An Application for Reconsideration

- by -

Kamloops Golf and Country Club Limited
("Kamloops Golf Club")

- 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: Kenneth Wm. Thornicroft

FILE No.: 2002/264

DATE OF DECISION: June 5, 2002

DECISION

OVERVIEW

The Tribunal, on its own motion and pursuant to section 116(1)(a) of the *Employment Standards Act* (the "*Act*"), has decided to reconsider certain aspects of two of its own decisions, namely, B.C.E.S.T. Decision No. D278/01 (the original appeal decision) and B.C.E.S.T. Decision No. RD544/01 (the reconsideration of the original appeal decision).

BACKGROUND FACTS AND PREVIOUS PROCEEDINGS

The Determination

Michael Kupchanko ("Kupchanko") was employed by the Kamloops Golf and Country Club ("Kamloops Golf Club") as the club's golf course superintendent from March 28th, 1997 to June 30th, 2000 (although his last working day was May 12th, 2000) and was paid an annual salary pursuant to a written employment contract. Following his resignation, Kupchanko filed a complaint with the Employment Standards Branch in which he claimed, *inter alia*, outstanding overtime pay. The Kamloops Golf Club took the position that Kupchanko was a manager and, accordingly, not entitled to overtime pay [see *Employment Standards Regulation*, section 34(1)(f)].

On January 25th, 2001 a delegate of the Director of Employment Standards (the "delegate") issued a Determination ordering the Kamloops Golf Club to pay Mr. Kupchanko the sum of $9,965.40 on account of unpaid overtime wages, one week's wages as compensation for length of service and section 88 interest (the "Determination"). The delegate, while accepting that Kupchanko was a "manager" as defined in section 1 of the *Regulation*, nonetheless concluded that Kupchanko was entitled to overtime pay by virtue of the combined effect of his employment contract and section 16 of the *Act:*

> "The employer '<u>must pay at least</u>' [section 16] minimum wage for all hours worked. While Mr. Kupchanko is exempt from premium overtime rates, he [sic, is?] still entitled to be paid his regular wage for all hours worked in excess of his 'normal' work week.
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> In 'Appendix B - Compensation' of Mr. Kupchanko's employment contract, it states:
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> > *'2. Hours of work are expected to vary. High season demands that the Superintendent often works more than the standard 40 hour week. The Superintendent shall be compensated accordingly with time in lieu during low season.'*

> This statement reveals that Mr. Kupchanko's normal work week was based on forty hours. In addition, Mr. Kupchanko's pay statements (Attachment #5) show 'eighty hours' as the regular number of hours worked during his bi-weekly pay periods. This further confirms a normal work week of forty hours. Therefore, Mr. Kupchanko is entitled to be paid his regular wage for all hours worked in excess of forty per week."
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> (Determination at p. 7)

Thus, the delegate awarded Mr. Kupchanko overtime pay, however not at the premium rates provided for in section 40 of the *Act*, but rather based on his "regular wage" as determined by the formula set out section 1 of the *Act.* The delegate further determined Kupchanko's overtime entitlement based on Kupchanko's personal records since "the Club did not keep a daily record of his hours worked" (Determination, p. 7).

The Appeal decision

Kamloops Golf Club appealed the Determination alleging that Mr. Kupchanko, being a manger, was not entitled to be paid any overtime and was not otherwise entitled to overtime pay by virtue of his employment agreement. Kamloops Golf Club also submitted that, in any event, Kupchanko's record of hours worked ought not to have been accepted by the delegate and, finally, that Kupchanko was not terminated but rather voluntarily resigned.

