EMPLOYMENT STANDARDS TRIBUNAL

In the matter of an application for reconsideration pursuant to Section 116 of the *Employment Standards Act* R.S.B.C. 1996, c.113

- by -

Greg Jones
(" Jones ")

- of a Determination issued by -

The Director of Employment Standards
(the "Director")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No.: 1998/632

DATE OF DECISION: April 20, 2000

DECISION

THE APPLICATION

This particular decision concerns the Tribunal's authority to reconsider, *on its own motion,* a prior decision or order issued by the Tribunal [see section 116(1) of the *Employment Standards Act* (the "*Act*")].

BACKGROUND FACTS

On September 10th, 1998 a delegate of the Director of Employment Standards (the "delegate") issued a Determination with respect to an unpaid wage complaint filed by Mr. Greg Thomas Jones ("Jones") against his former employer, Kitt Contracting Ltd. ("Kitt"). The delegate determined that Jones had been paid for all hours worked during the period September 13th to November 27th, 1997 and, accordingly, dismissed his complaint. Jones had been hired by Kitt pursuant to a 1-year training program sponsored by the Workers' Compensation Board--under this program the Board also paid a significant proportion of Jones' wages.

On October 5th, 1998, Jones appealed the Determination to the Tribunal alleging that the delegate did not correctly determine his regular hourly wage for purposes of calculating his overtime pay entitlement. In particular, Jones alleged that his monthly salary was based on a 40-hour week and that this latter figure should have been used for purposes of calculating his "regular wage" and, in turn, his overtime pay entitlement.

In a written decision issued on December 16th, 1998 (BC EST D#572/98) a Tribunal adjudicator dismissed Jones' appeal and confirmed the Determination. In dismissing the appeal the adjudicator noted several salient points:

- Although there was no dispute that Jones' monthly salary for the period in question was $4,000 there was no evidence that this salary was based on the assumption of a 40-hour work week;

- in fact, Jones regularly worked more than 40 hours per week;

- given that there was no evidence to show that the monthly salary was based on a 40-hour week, both the delegate and the adjudicator held--quite correctly in my view--that the formula set out in the section 1(1)(d) definition of "regular wage" ought to apply: "regular wage means...(d) if an employee is paid a monthly wage, the monthly wage multiplied by 12 and divided by the product of 52 times the lesser of the employee's normal or average weekly hours of work...".

- If Jones' monthly salary was based on a 40-hour work week, his regular hourly wage would have been $23.08 in which case he would have been entitled to

> additional overtime pay. However, applying the regular hourly rates calculated (a separate rate was calculated for each month) using the above-quoted section 1(1)(d) formula--which is based on *average* weekly hours worked--Jones did not have any unpaid wage entitlement.

The key findings of the adjudicator are set out below (at page 4 her Reasons for Decision):

> "In my view, given the circumstances of this case, the approach taken by the Director's delegate is correct.
>
> *There is absolutely no evidence that Jones' monthly salary was based on a 40 hour work week.* There is nothing about hours of work in the Letter of Understanding signed by Jones, and there is no dispute that he regularly worked in excess of 40 hours per week.
>
> In his appeal, *Jones appears to suggest that the WCB will support his position that his salary was based on 40 hours per week. No documents, however, were supplied by the WCB to support Jones' position...*
>
> Given the absence of any evidence which supports Jones' claim, I must conclude that the Director's delegate did not err in his calculations."
>
> *(italics* added)

By way of a 1-page letter dated January 27th, and filed with the Tribunal on January 29th, 1999, Jones requested that the Tribunal reconsider its December 16th, 1998 decision. Jones' January 27th letter is reproduced, in its entirety, below:

> "I am requesting a reconsideration of the decision based on further evidence obtained from W.C.B. I am trying to prove there was a hourly wage and the 4,000 per month was based on a 40 hrs work week. Thank you."

It should be noted that Jones did not provide *any* corroborating evidence to show that his salary was, in fact, based on a 40-hour work week. Accordingly, and quite correctly, the Tribunal chair wrote to Jones on February 1st, 1999 denying his request for reconsideration.

On or about June 7th, 1999 Jones filed a complaint with the provincial Ombudsman's office and, some time later, filed a second request for reconsideration.

ANALYSIS

Jones' second reconsideration request must be refused by virtue of the provisions of section 116(3) of the *Act.* Notwithstanding that latter provision, however, the Tribunal does have the discretionary authority to proceed, on its own motion, to reconsider a previous Tribunal decision. The issue, of course, is whether or not that discretion ought to be exercised in this case. I see no reason whatever to reopen this matter.

The key factual dispute between the parties, of course, centers on the terms and conditions of Jones' engagement by Kitt. Was his monthly salary based on a 40-hour week or not? It must be remembered that, as the complainant--and, subsequently, appellant and applicant for reconsideration--it was *Jones' burden* to show that his monthly salary was based only on a 40-hour work week.

I have reviewed all of the material that has been provided the Tribunal. This material clearly discloses that Jones has consistently maintained that his salary was based on a 40-hour week. His employer, Kitt, on the other hand, has consistently maintained otherwise. Further, there is simply no clear evidence to support Jones' position. Indeed, the very body that Jones suggested would provide the requisite corroborating evidence, namely, the WCB, has, in fact, submitted evidence to the Tribunal to the precise opposite effect. In a February 14th, 2000 submission from the WCB to the Tribunal, Mr. Vlad Yakimov states (at pp. 7-8) that there was no agreement set out in the original job-training contract (the September 3rd, 1997 "Letter of Understanding") regarding the weekly hours to be worked in exchange for the monthly salary nor was any agreement reached between the parties regarding the payment of overtime.

While, undoubtedly, parties may agree (provided they do not attempt to "contract out" of the *Act*) that a particular monthly salary is based on a maximum number of weekly working hours--in which case overtime pay will be based on a regular hourly wage derived by dividing the monthly salary by the total working hours contracted for--there is simply no evidence that such was the situation here. In section 1 of the *Act*, various formulae are prescribed in order to calculate a "regular wage" for purposes of, *inter alia*, paying overtime. The delegate did no more than apply the appropriate statutory formula in light of the evidence before him; the Tribunal, on appeal, did the same.

There is no fundamental issue of policy or statutory interpretation raised by this case. Obviously, Jones is a determined and dissatisfied claimant. I expect he will continue to be. Nevertheless, I see absolutely no basis in law or policy for the Tribunal, on its own motion, to embark on a second reconsideration of its earlier December 16th, 1998 decision.

ORDER`

The Tribunal declines to vary or cancel the decision of the adjudicator in this matter. Accordingly, both the Determination and the Tribunal's December 16th, 1998 decision are hereby confirmed.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal