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 -

Preston R. Sauer
(" Sauer")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Kenneth Wm. Thornicroft

FILE No: 2000/314

DATE OF DECISION: June 27, 2000

DECISION

OVERVIEW

This is an application filed by Preston R. Sauer ("Sauer") pursuant to section 116 of the *Employment Standards Act* (the "*Act*") for reconsideration of an adjudicator's decision that was issued on March 24th, 2000 (BC EST #D066/00).

BACKGROUND FACTS

The Determination

On October 6th, 1999 a delegate of the Director of Employment Standards issued a Determination, under file number ER 093038, ordering Proda Enterprises Ltd. ("Proda") to pay Sauer the sum of $4,500.85 on account of unpaid wages and interest (the "Determination").

Sauer was employed by Proda as a caretaker responsible for two separate 25-unit apartment complexes (some 10 blocks apart) owned by Proda. The delegate concluded, *inter alia*, that Sauer was a "residential caretaker", as defined in section 1 of the *Employment Standards Regulation*, with respect to one of the complexes (in which he resided) but not for the other complex.

Proda issued a termination of tenancy notice to Sauer under the *Residential Tenancy Act* and in due course applied for a series of residential tenancy arbitration orders. On October 16th, 1998, under file number 421850, an arbitrator issued an order of possession in favour of the landlord, Proda, and a further monetary order for $1,760 on account of unpaid rent and recovery of the landlord's arbitration filing fee. Sauer unsuccessfully applied to the (now-defunct) Arbitration Review Panel to have the arbitrator's order set aside. I understand that Proda, as landlord, obtained a second arbitrator's order in its favour against Sauer, under file number 425067, for $2,784.50. I understand that the monetary orders were subsequently filed in the Supreme Court of B.C. and now constitute court orders.

The Director's delegate determined that Sauer was entitled to $9,045.35 in unpaid wages and interest but then deducted the amounts due from Sauer to Proda as set out in the two above-noted *Residential Tenancy Act* monetary orders (*i.e.*, $4,544.50). Thus, by way of the Determination Proda was ordered to pay Sauer a "net" amount of $4,500.85.

The Adjudicator's Decision

On October 29th, 1999 Sauer appealed the Determination to the Tribunal alleging three specific errors in the Determination and later added a fourth ground, namely, that the delegate erred in "setting off" the *Residential Tenancy Act* orders from his unpaid wage claim.

Following an oral hearing the adjudicator issued a written decision on March 24th, 2000 holding that:

- the delegate correctly concluded that Sauer was a "resident caretaker" (and thus entitled to the wage rate set out in section 17 of the *Regulation*) only for the apartment complex in which he actually resided;

- the delegate correctly concluded that there was insufficient evidence to show that Sauer consistently worked weekends (in addition to his regular Monday to Friday schedule) in contravention of section 36 of the *Act;*

- Sauer was not entitled to compensation for length of service (see section 63) because he voluntarily resigned his position; and

- although the delegate erred in "setting off" (purportedly pursuant to section 21 of the *Act*) the *Residential Tenancy Act* orders against Proda's unpaid wage liability, the amount of those two orders was to be paid into court to the credit of the British Columbia Supreme Court file number relating to Sauer's application for judicial review of the two residential tenancy arbitration orders.

THE REQUEST FOR RECONSIDERATION

Sauer's request for reconsideration is contained in two letters addressed to the Tribunal's Vice-Chair dated, respectively, April 10th and 17th, 2000.

Sauer seeks a reconsideration of the adjudicator's decision as it relates to section 36 of the *Act* and of the adjudicator's direction to pay the amount of the residential tenancy arbitration orders into court.

ANALYSIS

Applications for reconsideration do not proceed as a matter of statutory right. The Tribunal "may" reconsider a previous decision (see section 116) if: i) the issue(s) raised in the reconsideration request are sufficiently significant to warrant further inquiry and ii) assuming the first threshold has been satisfied, it is appropriate that the adjudicator's decision be overturned (*e.g.*, where the adjudicator has made a significant error in interpreting the *Act* or where there has been a failure to comply with the principles of natural justice)–see *Milan Holdings Ltd.*, BC EST #D313/98. In order to meet the first branch of the test, the applicant must raise a serious question "of law, fact or principle or procedure [that is] so significant that [the adjudicator's decision] should be reviewed" (*Milan Holdings,* supra.).

Section 36

In my view, the request as it relates to section 36 of the *Act* fails to meet the first branch of the test. Section 36(1) states that an employee is entitled to 32 consecutive hours away from work each week and, if not provided, must be paid double-time for the hours worked during what should have been the 32-hour "work-free" period. Neither the delegate's nor the adjudicator's

decision turned on a interpretation of section 36(1)–rather, both the delegate and the adjudicator simply concluded that there was *insufficient evidence* presented to show that Sauer worked the hours he claimed to have worked in contravention of section 36(1)(a).