The adjudicator, in reasons for decision issued on May 29th, 2001 (B.C.E.S.T. Decision No. D278/01) held, relying on *Dusty Investments Inc. c.o.b. Honda North* (Reconsideration Decision No. D043/99), that the delegate did not err in awarding Kupchanko overtime pay based on his regular wage rate:

> "The logical conclusion, and the one reached by the Director, was that the salary being paid to Kupchanko was based on his working 40 hours a week. If that were not the understanding and the agreement between KGCC and Kupchanko, there would have been no reason to include a provision in the employment agreement compensating Kupchanko with 'time in lieu' of hours worked in excess of 40 in a week during the high season." (Reasons for Decision, p. 7)

The adjudicator also observed that Kupchanko was not awarded "overtime" pursuant to section 40 of the *Act* (which provides for premium rates) but rather based on his *contractual* entitlement to be compensated for all hours worked in excess of 40 per week calculated in accordance with the the "regular wage" formula set out in section 1 of the *Act.*

With respect to Kamloops Golf Club's assertion that Kupchanko's records were "inaccurate, excessive and recreated after the fact", the adjudicator was unable to conclude that Kupchanko's records were, in fact, created *ex post facto*. Further, the adjudicator was not satisfied that the delegate's reliance on Kupchanko's records was unfair or unreasonable. On this latter point, the

adjudicator also noted that Kamloops Golf Club had every opportunity to challenge the veracity or accuracy of Kupchanko's time records during the delegate's investigation (and did so, to some extent) but apparently chose not to do so in as full a manner as it might have:

> "One of the grounds of appeal alleges that the Director erred in accepting the record of hours provided by Kupchanko. Counsel for KGCC argues that the record was inaccurate and excessive and recreated after the fact. Support for this ground of appeal is identified as communications from KGCC to the Director on September 30, 2000 and October 28, 2000. The contents of those communications did not dissuade the Director from accepting the record provided by Kupchanko as a reasonably accurate reflection of his hours worked in 1999 and 2000. The Determination noted that some effort had been made to address the record provided by Kupchanko, that the entire record had been provided to KGCC and had been reviewed by KGCC. It also noted that some initial discussion had taken place between KGCC and the Director and the Director was attempting to arrange a further meeting in early November, 2000, to discuss the specific concerns raised in the October 28, 2000 communication when she was notified through counsel that KGCC was taking the position the Director had no jurisdiction to deal with the complaint. Thereafter, KGCC did not participate in any further discussion with the Director or make any further effort during the investigation to establish [that] the record of hours provided by Kupchanko was unreliable and should not be used by the Director as a basis for determining hours worked...
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> Equally important to this ground of appeal, and in respect of the reliance in this appeal to the information in the October 28, 2000 communication as evidence, the Tribunal has established that a party cannot fail or refuse to participate in the investigation of a complaint, then later challenge findings of fact with which they disagree. To allow such a process would be inconsistent with the role of the Tribunal as an appeal body and with the statutory purpose and objective of expedience and efficiency in dealing with disputes under the *Act*...
>
> If there was any basis for the specific concerns identified in the October 28, 2000 communication, it was incumbent on KGCC to provide that to the delegate during the investigation. They did not and may not now raise it as evidentiary support for their position on appeal. KGCC has not established the foundation necessary to support this ground of appeal."
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> (Reasons for Decision, pp. 8-10)

In reaching the above conclusion, the adjudicator applied the principles set out in previous Tribunal decisions such as *Tri-West Tractor Ltd.* (B.C.E.S.T. Decision No. D268/96) and *Kaiser Stables Ltd.* (B.C.E.S.T. Decision No. D058/97).

The appeal was partially successful in that the adjudicator accepted Kamloops Golf Club's assertion that Kupchanko was not terminated but, rather, voluntarily resigned and thus was not entitled to any compensation for length of service [see section 63(3)(c) of the *Act*]. Accordingly, the adjudicator varied the Determination by cancelling the award made to Mr. Kupchanko on this latter account.

The Reconsideration decision

By way a submission dated July 11th, 2001, Kamloops Golf Club applied for reconsideration of the adjudicator's decision. In that submission legal counsel for Kamloops Golf Club submitted that the adjudicator erred in confirming the Determination with respect to the Kupchanko's "overtime" entitlement. Kamloops Golf Club challenged both Kupchanko's right to overtime pay *per se*, as well Kupchanko's records setting out the number of overtime hours worked. With respect to this latter point, counsel took the following position:

> "With respect to the records of Mr. Kupchanko, the adjudicator refused to consider the evidence of the Kamloops Golf and Country Club that there were discrepancies in the time records created by Mr. Kupchanko and the discrepancies on the interpretations placed on those records by the Director. It continues to be the position of the Kamloops Golf and Country Club that the evidence of the discrepancies are [sic] material and relevant and ought to be considered in this appeal. Furthermore it is the interpretation of those records by the Director of Employment Standards which also must be reviewed and analysed."

