

An application for Reconsideration

- by -

Edward Allen Magee operating Delta Enterprises

- 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: Ian Lawson

FILE No.: 2005A/164

DATE OF DECISION: December 8, 2005

DECISION

SUBMISSIONS

Garth S. McAlister	on behalf of Edward Allen Magee
Berhane Semere	on behalf of the Director of Employment Standards
Angela K. N. Booth	on her own behalf

OVERVIEW

1. On March 24, 2005, a Determination was issued by Hans Suhr, a delegate of the Director, against Edward Allen Magee operating Delta Enterprises (“Magee”). The Determination was in the amount of \$701.93, and was payable on account of wages, statutory holiday pay and annual vacation pay owing to Magee’s former employee Angela K.N. Booth (“Booth”). Administrative penalties of \$1,000.00 were imposed for Magee’s contravention of sections 18 and 45 of the *Act*. Magee appealed from this Determination, and on July 13, 2005, Tribunal Member Carol Roberts dismissed the appeal. Magee now requests a Reconsideration of the latter decision, pursuant to section 116 of the *Act*. The request was filed on September 12, 2005, and it is now decided on the basis of written submissions and all the material before the Tribunal, including the record of proceedings before the delegate.

FACTS

2. Magee operates a bottle recycling depot and used furniture business in Delta, B.C. Booth was employed as a part-time cashier/bookkeeper at the depot between July 31, 2001 and May 5, 2004 and was paid \$8.50 per hour. Booth quit her employment, and filed a complaint with the Director that she was owed wages for 67.5 hours of work performed at her home during the last 6 months of her employment. The delegate conducted an investigation and spoke with Booth and Magee by telephone, and considered letters and documents submitted by both parties. The delegate noted Magee’s allegation that he had, on several occasions, instructed Booth’s mother (who was also employed by Magee as a bookkeeper) not to take work home. Booth provided detailed records of work performed for Magee, both at work and at home. In response to the complaint, Magee told the delegate there was no need for Booth to work at home and he had told her mother that on several occasions. The delegate concluded Magee was aware of this work that was being done at home, and in the absence of information concerning whether Magee took any action respecting Booth’s refusal to follow his instruction, the delegate concluded Booth’s work at home was done with Magee’s full knowledge and she was entitled to wages.
3. Magee filed an appeal from the Determination on May 2, 2005, claiming the Director failed to observe the principles of natural justice in making the Determination, and that evidence has become available that was not available at the time the Determination was being made. Magee submitted the delegate had not meaningfully heard his side of the story, and tendered six categories of documents which had not been provided to the delegate because the delegate did not fully disclose to Magee the case which Booth was making out against him. The appeal was decided by Tribunal Member Roberts on July 13, 2005. In dismissing the appeal, Member Roberts stated:

I conclude that Mr. Magee had every opportunity to respond to Ms. Booth's allegations, in compliance with both section 77 of the *Act* and the principles of natural justice.

Mr. Magee was given full disclosure of the allegations against him. Those allegations were set out in two letters and a telephone call with the delegate. Mr. Magee's response consisted of a blanket denial of the allegations, and the submission of payroll records and the ROE.

Mr. Magee submitted certain documents in response to those allegations and, unlike the appellant in *Heavenly Bodies [J.C. Creations Ltd. o/a Heavenly Bodies Sport, BCEST #RD317/03]*, had at least one telephone conversation with the delegate.

As I noted above, parties alleging a denial of natural justice hearing [*sic*] must provide some evidence in support of that allegation.

The ROE, which Mr. Magee signed, supported Ms. Booth's assertion that she worked as a bookkeeper. Mr. Magee cannot now succeed in his appeal by suggesting that he did not prepare the document and was unaware of the import of that document.

Similarly, I find that the delegate did disclose to Mr. Magee that Ms. Booth had complained about unpaid wages and vacation pay. Mr. Magee had been served with a Demand for payroll records. Mr. Magee was to provide the delegate with all records he was required to keep under section 28 of the *Act*. Those records would disclose whether the *Act* had been complied with in respect of statutory holiday pay.

4. Member Roberts accordingly dismissed Magee's appeal on the natural justice ground. She refused to consider the documents Magee tendered as new evidence, on the basis that the case against him had been fully disclosed and the documents ought to have been provided to the delegate at the time the Determination was being made.