The reconsideration provision of the *Act* is not to be used as a second (actually, in this case, a third) opportunity to present facts to support a particular position where those facts could have been presented to the adjudicator for his or her consideration.

Accordingly, the request for reconsideration of the adjudicator's decision with respect to section 36 of the *Act* is refused.

The adjudicator's direction to pay into court

In my view, however, the second ground for reconsideration–relating to the adjudicator's order directing the payment into court–does raise a serious legal question and, therefore, satisfies the first branch of the test.

As noted above, the adjudicator held–quite correctly, in my opinion–that section 21 of the *Act* did not empower the delegate to "setoff" the residential tenancy arbitration orders against Proda's unpaid wage liability. However, the adjudicator nonetheless ordered that the amount of those two orders be paid into court. The relevant portions of the adjudicator's decision are set out below:

> "The troubling aspect of this case is the appearance of inequity and unfairness to [Proda which has] a judgment against [Sauer] in the amount of $4,544.50. Conversely, Proda owes [Sauer] monies pursuant to the Determination dated October 6, 1999. [Sauer] does not agree to the assignment of the debt under Section 22 of the *Act* for the amount of the Residential Tenancy Arbitration Awards. Indeed [Sauer] has commenced judicial review proceedings to challenge those awards. However, I cannot in good conscience require Proda to pay the entire amount of the [Determination] to [Sauer] without some form of security or assurance from [Sauer] that the monies will be preserved to satisfy the Residential Tenancy Arbitration Awards. One of the purposes of the *Act* as set out in Section 2(b) is 'to promote the fair treatment of employees and *employers*'. [original italics]
>
> My finding that the Director's delegate did not have the jurisdiction to offset the amounts of the Residential Tenancy Arbitration Awards from her Determination and the fact that [Sauer] has commenced judicial review proceedings with respect to those awards does not relieve [Sauer] of his obligation to pay the amounts prescribed by those awards. [Sauer] is a judgment debtor. This is not a case where an employer wishes to offset an unliquidated amount from the wages [of] an employee without that employee having granted consent pursuant to Section 22(4) of the *Act* [citations omitted]. However, the legal hurdle that is faced in this instance is that the *Employment Standards Act* requires the payment of amounts pursuant to determinations and does not allow for the offset of other

> credit obligations without the specific written consent of the employee pursuant to Section 22(4) of the *Act.*
>
> To provide an element of fairness in this matter I direct that [Proda] pay the amount of $4,544.50, which is the amount of the two orders pursuant to the Residential Tenancy Arbitration Awards, into British Columbia Supreme Court under Action No. A982898. [Sauer] has commenced judicial review proceedings in that matter. If he does not pursue that application within a reasonable period of time Proda could make an application for payment out of the monies."

Sauer's position–as set out in his April 17th submission–appears to be that the adjudicator's direction amounts to a contravention of section 21. However, in my view, section 21 has no application here. Section 21 addresses an *employer's* right to make certain deductions from an employee's wages. The adjudicator *accepted* that neither the employer nor the delegate had the right, under section 21 of the *Act,* to "setoff" the residential tenancy orders against Proda's unpaid wage liability.

The adjudicator, as is clear from the above-quoted portions of his decision, issued his direction in an effort to balance the respective rights of both the employer and the employee in an effort to ensure "fair treatment" [see section 2(b)] of *both* parties. I might add that Sauer remains free to make an application to the Supreme Court of B.C. for payment out of the monies in question but, apparently, has not done so. If Sauer has a *bona fide* concern about the monies being held in court, it seems to me that Sauer ought to apply directly to the court particularly when this Tribunal–I would suggest–has no authority to now direct the Supreme Court of B.C. with respect to monies that are being held by that court's registry to the credit of a particular action.

Further, it might also be recalled that the residential tenancy orders have been filed with the court under section 57 of the *Residential Tenancy Act* and thus now constitute *court orders.* Under section 18 of the *Act,* an employer is only obliged to pay "wages *owing* to an employee" upon the termination of employment. Given that Proda's claims against Sauer have been crystallized into court orders, it is certainly arguable that that the wages payable by Proda–at least to the extent of the amounts reflected in the residential tenancy orders–were not *owed* by Proda to Sauer. Rather, those monies were owed by Sauer to Proda. Indeed, given the court orders, the latter funds might not even be properly characterized as "wages" since, by definition, wages reflect monies "paid or *payable*" for work.

To summarize, it is not obviously apparent to me that the adjudicator erred in making a direction regarding the payment of certain monies into court. In my view, an application relating to those funds ought to be made to a judge of the Supreme Court of B.C.

Accordingly, I do not consider it appropriate to vary or cancel the adjudicator's direction regarding the payment of certain monies into court.

ORDER

Sauer's application, made pursuant to section 116 of the *Act*, to vary or cancel the adjudicator's decision in this matter is refused.

Kenneth Wm. Thornicroft
Adjudicator
Employment Standards Tribunal