Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

Knutson First Aid Services (1994) Ltd.
("the Employer")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

pursuant to Section 116 of the
Employment Standards Act R.S.B.C. 1996, C.113

ADJUDICATOR: Frank A.V. Falzon
Fern Jeffries
Michelle Alman

FILE No.: 2000/723

DATE OF DECISION: February 27, 2001

DECISION

INTRODUCTION

Knutson First Aid Services (1994) Ltd. ("the Employer") seeks reconsideration of an Adjudicator's decision dated July 24, 2000.

The Employer says the Adjudicator failed to hold a hearing in compliance with the *Act* and denied it a full and fair opportunity to present evidence. The Employer also says that the Adjudicator failed to consider all relevant evidence, failed to consider other relevant issues, failed to correctly distinguish between "work" and "residence" as defined in the *Act* and wrongly applied the "purposes" section of the *Act* to the facts of this case.

BACKGROUND

This case is about a first aid attendant employed in the oil and gas industry. The oil rig drilling site in this case operated 24 hours per day, at a remote location two hours outside Fort St. John. Because of its continuous operation, the operation ran two shifts.

Workers Compensation Regulations require first aid attendants in the oil and gas industry to be present at all times during periods of operation. The Employer says it hired the Employee, Mr. Morris, as a first aid attendant at the rate of $10 per hour and paid him for a 10 hour shift. Mr. Morris was the only first aid attendant hired during the period in question (late January-early February, 1999). Compliance with WCB Regulations meant that the Employee, as part of his job requirement, was, in the Employer's words: "required to be on site and on call 24 hours per day".

Upon leaving his employment, the Employee filed a complaint with the Director. He said that he worked 24 hours per day, and was paid only for 10. He therefore claimed wages owing for the remaining 14 hours per day.

In general, the *Act* establishes rights to compensation based on hours worked: ss. 3, 35. It expressly recognizes "on call" time to "count" if it is a location designated by an employer. But there is one exception – where "the designated location is the employee's residence": *Act*, s. 1(1) definition "work" and s. 1(2):

> 1(1) … "work" means the labour or services an employee performs for an employer whether in the employee's residence or elsewhere.
>
> 1(2) An employee is deemed to be at work while on call at a location designated by the employer unless the location designated is the employee's residence.

In her January 14, 2000 Determination, the Director upheld the complaint, finding that the Employee was, in these circumstances, at "work" 24 hours per day and not at his "residence". On the "work" issue, the Director held as follows:

> Granted the first aid attendant may never physically do or be required to do anything. That would be the ideal situation for this job. However, he has to remain and be present on site, that is what is expected and required for this job. The second fact to note is that Morris did not have a shift. He could not leave after the 10 hours he was paid for. He was responsible to be present and available 24 hours per day….
>
> Mr. Morris was not subject to any form of a shift schedule, rather he was required to remain on site at all times, subject to taking meal breaks, only 3 minutes away and only long enough to eat and subject to remaining in radio communication. As such I further find Mr. Morris was at work for 24 hour periods.

On the question whether Morris was residing in the "employee's residence", the Director held:

> In this situation, there is a trailer designed used and supplied as a first aid station, with an adjoining bedroom. There is no permanency at all as the employees are there only for periods of work, which is some cases are quite short in duration, as in this case, being only 8 days. There is no address, the site was 2 hours out of Fort St. John and located in the bush….
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> The courts may require the necessity of a search warrant for any place where there is an expectation of privacy, [but] that does not necessarily make it a residence.
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> Morris maintained his residence in Fort St. John. During periods of employment, he would live out of a suitcase, packing a change of clothes, toiletries and books to pass the time.

The Employer appealed to the Tribunal. It framed the issue as being whether the first aid trailer should be considered a "residence" within the meaning of s. 1(2) of the *Act*.

On July 24, 2000, the Tribunal dismissed the appeal. Adopting the careful analysis in the Tribunal's earlier *Corner House* decision (BCEST #D254/98) and referring to the Supreme Court of Canada's decision in *Thompson v. M.N.R.*, [1946] S.C.R. 209, the Adjudicator held:

It is obvious from the above excerpts that the Tribunal has accepted and incorporated the requirement of a degree of permanence or settlement into the meaning of residence for the

purposes of the *Act*. I agree with that approach. It is a common sense approach to the notion of "residence" that is not inconsistent with common usage, but is sufficiently "strict" that it meets the purposes and objects of the *Act* and is consistent with its remedial nature.

> It follows that I do not accept the argument of counsel for Knutson that something as impermanent as a tent in a campground could be considered as being on a continuum of what is "residence" for the purposes of the Act. I don't disagree with the notion of there being a continuum for what is a residence for the purposes of the Act, but in order to be anywhere on the continuum the location being considered must at least demonstrate the degree of permanence contemplated by the Tribunal's comments in the *Corner House* case….

ISSUE

The issue before us is whether we ought to grant the Employer's application to reverse the Adjudicator's decision on the grounds it has set out.

ANALYSIS

Section 116(1) governs the reconsideration power:

> s. 116 (1) On application under subsection (2) or on its own motion, the tribunal may
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> (a) reconsider any order or decision of the tribunal, and
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> (b) cancel or vary the order or decision or refer the matter back to the original panel.

