

**BC EST #D203/98**  
**Reconsideration of BC EST #D607/97**

**EMPLOYMENT STANDARDS TRIBUNAL**  
In the matter of an appeal pursuant to Section 112 of the  
*Employment Standards Act R.S.B.C. 1996, C. 113*

- by -

Jutt Motors Ltd.  
("Jutt Motors")

- of a Determination issued by -

The Director Of Employment Standards  
(the "Director")

**ADJUDICATOR:** Lorna Pawluk

**FILE NO.:** 98/207

**DATE OF DECISION:** August 14, 1998

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**DECISION**

**OVERVIEW**

This is an application by Jutt Motors Ltd. (Jutt Motors or "the employer") for reconsideration under Section 116 of the *Employment Standards Act* of Decision BC EST #D60797 issued by the Employment Standards Tribunal on January 14, 1998. That Decision varied the Determination issued by the Director of Employment Standards on September 27, 1997. The adjudicator confirmed the sums owing to Pakahar Bains ("Bains") but increased the sum owing to Harnek Chhiana ("Chhiana") and Kulwant Dhillon ("Dhillon").

The employer applies for reconsideration of the Tribunal's decision on the grounds that it "is quite unreasonable considering the circumstances". It is also claimed that the Determination improperly calculated amounts owing to Dhillon and if those calculations were correct, Dhillon would have earned \$!2.40 per hour. The employer submits that this error was not discovered earlier as "we are working 16 to 18 hours at the Service Station and being overtired we overlooked this error". The employer says it was assumed that the calculations in the Determination were correct and that the errors were not discovered until #D607/97 had been issued. Finally, they claim that Dhillon has advised the Unemployment Insurance Commission that he did not work at all from January 1 – September 30, 1995, although he told the original Tribunal hearing that he made \$5.00 per hours during that period at Jutt Motors.

**ISSUE TO BE DECIDED**

The issue is whether there are grounds to reconsider BC EST #D607/97?

**FACTS**

This reconsideration arises from a Determination dated October 8, 1997 which ordered Jutt Motors to pay \$11, 285.98 to Bains, \$5438.37 to Chhiana and \$11,391.69 to Dhillon for unpaid wages. The three were employed at a service station operated by the employer and were paid \$5.00 per hour or less than the minimum wage. The Determination ordered Jutt Motors to pay these three individuals the difference between the actual sum paid and minimum wage. In #D607/97, the original adjudicator modified to the sums owing to Chhiana and Dhillon. The Director's delegate had pointed out a calculation error in the amount owing to Chhiana and Dhillon's counsel identified a problem with the calculation of vacation pay. The original adjudicator agreed with both of these submissions and varied the original Determination accordingly. Thus, Chhianna was found to be owed \$5942.64 and Dhillon, \$11, 697.69. In this reconsideration application, the employer takes issue with the amounts owing to Dhillon and claims that the original Determination and

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#D607/97 erred with respect to the wages owed for the period of October 1 – December 31, 1995.

It is useful to begin with the calculations as set out in the "Calculation Sheet" attached to the Determination:

Wages claimed October 1, 1995 through July, 1995:	
1995:	
1452 hours (\$7260.00 on T4A and paid \$5.00 per hour) x \$2.00	2904.00
1996:	
1857 hours (\$9285.00 on T4A and paid \$5.00 per hour) x \$2.00	2714.00
1997:	
1350 hours claimed x \$2.00 per hour	2700.00
Statutory Holiday Pay	
15 during period of employment x 8 hours x \$7.00 per hour	840.00
Vacation pay	
4% x \$16,545.00 (entire gross earnings as per T4A slips)	661.80
4% x \$2,700.00 (earnings for 1997)	54.00
4% x \$9318.00 (minimum wage adjustment)	372.72
4% x statutory holiday pay (840.00)	<u>33.60</u>
Total vacation pay	1122.12
Sub-total	11280.12
Interest to September 30, 1997	
111.57	
<b>Total owing as of September 30, 1997</b>	<b>11391.69</b>

(Reproduced as written)

This was adjusted in #D607/97 for a mathematical error in Dhillon's vacation pay. The adjudicator agreed with counsel for Dhillon that "4% vacation pay should be calculated on Mr. Dhillon's actual earnings after adjustment for minimum wage, rather than on just the additional monies owing for the minimum wage adjustment." While the calculations were not included in #D607/97, the additional sum owing was found to be \$216.00 for a total of \$11,607.69.

