kew were considered to be "at work" and then "off work" while "on call" during the course of his scheduled shift, Mr. Hills would have been liable to pay not less than the applicable minimum number of hours for each "at work" period regardless of its duration. In light of the view we have taken with respect to the interpretation of the "on call" provision, this point is now moot. However, and merely for the sake of completeness, we note that section 34 refers to minimum daily hours of pay and does not separately apply to each and every defined segment of work (for example, each "working" period) within a particular day. In other words, we do not agree that each "working" segment (to be contrasted with each "on call" segment) within a scheduled shift separately triggers a minimum daily pay entitlement that, in turn, accumulates throughout the entire shift period. Section 34 would only have been relevant if Mr. Kew's total wages for a scheduled shift fell below his minimum daily pay entitlement and, on the evidence presented in this case, that never occurred.

Summary

45. The delegate determined that Mr. Kew had been paid for all hours "worked". By way of the Appeal Decision, the delegate's determination that Mr. Kew was a "taxi driver" was confirmed but the delegate was found to have erred in law in determining that Mr. Kew was not "working" during his "on call" periods. In our view, the Appeal Decision is correct as to the former issue but incorrect as to the latter.

46. Subsections 116(1)(a) and (b) of the *Act* set out our jurisdiction on a reconsideration application 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.

47. Accordingly, we shall confirm the Appeal Decision as it relates to the finding that Mr. Kew was a "taxi driver" as defined in section 1 of the *Regulation*. In addition, we will cancel that aspect of the Appeal Decision upholding Mr. Kew's claim for unpaid wages covering his "on call" periods and will vary the order contained in the Appeal Decision to reflect a confirmation of the Determination insofar as this matter is concerned.

ORDER

48. The application for reconsideration is allowed. The conclusion set out in the Appeal Decision regarding Mr. Kew's status as a "taxi driver" as defined by section 1 of the *Regulation* is confirmed. The conclusion set out in the Appeal Decision that Mr. Kew was "working" (and thus entitled to be paid) during his various "on call" periods is cancelled.

49. Pursuant to section 116 of the *Act*, the order set out at para. 38 of the Appeal Decision is varied to read as follows: "Pursuant to section 115 of the *Act*, the Determination dated November 26, 2010, is confirmed as issued."

Kenneth Wm. Thornicroft
Member and Panel Chair,
Employment Standards Tribunal

Brent Mullin
Chair, Employment Standards Tribunal

Carol L. Roberts
Member, Employment Standards Tribunal