As outlined in *Valoroso Ristorante Italiano*, BCEST #RD046/01:

> There are compelling reasons to exercise the reconsideration power with restraint. One is to preserve the integrity of the process at first instance. Another is to ensure that, in an adjudicative process subject to a strong privative clause and a presumption of regularity, the "winner" not be deprived of the benefit of an adjudicator's decision without good reason. A third is to avoid the spectre of a Tribunal process skewed in favour of persons with greater resources, who are best able to fund litigation, and whose applications will necessarily create further delay in the final resolution of a dispute.

The Tribunal therefore takes a principled approach to the exercise of the discretion to reconsider, consistent with the purposes of the *Act*. This involves the two staged process outlined in *Milan Holdings Ltd.*, BCEST #D313/98:

> At the first stage, the reconsideration panel decides whether the matters raised in the application in fact warrant reconsideration…. In deciding this question, the Tribunal will consider and weigh a number of factors. For example, the following factors have been held to weigh against a reconsideration:
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> (a) Where the application has not been filed in a timely fashion and there is no valid cause for the delay: *Re British Columbia (Director of Employment Standards)*, BCEST #D122/98. In this context, the Tribunal will consider the prejudice to either party in proceeding with or refusing the reconsideration: *Re Rescan Environmental Services Ltd.* BC EST #D522/97 (Reconsideration of BCEST #D007/97).
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> (b) Where the application's primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the adjudicator (as distinct from tendering compelling new evidence or demonstrating an important finding of fact made without a rational basis in the evidence): *Re Image House Inc.*, BCEST #D075/98 (Reconsideration of BCEST #D418/97); *Alexander (c.o.b. Pereguine Consulting)* BCEST #D095/98 (Reconsideration of BCEST #D574/97); *323573 BC Ltd. (c.o.b. Saltair Neighbourhood Pub)*, BC EST #D478/97 (Reconsideration of BCEST #D186/97);
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> (c) Where the application arises out of a preliminary ruling made in the course of an appeal. "The Tribunal should exercise restraint in granting leave for reconsideration of preliminary or interlocutory rulings to avoid multiplicity (b of proceedings, confusion or delay": *World Project Management Inc.*, BCEST #D134/97 (Reconsideration of BCEST #D325/96). Reconsideration will not normally be undertaken where to do so would hinder the progress of a matter before an adjudicator.
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> The primary factor weighing in favour of reconsideration is whether the applicant has raised questions of law, fact, principle or procedure which are so significant that they should be reviewed because of their importance to the parties and/or their implications for future cases…

The Employer's first set of grounds may be summarized in the argument that by not considering affidavit evidence it wished to tender, the Adjudicator did not conduct a fair hearing or hear all relevant evidence. The argument that the Tribunal failed to afford procedural fairness and failed to consider key evidence is a serious allegation and thus

worthy of review. Having considered the matter, however, we find the argument to be without merit.

By way of background, we note that the Adjudicator issued carefully considered reasons on July 4, 2000 explaining why he did not consider an oral hearing to be necessary. Critical to that decision was the Employer's own concession through counsel that "the Director and the employer do not disagree over the facts but over the interpretation of the residence as applied to the particular facts of this case".

One week after the release of the Adjudicator's July 4, 2000 decision, the Employer wrote to the Tribunal seeking "confirmation that the Employer may submit evidence by Affidavit". The Employer submits that, by rendering his decision without responding to this request for confirmation, the Adjudicator denied the Employer "full opportunity to be heard and further precluded the tendering of relevant evidence".

As alluded to above, we dismiss this ground as having no merit. The very basis for the Adjudicator's unchallenged July 4, 2000 decision was that evidence did not need to be led because the facts were agreed:

> The facts are agreed, at least as between the Director and Knutson, and the complainant has not made any assertions that would raise a concern about the factual matrix within which the interpretive issue arises. The interpretive issue, the meaning of "residence" under the *Act*, is one that can be addressed by way of written submissions….
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> It is my view that an oral hearing is not required and the appeal will proceed on the basis of the written submissions of the parties. If any of the parties have final comments, they should be delivered to the Tribunal within one week of the date of this letter. [emphasis added]

The Adjudicator directed that the appeal would proceed based on written *submissions*. Submissions are not evidence. To request "confirmation" of the right to submit evidence when an Adjudicator has just told you that the matter will proceed based on submissions reflects, at best, a significant misunderstanding of the direction given. From another perspective, it might be viewed as being somewhat presumptuous.

The Adjudicator was entirely correct to conclude that, in an appeal advanced on the basis that the key facts are agreed, evidence is not necessary either as a matter of fairness or substance. Rather than comply with the Adjudicator's direction to provide final comments within a week, the Appellant instead waited the full week, raised the issue of Affidavit evidence and applied to delay the process. The Employer did not explain what affidavit it wished to tender, why it was previously unavailable and why it was so significant as to justify the Adjudicator reopening his July 4, 2000 direction in favour of further delays. While a prompt and polite "no" from the Tribunal might have been ideal at this point, there was no breach of

procedural fairness or failure to consider relevant evidence. Evidence is not necessary as a matter of procedural fairness unless there are essential facts in dispute. The Appellant's own appeal submissions ran contrary to that notion.

