Employment Standards TRIBUNAL

An Application for Reconsideration

- by -

The Director of Employment Standards
("the Director")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

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

TRIBUNAL PANEL: David B. Stevenson, Panel Chair
Brent Mullin, Tribunal Chair
John Orr, Member

FILE No.: 2004A/83

DATE OF DECISION: July 28, 2004

DECISION

SUBMISSIONS:

Pat Cullinane on behalf of the Director

OVERVIEW

The Director of Employment Standards ("the Director") seeks reconsideration under Section 116 of the *Employment Standards Act* (the *"Act"*) of a decision made by a Member of the Tribunal, BC EST #D059/04, dated April 6, 2004 (the "original decision"). The original decision considered an appeal of a Determination issued by a delegate of the Director of Employment Standards (the "Director") on December 19, 2003 by Summit Security Group Ltd. ("Summit") The Determination found Summit had contravened Part 3, Section 18 and Part 4, Section 40 in respect of the employment of Colleen Hooge ("Hooge") and ordered Summit to pay wages in an amount of $128.25. The Determination also imposed administrative penalties totaling $1000.00, under Section 29(1) of the *Employment Standards Regulations* (the *"Regulations"*), for contravening Sections 18 and 40 of the *Act*.

The original decision cancelled one of the administrative penalties. The Director says that was an error in law.

The appeal was conducted by way of written submissions. This panel is therefore in as good a position as the Adjudicator to assess the merits of the case.

ISSUE

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 issue raised in this application is whether the decision to cancel one of the administrative penalties was an error of law.

ANALYSIS OF THE PRELIMINARY ISSUE

The legislature has conferred an express reconsideration power on the Tribunal in Section 116 which provides:

> *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.*
>
> *(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.*

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. It will weigh against an application if it is determined its primary focus is to have the reconsideration panel effectively "re-weigh" evidence already tendered before the Adjudicator (as distinct from tendering new evidence or demonstrating an important finding of fact was made without a basis in the evidence) and come to a different conclusion. An assessment is also made of the merits of the Adjudicator's decision.

Consistent with the above considerations, the Tribunal has accepted an approach to applications for reconsideration that resolves into a two stage analysis. At the first stage, the reconsideration panel decides whether the matters raised in the application 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.

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.

The Director argues a reconsideration is justified because there are significant questions of law and policy raised by the original decision. After reviewing the original decision, the material on file and the arguments of the Director on this application, the Panel agrees this application raises significant issues under the *Act* and has decided this is a case that warrants reconsideration.

THE FACTS

The original decision set out the following facts:

> The Appellant operates a security business which employed the Respondent as a security guard from June 19, 2003 to August 24, 2003 at the rate of $9.00 per hour. The Employer terminated the Respondent who then filed a complaint under the *Act*. The Employer provided a record of the hours the complainant worked and the wages she was paid. The parties entered into an averaging

> agreement signed by the parties after the Employee commenced her employment. Consequently, the Delegate found the Employee was entitled to overtime wages worked before that agreemnt was signed on July 19, 2003. The Employee was entitled to 12 hours of overtime for which she had been paid regular time with a net amount due to her of $54.00. That finding is not in dispute.
>
> Both parties agreed that, after evidence presented by the Respondent to the Delegate that she was entitled to 2.5 hours of regular time for travel and 5 hours of regular pay as a result of a miscalculation due to the Employer having paid the complainant based on hours she was supposed to work according to her schedule rather than hours she actually worked.
>
> The Delegate imposed $500.00 administrative penalties pursuant to Section 29 of the Regulation for contraventions of each of Section 18 (regular wages) and 40 (overtime wages).

The original decision also found the contravention of Section 18 of the *Act* was completely inadvertent and unintentional, with no suggestion the employer was negligent or remiss in its record keeping or informing itself of the requirements of the *Act* and, while not stated directly as a finding of fact, that the employer had no knowledge of the regular wages owing to Hooge, at least at the time the statutory obligation under Section 18 arose. The latter point seems to conform to a comment found in the Director's submission on the appeal, that "during the hearing . . . the employer agreed he owed the complainant regular wages because she had not informed him of some time she had worked".

The original decision considered the provision which was found to have been contravened in the context of previous decisions of the Tribunal, the purposes of the *Act*, principles of statutory interpretation, the particular facts and, based on those considerations, concluded that wages of which the employer is neither aware nor ought reasonably to be aware cannot be "owing" to an employee for the purposes of Section 18 of the *Act*.