The application for reconsideration was dismissed in by way of a decision issued on October 17th, 2001 (B.C.E.S.T. Decision No. RD544/01). The relevant portions of the reconsideration decision (at pp. 4-5) are reproduced below:

> "In this case the Adjudicator relied on *Re Dusty Investments c.o.b. Honda North* BCEST #D043/99 (Reconsideration of BCEST #D101/98) to find that the Delegate had the jurisdiction to enforce the contract of employment. Counsel for KGCC has not attempted to distinguish this case in any way. I have read the *Honda North* decision and agree that the argument advanced by the appellant in this case is identical to the argument rejected in *Honda North*...The appellant has not shown that the Adjudicator has made any error of law in concluding that the Delegate had the jurisdiction to enforce the contract of employment. For these reasons the first ground of the reconsideration application must be dismissed.
>
> The second ground of appeal deals with an allegation by counsel for KGCC that the Adjudicator refused to consider evidence that the records of the complainant that were accepted by the Delegate in determining hours worked had serious discrepancies such that the interpretation put on these records by the Delegate was wrong...

> The evidence before the delegate dealing with the employer's interpretation of the complainant's record of hours worked was limited to submissions sent in by the employer prior to KGCC taking the position that the Delegate did not have jurisdiction. After taking this position, KGCC did not participate in any further discussions with the Delegate. The contents of the submission sent in by KGCC to the Delegate would appear to have been considered, but were not found to be sufficient to dissuade the Delegate from accepting the complainant's records in the absence of any other records.
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> It is uncontested that the employer stopped participating in the Delegate's investigation after the employer concluded that the Delegate did not have jurisdiction in this matter. There is a long-standing policy of the Tribunal not to allow parties to adduce evidence on appeal that should have properly been before the Delegate...
>
> Where a party has notice of a proceeding and refuses to participate on the mistaken belief that there is no jurisdiction to proceed, it is not a denial of a fair hearing for the proceeding to continue and for a determination to be made solely on the evidence adduced in the proceeding.
>
> The Tribunal does have the authority to allow the introduction of evidence on appeal, even where the evidence should have been before the Delegate. At a bare minimum in order to be successful on a reconsideration application, the party wishing to introduce such evidence must say what it is and how such evidence may change the original decision. (*Re Dusty Investments c.o.b. Honda North* BCEST #D043/99 (Reconsideration of BCEST #D101/98). **There does not appear to be any evidence on file apart from the submissions received by the Delegate.** The employer has not brought forward any new evidence to support its position that the determination by the Delegate concerning hours worked by the complainant was in error. Given this there is obviously no evidence concerning how such evidence would change the original reasons. For these reasons, this part of the reconsideration application must also fail." (my **emphasis**)

Reconsideration on the Tribunal's own motion

By way of a letter to the parties dated April 5th, 2002 the Tribunal's vice-chair referred to that portion of the reconsideration noted in boldface above and then noted:

> "Upon a review of the file, it is apparent that there <u>was</u> evidence on file apart from the submissions received by the Director's Delegate. Specifically, the handwritten notes of Michael Webber dated October 28, 2000 had not been submitted to the Director's Delegate but were attached to your original appeal. The Original Panel refused to consider this evidence on the basis of the Tribunal's policy articulated in such decisions as *Tri-West Tractor.* Unfortunately, the

> Reconsideration Panel appears not to have understood that there was evidence which you were seeking to adduce which you had not placed before the Director...
>
> Because the Reconsideration Panel erred by not properly considering the evidence advanced by [Kamloops Golf Club], the Tribunal has decided to reconsider this aspect of the Reconsideration decision." (underlining in original)

The vice-chair invited the parties to file submissions regarding the admissibility of Mr. Webber's notes dated October 28th, 2000. I now have before me submissions filed by legal counsel for Kamloops Golf Club (dated April 19th, 2002), the Director's delegate (dated April 11th and May 10th, 2002) and Mr. Kupchanko (dated May 14th, 2002).