In our view, the Employer received a fair hearing. It was represented by legal counsel. It was well able to, and did, advance its points comprehensively, in writing, in a meaningful fashion and on more than one occasion. This was not a case in which justice was not possible in a written format. A careful review of the content of all the submissions before the Adjudicator makes clear that this was not a case in which the central issue turned on questions of credibility. The case turned on issues of legal characterization rather than primary fact.

The Employer's next ground is that the Adjudicator erred in his conclusion that the first aid trailer was not, in the circumstances before him, a "residence". In this respect, the Employer has repeated the arguments it made to the Adjudicator, supplemented by reference to legislation in other jurisdictions, the purposes of the *Act* and the argument that the Adjudicator's decision "ignores the geographical facts of the remoter work sites in British Columbia". In our view, this argument is worthy of review by a reconsideration panel.

We find no error in the Adjudicator's decision.

As noted by Justice Rand in *Thompson v. M.N.R.*, *supra*, however the highly flexible term "residence" might be defined in a given context, it should be distinguished from a "stay" or "visit". Justice Kellock distinguished "residents" from "sojourners", the latter being persons who "make a temporary stay in a place".

There is good reason under the *Act* not to take an overly expansive view of the term "employee's residence" in s. 1. The *Act* itself creates the presumption that "on call" employees are deemed to be at work while on call. In expressly addressing the "on call" scenario, the Legislature must be taken to have understood the reality that workers are often "on call" for many hours beyond the regular workday. The Legislature, not the Director or the Tribunal, has made the policy decision that the only exception to counting all "on call" hours as work is when the "designated location" to be on call is the "employee's residence".

The *Act* compensates employees for labour and services performed whether at the employee's residence or elsewhere: s. 1(1) "work". The *Act* extends the definition of "work" to include on call time, except where the designated on call location is the employee's residence: s. 1(2). It is noteworthy that the Legislature defined the exception in s. 1(2) by using the phrase *employee's residence* rather than a formulation such as "location designated by the employer" or "accommodation designated by the employer". Manifestly, the Legislature felt the term "employee's residence" should be defined objectively, and that "on call" time should be non-compensable only when an employee can truly and clearly be said to be otherwise "compensated" by being at their residence.

This is not to say that the *Act* requires us to equate "residence" with permanent domicile, or that accommodation provided by the employer can never constitute the "employee's residence". However, to find, as the Adjudicator did, that residence demands a higher degree of permanence or settlement than shown here reflects fidelity to legislative intent and to the principle in *Rizzo Shoes*.

The employee was only present in the first aid trailer full time because he had to be. He had no choice in the matter. He was on call 24 hours per day. It was "a location designated by the employer" and thus falls squarely within the deeming provision for "work" in section 2(2). He was "staying" there temporarily and for a limited purpose: *Corner House*, *supra*, at p. 9. The trailer was not the employee's residence. To suggest that it was the employee's residence would in our view require a degree of permanence or settlement not shown here.

The wisdom of the Adjudicator's decision can be demonstrated by considering the legal implication if the Employer is correct. The Employee was on call 24 hours per day. He had no particular shift. It is common ground that, happily for the other employees, the Employee had to spend very limited time performing actual first aid work. If in fact the Employee was located at his "residence" full time on call, except for the time he actually performed first aid "work", he would have virtually no statutory entitlement to wages. That result would effectively exclude him from the *Act*. He would be left to enforce contractual rights in Court, contrary to the fundamental purpose of creating employment standards legislation. To interpret the legislation in this fashion, in these circumstances, would take very clear language indeed.

The Employer feels it is unfair to have to pay a first aid attendant 24 hours per day when the attendant may never need to administer first aid at all. The Employer considers the source of the problem to be the fact that, in contrast to the forest industry where WCB Regulations allow forest workers paid for shift work also to be first aid attendants, the oil industry requires a person devoted exclusively to first aid work.

We recognize that, at least in circumstances such as exist here, an "either/or" scenario is created where a first aid attendant, or attendants, have a statutory right to be paid for all on call time, or virtually none of it. Whether workers compensation law or employment standards law should be modified is not for this Panel to determine. The Tribunal's role on appeal and reconsideration is not to make law, but to apply the law as it is. The Adjudicator has done so correctly in this case.

The Employer seeks to "invite the Tribunal to cooperate with the employers and employees in the gas sector to consider a Regulation which strikes a fair balance between the major stakeholders". While the Tribunal has the authority under s. 109(1)(a) to make recommendations to the Lieutenant Governor in Council about the exclusion of classes of persons from all or part of the *Act* or Regulations, the present decision is solely in respect of a s. 116 reconsideration application in an individual dispute. A separate application to the

Tribunal is required to address larger policy questions requiring the participation of, and balancing of interests between, major stakeholders.

ORDER

The application for reconsideration is dismissed.

FRANK A.V. FALZON

Frank A.V. Falzon
Adjudicator
Employment Standards Tribunal

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Fern Jeffries
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