Some additional facts, which are found in the record, warrant consideration. Hooge was terminated in a letter dated August 22, 2003, the body of which reads:

> We regret to inform you that you employment with Summit Security Group is terminated effective August 24, 2003 for the following reason(s):
>
> You are still within your 90 day probationary period and we feel that you are not suited for the job.
>
> Your pay check will be available for pick up at our office Auguxt 25. Please return all uniforms and any Summit Security Group equipment that you may have.

In a letter, dated September 5, 2003, Summit wrote to Hooge concerning a perceived overpayment of wages. The opening paragraph of that letter says:

> In reviewing you [sic] last pay check with the schedule and your actual worked hours, you have been over paid 14 hours.

Hooge filed a request for payment with Summit on September 10, 2003. Within that request, Hooge set out a claim for regular wages comprising 2.5 hours for hours worked, but not paid, on August 15th, 2003 and 4.75 hours for time worked, but not paid, on August 17th, 2003. The claim for regular wages was in addition to claims for overime hours worked, but not paid, for statuory holiday pay, for travel time and for

the cost of uniform cleaning. Included with the Request was, among other things, a form Letter from the Employment Standards Branch to the Employer, which includes the following statement:

> On November 29th, 2002, the *Employment Standards Act* was amended to include **mandatory penalties** for employers who are found in a Determination, issued by the Branch, to have contravened the legislation after that date. (emphasis included)

On September 12, 2003, Summit responded to the request for payment. In response to the claim for regular wages, the response states:

> **Regular Wages:**
>
> - Aug 15, 2003 you were paid for the shift from 0000 to 0700hrs.
>
> - Aug 17, 2003 you were paid for the shift from 1200 to 2000hrs.

As well, there was reference to the September 5, 2003 letter:

> We have also sent you a letter dated September 5, 2003 concerning an overpayment of wages on our part. There was an overpayment of 14 hours or $126.00 for the following days:
>
> - August 16 you were paid 12hrs (0000-1200) but you only worked 9hrs (0000-0900) this resulted in an overpayment of 3hrs or $27.00.
>
> - August 17 you were paid 12hrs (0000-1200) but you only worked 8hrs (0000-0800) this resulted in an overpayment of 4hrs or $36.00.
>
> - August 18 you were paid 7hrs (0000-700) but in fact you did not even work the shift. This resulted in an overpayment of 7hrs or $63.00.
>
> Total amount overpaid is $126.00.

Hooge filed a complaint with the Director on September 24, 2003.

The Director attempted mediation, without success, in late October 2003. A hearing was scheduled for, and took place on, November 18, 2003. As noted above, Summit agreed, after Hooge presented evidence on her claim, that she was owed 2.5 hours regular wages for travel time and 5 hours regular wages, which was described in the Determination as a discrepancy between the hours which Hooge was supposed to work according to her schedule and the hours she actually worked. Summit paid her based on her schedule.

There is no indication in the original decision, the Determination or in the record that Summit made any efforts before Hooge was terminated to confirm the correctness of the schedule as an accurate measure of the hours actually worked by her.

ANALYSIS

The Director argues the original decision has effectively changed the nature of the statutory obligation that is placed on an employer under Section 18 of the *Act* to pay all wages owing to an employee within

48 hours of termination. The Director says an employer has never been allowed to avoid the responsibility to ensure timely payment of wages owing by claiming ignorance of the fact, or the amount, of wages owing. Such a conclusion ignores the statutory requirement imposed by Section 28 of the *Act* to keep records, and specifically, the requirement to keep a record of the hours worked by the employee on each day (paragraph 28(1)(d)).

The Director relies on several decisions of the Tribunal, arising in the context of overtime claims, which confirm there is an obligation on an employer to direct and control its employees' hours of work if that employer wishes to avoid liability under the Act for payment of overtime wages. The Director refers to *BCA Industrial Controls (1995) Ltd.*, BC EST #D245/97, where the Tribunal said:

> The significance of the phrase "directly or indirectly", as it appears in Section 1(1) and Section 35 leads me to conclude that the responsibility rests with the employer to control when an employee works and to record those hours daily. That is, if an employer does not wish employees to work overtime hours, he must not only order them not to work overtime, but must also supervise and record their hours of work to ensure that no overtime hours are worked.

The Director says the circumstances of this case are analogous – that the statutory responsibilty of Summit included the requirement to record the hours worked by Hooge daily and Summit may not avoid paying wages as required by Section 18 of the *Act* when clearly it did not meet that statutory responsibility.

There has been no reply to this application from either Summit or Hooge.