THE ADMISSIBILITY OF THE MR. WEBBER'S NOTES

As recorded in the Determination (at p. 2), Mr. Kupchanko submitted his "daytimers" for the years 1999 and 2000 in which he recorded, on a daily basis, his working hours. As previously noted, the delegate accepted Kupchanko's records since "the Club did not keep a daily record of [Kupchanko's] hour worked" (Determination, p. 7). The relevant pages from Mr. Kupchanko's actual "daytimers" were not attached to the Determination; rather, the delegate appended a detailed Calculation Schedule that was based on Mr. Kupchanko's time records.

The adjudicator concluded that Kamloops Golf Club did not prove that the "record provided by Kupchanko was 'recreated after the fact', as alleged in the appeal" (adjudicator's reasons at p. 9). The original adjudicator did not address, in his reasons for decision, the notes prepared by Mr. Webber on October 28th, 2000--through which Mr. Webber challenged the veracity of Kupchanko's records--primarily because the adjudicator concluded that the assertions contained in the notes (as well as the actual notes) should have been placed before the delegate for her consideration.

On reconsideration, the adjudicator appears to have overlooked the fact that Kamloops Golf Club submitted Mr. Webber's notes to the Tribunal in support of its position that the delegate erred in accepting Mr. Kupchanko's records of hours worked. In other words, there *was* evidence (in the form of Mr. Webber's notes) that was presented to the Tribunal and which, if accepted without reservation, might call into question the delegate's calculation of Mr. Kupchanko's unpaid wage entitlement (based, as it was, on Mr. Kupchanko's allegedly inaccurate and unreliable daytimers).

Thus, Kamloops Golf Club's central argument that the original adjudicator erred in refusing to accept or consider Mr. Webber's notes was not addressed on reconsideration. For that reason, the Tribunal has reopened this matter so that this latter issue can be specifically addressed.

The evidentiary value of Michael Webber's notes

Mr. Webber's (who is Kamloops Golf Club's "Links Director") handwritten notes are dated October 28th, 2000 (a date, I note, that is some three months prior to issuance of the Determination) and contain various challenges to the accuracy or veracity of Mr. Kupchanko's records. For example, Mr. Webber records in his notes that Mr. Kupchanko only worked 5 hours on April 14th, 1999 rather than the 8 hours claimed. However, a perusal of the Calculation Schedule appended to the Determination shows that the delegate only credited Mr. Kupchanko for 5 working hours on April 14th. Another example: for May 7th to 13th, 2000, Mr. Webber's notes say that Mr. Kupchanko was credited for 40 hours when the correct figure was 27; in fact, the delegate credited Mr. Kupchanko with 34.5 working hours for that period. I have reviewed both Mr. Webber's notes and the Calculation Schedule and have found several other discrepancies of a similar nature.

Thus, Mr. Webber's recorded objections are highly problematic in that, in very many cases, the Calculation Schedule appended to the Determination simply *does not indicate* that Mr. Kupchanko was credited for the working hours that Mr. Webber suggests the delegate credited to Mr. Kupchanko. Since I do not have Mr. Kupchanko's original daytimers before me, I am unable to say if Mr. Webber simply misread Kupchanko's daytimers or if the delegate made independent adjustments. In this latter regard, and as noted at page 3 of the Determination, the delegate met with two Kamloops Golf Club officials on October 5th, 2000 (Mr. Webber and Mr. Bava, the club's secretary) and during that meeting Mr. Kupchanko's daytimers were reviewed in some detail. In addition, the delegate, in her submission to the Tribunal dated March 14th, 2001, acknowledged that she did make some adjustments where, for example, the diary contained simple arithmetic errors.