In a letter dated February 8, 1998 to the Registrar of the Tribunal, Jutt Motors claimed that the actual sum owing was \$9314.22 and that the sum owed for October 1-December 31, 1995 should be \$1168.00 to reflect 584 hours at \$2.00 per hour, rather than \$2904.00 for 1452 hours. Mrs. Jutt indicated that even though Dhillon's claim started on October 1, 1995, the Determination calculated his entitlement by his income for the entire year. Mrs. Jutt's calculations show that the correct figures were used for 1996 but that Dhillon actually worked 1261 hours between January 1 and July 31, 1997. She also agrees with the

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calculation of statutory holiday pay, but maintains that vacation pay owing is only \$740.40 rather than \$1122.12. She also submits that vacation pay of the minimum wage adjustment should be \$296.16 rather than \$372.72.

According to his counsel, Dhillon "stands by his original position". Counsel for the Director submits that while the Determination noted wages claimed from October 1, 1995 "it probably should have said from July of 1995 since on his complaint form he states that he was working 'for the last three years'." As for the unemployment insurance claims, the Director indicated she had "no information on file which would guide us as to these dates".

**ANALYSIS**

Section 116 of the *Act* confers reconsideration powers on the Tribunal:

- 116(1) On application under subsection (2) or on its own motion, the tribunal may reconsider any order or decision of the tribunal, and cancel or vary 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.

This is not an opportunity to revisit the evidence or reconsider the original arguments. Rather, a reconsideration application will succeed in narrow circumstances. *Zoltan Kiss B.C.E.S.T. No. D 122/96* outlines the principles used by this Tribunal in the exercise of its reconsideration powers:

- failure to comply with the principles of natural justice
- mistake of fact
- decision inconsistent with prior decisions indistinguishable on their facts
- significant new evidence not available to the first adjudicator
- mistake of law
- misunderstanding of or failure to deal with a serious issue
- clerical error

The gist of Jutt Motors' submissions is that the Determination incorrectly assumed that Dhillon had worked 1452 hours in a three month period in 1995, when in fact that referred to his total hours for that year. They submit that he worked 584 hours in the three months; neither the director nor Dhillon take issue with this figure. The Director's delegate only argues that perhaps the Determination should have referred to July, 1995 but did not and this is insufficient to call into question the figure submitted by Jutt.

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It is clear that Dhillon could not have worked that many hours in three months; it would have meant approximately 110 hours per week and if that was physically possible, such hours would raise questions of overtime and work in excess of maximum hours. Thus I agree that #D607/97 was based on a mistake of fact, one of the grounds for reconsideration as outlined in *Zoltan Kiss*. The error is clear on the face of the Determination, but was not identified by any of the parties involved in the appeal, including Jutt Motors, the employees or their counsel and the Director's delegate identified this rather blatant error. Ordinarily, this would be the type of error one would expect to be identified at the appeal but was not.

A party applying for reconsideration cannot withhold information or submissions from the original adjudicator and the successfully rely on them it on reconsideration. However this is an unusual case in the everyone failed to identify a very blatant error and thus, the reconsideration application succeeds.

I also note that the adjudicator adjusted the amount owing to Dhillon on the assumption that the Determination incorrectly failed to pay him vacation pay on the difference between the actually received and the minimum wage. However, I note that the original Determination was not deficient in this respect as it calculated vacation pay for all sums owing.

**ORDER**

Pursuant to section 116 of the *Act*, I hereby allow the reconsideration application and return the matter to the original adjudicator for recalculation of Dhillon's entitlement in keeping with the comments above.

**Lorna Pawluk**  
**Adjudicator**  
**Employment Standards Tribunal**