The Tribunal Member of the original decision says that it would lead to an absurdity, or some repugnance or inconsistency with the purposes of the *Act*, to impose an administrative penalty in circumstances where the employer was not aware, nor ought reasonably to have been aware, that wages were owed when the statutory obligation arose. The inference in that statement is that Summit was not aware, nor ought reasonably to have been aware, that wages were owing when Hooge was terminated. We have two concerns with that conclusion.

The first arises on the facts. The indication that Summit was not aware, and could not reasonably have been aware, is based on the submission of Summit in their appeal and comments made by the Director in reply to the appeal. In the appeal, Summit said:

> We paid Colleen Hooge all wages that were owed to her by my records at the time of termination; it was not until the employee submitted the self help kit that I was aware of her being short any hours. . . . It was not our intention to with hold payment of any amount, it was simply a matter of not having accurate information, I paid her to the best of my records at the time of termination.
>
> I am asking the Director to see this as a lack of commucation on both parties. . . .

In her reply, the Director agreed that the contravention of Section 18 occurred as a result of "lack of communication on both parties".

With respect, such an assertion by Summit and acknowledgement by the Director does not justify a conclusion that Summit could not reasonably have become aware of the wages owing to Hooge at the time of her termination, either by complying with their obligation to keep records of daily hours worked

by Hooge or by simply asking Hooge to confirm her hours worked following the decision to terminate her and before the 48 hours following termination.

The unpaid hours related to wages earned more than a week before her termination. It begs the question of why Summit remained unaware of the hours she worked for that length of time. We have no adequate explanation or facts on the record as to why Summit did not have the very records that it is obliged, by law, to maintain. Summit controlled not only the decision to terminate, but its timing as well. There was no apparent urgency in applying the decision to terminate Hooge that would have made it impossible to meet the requirements of Section 18. The termination letter does not ask Hooge to either submit a record of hours worked during her final week or to confirm the correctness of the employer's calculation of her hours worked. On the facts of this case, and in light of Summit's statutory obligations, we find no basis for an argument that Summit was not in contravention of the *Act*.

The second concern arises from the indication that imposing an administrative penalty in the circumstances would lead to some repugnancy or inconsistency with one of the stated purposes of the *Act*, to promote the fair treatment of employers and employees.

In this application, the following point is made by the Director:

> . . . the employer's own submission with their appeal acknowledged that they were aware that the employee was claiming for unpaid hours when the employee delivered the self help kit to the employer. Had the employer paid the wages voluntarily at that time, the Director would not have issued a determination with respect to the matter, and consequently no accompanying mandatory penalty would have resulted with respect to that matter.

As noted by the Tribunal in *Royal Star Plumbing, Heating & Sprinklers Ltd.*, BC EST #D168/98, administrative penalties generated through provisions of the *Employment Standards Regulation* are part of a larger scheme designed to regulate employment relationships in the non-union sector. Such penalties are generally consistent with the purposes of the *Act*, including ensuring employees receive at least basic standards of compensation and conditions of employment and encouraging open communication between employers and their employees. The design of the administrative penalty scheme under Section 29 of the *Employment Standards Regulation*, which provides mandatory penalties where a contravention is found by the Director in a Determination issued under the *Act*, meets the statutory purpose providing fair and efficient procedures for the settlement of disputes over the application and interpretation of the *Act*. Such an interpretation and application of the *Act* is also consistent with the modern principles of, or approach to, statutory interpretation noted by Driedger, *Construction of Statutes*, 2nd ed. Toronto: Butterworths, 1983, p. 87 ff. and the nature and purpose of employment standards legislation as explained by the Supreme Court of Canada in *Danyluk v. Ainsworth Technologies Inc.*, [2001] 2 S.C.R. 460, which was cited by the Tribunal in *J.C. Creations Ltd. 0/a Heavenly Bodies Sport*, BC EST # RD 317/03 (Reconsideration of BC EST # D132/03).

There can be no dispute that Summit failed to pay Hooge all wages owing to her within 48 hours of her termination. Summit had several opportunities to avoid an administrative penalty by simply meeting its statutory obligation to determine the daily hours of work and pay her the wages owing on those hours. Summit did not ensure compliance with its specific obligations or with its general obligation to pay Hooge the wages she had earned until faced with Hooge's evidence at the hearing on November 18, 2003. We can find no reason why a contravention of Section 18 of the *Act* should not have been found and no basis for not imposing an administrative penalty for that contravention.

ORDER

Pursuant to Section 116 of the Act, we order the original decision be cancelled and the Determination dated December 19, 2003 confirmed.

David B. Stevenson **Panel Chair** **Employment Standards Tribunal**	**Brent Mullin** **Tribunal Chair** **Employment Standards Tribunal**	**John M. Orr** **Member** **Employment Standards Tribunal**