Given the foregoing, the probative value of Mr. Webber's notes must be called into question. Quite apart from the principle espoused in *Tri-West Tractor* and *Kaiser Stables*, unreliable evidence is quite properly discounted or even ignored altogether. In other words, even if either adjudicator did consider Mr. Webber's notes, would that consideration have likely resulted in a favourable decision for Kamloops Golf Club on this particular issue? I am very doubtful that a consideration of Mr. Webber's notes by the adjudicator (or for that matter, by the reconsideration panel) would have resulted in favourable decision for Kamloops Golf Club.

I now specifically turn to the *Tri-West Tractor/Kaiser Stables* principle.

Were Webber's notes admissible before the adjudicator?

The *Tri-West Tractor/Kaiser Stables* principle is sensible and easily understood:

> "The Tribunal will not necessarily foreclose any party to an appeal from bringing forward evidence in support of their case, but we will not allow the appeal procedure to be used to make the case that should have and could have been given

> to the delegate in the investigative process." (*Tri-West Tractor Ltd.*, B.C.E.S.T. Decision No. D268/96)

I have already noted that Mr. Webber's notes were apparently prepared about three months before the Determination was issued. Thus, there is no particular reason why his notes could not have been provided to the delegate. Further, the material before me shows that the delegate repeatedly requested that Kamloops Golf Club provide all relevant information with respect to the matter of the Mr. Kupchanko's claimed hours of work.

I have previously referred to the October 5th meeting where Kamloops Golf Club officials reviewed and commented on Mr. Kupchanko's time records. Subsequent to that meeting, the delegate provided Kamloops Golf Club with copies of the disputed time records. On November 22nd, 2000 the delegate wrote to Kamloops Golf Club's legal counsel and specifically requested a meeting so that the "concerns [Kamloops Golf Club] may have with any of the entries" could be discussed. In that same letter, the delegate requested that if Kamloops Golf Club and/or its counsel did not wish to meet with the delegate, Kamloops Golf Club or its counsel should "provide a written submission from Mr. Webber or Mr. Bava on the dates and entries in question from Mr. Kupchanko's daytimers". In other words, the delegate specifically requested, as it turned out, that Mr. Webber's October 28th, 2000 analysis of Mr. Kupchanko's daytimers be submitted for her consideration. In the absence of any sort of reply, the delegate wrote Kamloops Golf Club's legal counsel yet again on December 6th, 2000 reiterating her earlier request.

Despite two formal requests by the delegate, Mr. Webber's notes were never provided to her. Counsel did reply, on December 19th, 2000, but only to say that the delegate had no "jurisdiction" in the matter and to threaten judicial review proceedings if "the Employment Standards Branch decides to take jurisdiction in this case". Counsel also stated in his December 19th letter that Kamloops Golf Club "reserve[d] the right to adduce whatever further evidence may be necessary at a later date".

Thus, as events unfolded, Kamloops Golf Club did attempt to introduce "further evidence" at a later date (namely, Mr. Webber's notes) only to be frustrated in that endeavour by the adjudicator's evidentiary ruling. And with respect to that latter ruling, in my view, the adjudicator's ruling was neither clearly wrong nor manifestly unfair.

The reconsideration panel may have misunderstood that Kamloops Golf Club did, in fact, file evidence with the Tribunal (*i.e.*, Mr. Webber's notes) challenging the veracity and accuracy of Mr. Kupchanko's time records. The reconsideration panel did not specifically review the adjudicator's decision to exclude that evidence at the appeal level. That omission has now been addressed by way of these reasons for decision. It is my view that the adjudicator did not err in excluding Mr. Webber's notes and, accordingly, I would not overturn the adjudicator's ruling in that regard. Further, I am of the view that even if the notes had been considered by the adjudicator on appeal, such consideration would not likely have materially affected the adjudicator's decision.

ORDER

The application to vary or cancel the evidentiary ruling of the adjudicator with respect to the admissibility of Mr. Webber's notes is **refused.**

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal