

EMPLOYMENT STANDARDS TRIBUNAL

An application for reconsideration

- by -

Can Com Electronics Ltd.

- 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: John M Orr

FILE No: 2000/802

DATE OF DECISION: March 23, 2001

DECISION

OVERVIEW

This is an application by Can Com Electronics Ltd. ("Can Com" or "the company") under Section 116 (2) of the *Employment Standards Act* (the "Act") for a reconsideration of a Decision #D334/00 (the "Original Decision") which was issued by the Tribunal on September 01, 2000.

The original decision was issued in response to an appeal filed by Can Com of a Determination issued by the Director in relation to an employee, Donald Hinsche ("Hinsche"), who claimed overtime wages. The primary issue in the Determination and in the original decision was whether or not Hinsche was a "manager" and therefore not entitled to overtime.

Hinsche was a commission salesman and adopted the title of manager. The primary issue discussed in the Determination and in the original decision was focused on whether he actually met the definition as contained in the *Act*. However, there were other issues raised by the company during the investigation and at the hearing which gave rise to the original decision. These issues included the fact that because Can Com took the position that Hinsche was a manager he was therefore authorised to approve the schedules of the employees but he was not authorised to approve overtime. Can Com also took issue with the quantum of wages as calculated by the Director's delegate.

In the original decision the adjudicator upheld the Director's finding that Hinsche was not a manager and then confirmed the Determination.

Can Com has requested that the Tribunal reconsider the original decision. The company's request is not very well focused on the precise grounds for this request but it is clear that the company continues to argue the issue about Hinsche being a manager. It is also clear in the request that the company remains concerned that two other significant issues were not addressed. These issues are that Hinsche was not authorised to work overtime and in fact may have been forbidden from working overtime and, secondly, that the wage calculations are inaccurate.

ANALYSIS

The current suggested approach to the exercise of the reconsideration discretion under section 116 of the *Act* was set out by the Tribunal in *Milan Holdings Ltd.*, BCEST #D313/98. In *Milan* the Tribunal sets out a two-stage analysis in the reconsideration process. The first stage is for the panel to decide whether the matters raised in the application for reconsideration in fact warrant reconsideration. In deciding this question the Tribunal should consider and weigh a number of factors such as whether the application is timely, whether it is an interlocutory matter, and

whether its primary focus is to have the reconsideration panel effectively "re-weigh" evidence tendered before the adjudicator.

The Tribunal in *Milan* went on to state that the primary factor weighing in favour of reconsideration is whether the applicant has raised significant questions of law, fact, principle or procedure of sufficient merit to warrant the reconsideration. The decision states, "at this stage the panel is assessing the seriousness of the issues to the parties and/or the system in general". Although most decisions would be seen as serious to the parties this latter consideration will not be used to allow for a "re-weighing" of evidence or the seeking of a "second opinion" when a party simply does not agree with the original decision.

It is one of the defined purposes of the *Act* to provide a fair and efficient procedure for resolving disputes and it is consistent with such purposes that the Tribunal's decisions should not be open to reconsideration unless there are compelling reasons: *Khalsa Diwan Society* BCEST #D199/96.

The circumstances in which an application for reconsideration will be successful will be limited. In a Reconsideration decision dated October 23, 1998, *The Director of Employment Standards*, BCEST #D475/98, the Adjudicator sets out those limits as follows:

- *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*

In my opinion this is a case that warrants the exercise of the reconsideration discretion. It appears that there was a failure, in the original decision, to deal with two significant issues.

While the original decision dealt thoroughly and analyzed carefully the evidence and submission in relation to the fundamental issue about whether or not Hinsche was a manager it did not fully address the consequences of the finding that Hinsche was simply an employee. I am not satisfied by the appellant's submission that the adjudicator was wrong on this latter point. The definition of "manager" in the *Act* is very simple and straightforward and the adjudicator applied the evidence to the definition in a clear and logical manner. The appellant must understand that although the business world may have a generally accepted understanding of what is meant by a "manager" the Director and this Tribunal are bound by the definition imposed upon us by the legislation.

However, there are two significant issues that arise from the submissions of the company both to the Director and to the adjudicator which were not addressed in the original decision. The first of these is that, having found that Hinsche was simply an employee, the adjudicator needed to address whether or not the overtime claimed by Hinsche was authorised by the employer or that the employer knowingly allowed him to work overtime. The employer had submitted that Hinsche was directed not to work any overtime. If this were the case and Hinsche work the overtime in direct contravention of a direction from the employer then he would not be entitled to wages for that time. The original decision does not address this issue and as I review the Determination it does not adequately address this issue either.

The second issue raised by the company and not addressed in the original decision is the method of calculation of the wages used by the Director's delegate. I have reviewed those calculations and they do not seem to address the reality that Hinsche was a commission salesman. There was no agreed salary or hourly rate of pay. In these circumstances the Director is limited to ensuring that the employee has been paid the legal minimum wage for the hours worked. Whatever manner is used to calculate wages owing the delegate cannot apply an hourly rate greater than the minimum, subject to the premiums for overtime if it is found that overtime was authorised. The hourly rates used by the delegate fluctuate throughout the period of the claim. This cannot be. The employee is entitled to the minimum wage but there is no authority, in the absence of a rate set in the employment contract, to apply a rate greater than the minimum.

Under these circumstances, it seems to me that the appropriate remedy is to vary the original decision to refer the matter back to the Director to address these two significant issues.

ORDER

This Tribunal grants the application for reconsideration and hereby varies the original decision as follows:

1. the finding that Hinsche was not a manager is confirmed;
2. the matter is referred back to the Director to re-investigate and to issue a new determination addressing the issue as to whether the overtime claimed by Hinsche was authorised by the employer, and
3. if so, to recalculate the wages owing based properly on the minimum wage.

John M. Orr

John M. Orr
Adjudicator
Employment Standards Tribunal