SUBMISSIONS

5. Counsel for Magee states the basis of the request for reconsideration as follows:
 - a) "Mr. Magee submits that it was patently unreasonable to allow Ms. Booth's wages claim for work allegedly performed at home *against* the instructions of her employer.
 - b) "A further, and compounding denial of natural justice arises as a result of the Member's refusal (at para. 7) to hold an oral hearing to fully explore these matters. The credibility of both parties, and of other witnesses, was hotly disputed, and should not have been determined on the written record alone. This is particularly so where the [*sic*] Ms. Booth's mother was responsible for preparing payroll records for all staff, where Ms. Booth did not claim such wages in the pay periods they were allegedly earned, and where the amount awarded was calculated on records Ms. Booth produced *after* her resignation."
6. In elaborating on these points, counsel states:

Mr. Magee told Mr. Suhr that on several occasions he had told Ms. Booth not to work at home. Mr. Suhr concluded that, as Mr. Magee had not introduced any evidence of *further* steps to prevent this from occurring, he implicitly allowed it to continue! [original emphasis]

It simply does not make sense to reward an employee for disobeying her employer's instructions by permitting such a claim to stand.

At paras. 12 and 15, the Member reviewed the evidence of both Ms. Booth and Mr. Magee relating to unpaid extra time as summarized by Mr. Suhr in the Determination. At para. 17, she repeated Mr. Suhr's conclusion that Ms. Booth was entitled to be paid for unauthorized work, but did not consider the appropriateness of that conclusion.

Mr. Magee submits it was patently unreasonable of Mr. Suhr to permit Ms. Booth's claim to proceed, and the Member's Decision perpetuates that error.

7. With respect to an oral hearing, the following submission is made on behalf of Magee:

Both parties to this complaint have attacked each other's credibility. The documents provided by Ms. Booth on her unpaid wages are open to question.

Ms. Booth's records of her time are suspect. Her mother prepared payroll records recording Ms. Booth's hours and wages during her employment that did not include the alleged homework. Mr. Magee provided those records to Mr. Suhr. Ms. Booth did not provide her summary of the alleged extra hours to Mr. Magee until after her resignation....

In these circumstances, Mr. Magee submits it was a further denial of natural justice not to order an oral hearing on the appeal. Mr. Magee was not able to challenge, and the Member was not able to assess, Ms. Booth's credibility.

8. On her own behalf, Booth makes the following illuminating submission:

Mr. Magee claims that he did not want myself or Mimi Booth to do any work at home. On Sunday, April 18, 2004, I went to Ladner Bottle Depot to do the daily cash out. I had the displeasure of having to call Mr. Magee to let him know that the cash was \$1,149.03 short. Mimi Booth was out of town visiting in Kelowna. I had counted the cash Saturday morning and the cash was accounted for. Travis Mackenzie had counted it Saturday night and the cash was accounted for.

Mr. Magee came to the bottle depot. With Mr. Magee present and talking to an employee named Michelle and myself; I took the Journal Tapes out of the two Cash Registers. Mr. Magee saw me put them into a bag. We discussed that I was going to go over the two Journal tapes and see if there was any Voids or Large orders to question, and to do up Inventory Sheets for the products to compare the inventory on the floor to the spreadsheets done on my computer so we knew how many bags were on the floor to see if there were any errors in the comparison of the two and I was to let Mr. Magee know.

I walked out of Ladner Bottle Depot with Mr. Magee and Michelle. I was carrying the Journal Tapes and the Daily cash out sheet for Friday, Saturday and Sunday to check over for any errors. Mr. Magee let me take them home. If he didn't want me to do the work Mr. Magee could have taken the Journal Tapes and Daily Cash Out Sheets away from me. He never took them or made any suggestion that he did not want me to do it. He told me to let him know if I found anything. At home I looked over the Journal Tapes at each Transaction. I then did up three inventory sheets One for Pop Inventory, Glass Inventory, and Beer Inventory. I then hand wrote up a cover page for Mr. Magee letting him know I found nothing out of the ordinary on the Journal tapes and what the inventory bag count was for each product from the time of the last pick up to April 18, 2004. I then faxed this information at 9:25 pm on April 18, 2004 to Mr. Magee at his home fax... [s]o he

would have the information for the next morning. All of this was done 17 days prior to my leaving Delta Enterprises...

My point is that the spreadsheets were done with Mr. Magee's consent. He allowed myself and Mimi Booth to take the work home to be done and he was well aware that I was doing it at home on the computer. I would have done it on the computer at the place of business if there had been a computer. I did submit sample spreadsheets to Mr. Suhr at the time of the complaint.

9. There is of course no record of exactly what evidence the delegate heard from Booth in the course of his investigation, but I presume the above is similar to what Booth told the delegate initially. In response to this submission, Magee denies seeing Booth take home any tapes, denies that she performed any extra work at home on this occasion, and states the employee "Michelle" agrees with him that he was not present at the bottle depot on the night in question (I also presume this is similar to what Magee told the delegate initially).

ISSUE

10. In any request for reconsideration there is a threshold issue whether the Tribunal will exercise its discretion under section 116 of the *Act* to reconsider the original decision.

ANALYSIS OF THE THRESHOLD ISSUE

11. The Tribunal's power to reconsider its decisions is discretionary. A principled approach to the exercise of this discretion has been developed. 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, which can be usefully summarized as follows:

- Any party exercising its right to request the Tribunal to reconsider must first pass the threshold of persuading the Tribunal that it is appropriate to enter upon a reconsideration of the member's decision. The obligation to satisfy the Tribunal that it ought to embark on a reconsideration may be seen as roughly analogous to the obligation, in some statutory contexts, to obtain leave to appeal before a Tribunal decision may be appealed to the Courts.
- In recognition of the importance of preserving the finality of member's decisions, the Tribunal will agree to reconsider those decisions only to the extent that it is first satisfied that one or more of the issues raised in the reconsideration application is important in the context of the *Act*.
- The Tribunal tends not to be favourably disposed to entering upon a reconsideration where the reconsideration application is untimely, where it asks the panel to re-weigh evidence, and where it seeks what is in essence interlocutory relief.

- Where the Tribunal agrees to enter upon a reconsideration of a decision, the Tribunal moves, at the second stage, directly to the merits. The standard of review at this stage is the correctness of the decision.
- Unlike the process for seeking leave to appeal in the Courts, the party requesting the Tribunal to reconsider must address in one submission both the test for reconsideration and the merits of the decision.

12. I now consider whether the two bases for Magee's request for reconsideration can meet the threshold test.

13. First, Magee argues the impugned decision contains a denial of natural justice, as the Member should have conducted an oral hearing to properly determine questions of credibility which arose in the Determination under appeal. The Tribunal, however, does not re-hear a complaint whenever an appeal is filed which raises matters of credibility. The issue in all appeals is whether the appellant proves an error or unfairness was made in the Determination under appeal. One of Magee's grounds of appeal from the Determination was that the Director failed to observe the principles of natural justice in making the Determination. Magee relied on *J.C. Creations Ltd. o/a Heavenly Bodies Sport*, BCEST #RD317/03, and argued the delegate did not meaningfully hear the Employer's side of the story. Magee's submission to the Member contains the following statements:

First of all, Mr. Magee had no knowledge that Angela [Booth] at any time "was helping with the books", either at work or at home. There were no books to be kept, only simple inventory sheets which the cashier on duty filled out at the end of each shift....

Mr. Magee did not at any time tell the delegate that he knew Angela was doing such work because he is at a loss to figure out what this alleged work might be.

14. As I see it, the issue Magee presented to the Member was not really one of credibility, but one relating to the duties Booth was supposed to perform, and what knowledge Magee had of the actual work she was doing. In this light, I do not see the Member's decision not to hold an oral hearing as raising any question of importance that could support reconsideration at the threshold level.

15. Magee's contention that the impugned decision is patently unreasonable might be his strongest argument at the threshold level. Any argument that a decision of the Tribunal is out of line with reality in the workplace might go a long way in support of a request for reconsideration. I am not satisfied, however, that the impugned decision is capable of such an interpretation. The employer is in control of the workplace. If an employee does not follow the employer's policies or directions, the employer must act to retain control. For example, an employer's failure to control an employee who was left to schedule his own hours to perform a small amount of work has resulted in the employer's liability to pay the minimum daily wage: *Re Kelvin Bristle*, BCEST #D015/01. An employer who did nothing to control employees who failed to follow its written overtime policy has been held liable to pay overtime wages to those employees: *Re Small Town Press Ltd.*, BCEST #RD016/04. While Magee might find those propositions unreal (as he says in his submission, "[i]t simply does not make sense to reward an employee for disobeying her employer's instructions"), they reflect the weighty responsibilities resting on all employers, in return for their right to control the workplace and dictate the terms and conditions of employment to their employees. Indeed, the Reconsideration Panel in *Small Town Press* referred to the following passage from *International Energy Systems Corp.*, BCEST #D189/97: "if an employer does not wish its employees to work overtime it must not only order them not to work but must ensure that they do not work any hours not scheduled by the employer."

16. Accordingly, Magee fails to persuade me at the threshold level that the impugned decision raises any important issue that ought to be reconsidered in the context of the *Act*. The issues raised appear to be in accord with the Tribunal's established jurisprudence and do not appear at the threshold level to be patently unreasonable or unfair in any way.

ORDER

17. Pursuant to section 116 of the *Act*, the request for reconsideration is denied.

Ian Lawson
Member
Employment Standards Tribunal