

BC EST #D251/98
Reconsideration of BC EST #D041/98
and BC EST #D042/98

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 -

Monarch Beauty Supply Company
("Monarch")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATORS: John M. Orr
Geoffrey Crampton
Mark Thompson

FILE No: 98/138 and 98/139

DATE OF DECISION: July 29, 1998

DECISION

OVERVIEW

This is an application by "Monarch" under Section 116 (2) of *the Employment Standards Act* (the "Act") for a reconsideration of Decisions No. D041/98 and D042/98 (the "Decisions") which were issued by the Tribunal on January 27, 1998.

This application raises a straight forward issue of interpretation of *The Employment Standards Regulation* (the "*Regulation*"). Section 34 (1) (l) of the *Regulation* exempts from Part 4 of the *Act* (Hours of Work and Overtime) "*a commercial traveller who, while travelling, buys or sells goods...*". The issue is whether a commercial traveller is entitled to be paid for times when he is at work for his employer but not "buying or selling goods while travelling". In this particular case the issue is whether two commercial travellers, normally paid on the basis of sales commissions, who are required by their employer to attend monthly sales meetings are entitled to be paid a wage for the time spent on attending the meetings.

PROCEDURAL HISTORY

On July 18, 1997 and October 23, 1997 a delegate of the Director issued Determinations (File No. 074249) in which he carefully considered section 34 (1)(l). In both cases he found that the complainants were commercial travellers who were required to travel from Victoria to Surrey, normally on weekends, to attend the monthly sales meetings. Their expenses were reimbursed but they were not paid any wages for the time spent on attending the meetings. The Delegate found that the complainants were still performing work for their employer on these days. The Delegate found that the exemption provided in the *Regulation* from Part 4 of the *Act* restricts the exemption to the time spent "while travelling" and it did not exempt the company from the payment of wages for all other hours worked.

Monarch appealed to the Tribunal. The appeal stipulated that there were no facts in dispute. The fundamental basis for the appeal was that section 34 (1)(l) of the *Regulation* is a defining provision so that if the complainants bought and sold goods while travelling they were by definition commercial travellers and therefore exempt from Part 4 of the *Act* for all purposes.

On January 27, 1998 an Adjudicator of this Tribunal delivered written decisions, BC EST #D041/98 and #D042/98, in which he also carefully considered the meaning and scope of the *Regulation* and the written arguments submitted by the employer. The Adjudicator clearly considered the submissions made by the employer and in a carefully reasoned decision agreed with the Delegate's conclusions and confirmed the Determination.

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Monarch, by letter dated March 04, 1998, now applies pursuant to Section 116 of the *Act* for reconsideration of the Adjudicator's decision. The application stipulates that there are no facts in dispute and in all other substantial ways submits the same arguments that were made in the initial appeal. The appellant, however, includes in its submission reference to a prior decision of the Tribunal, *Kenneth Edwin Rindero* (BC EST #D053/96).

ANALYSIS

The Tribunal will grant a reconsideration where there is a demonstrable breach of the rules of natural justice, where there is compelling new evidence that was not available at the first hearing, or where the adjudicator made a fundamental error of law: *Bichieri Enterprises Ltd.* (BC EST #D335/96) and confirmed more recently in *The Director of Employment Standards* (BC EST #D 301/98).

This application for reconsideration does not allege any breach of the rules of natural justice and does not present any new evidence. Monarch alleges that the Adjudicator in the Decisions misinterpreted section 34 of the *Regulation* and failed to follow *Rindero*. Monarch submits that there is no tenable distinction between this case and *Rindero*, and accordingly, the principle of *stare decisis* requires that the interpretation of s.34(1)(l) adopted by the Tribunal in *Rindero* be followed in these cases.

Although adjudicators are not bound by decisions of other Adjudicators, the reconsideration process may be used to ensure consistency among decisions and the principles enunciated by the Tribunal: *Zoltan Kiss* (BC EST#D 122/96). *Rindero* was a decision of the Tribunal rendered prior to the Decisions in these cases and therefore, if it is indistinguishable from the present cases, it should have been persuasive.

In our opinion, *Rindero* is distinguishable from the present cases. In *Rindero* there was no claim made for wages for the time spent in the office and therefore the issue raised in these cases was not considered. *Rindero* was required to report each morning he was in town (where the company's office was located) and check in at noon on those days he was in town. This requirement was because *Rindero* did not have a telephone at his home in town and he was required to check in for the purpose of sharing information and other necessary communications. There was no evidence that he was required to do other work at the office apart from his sales duties.

In this case Monarch required the employees to attend mandatory monthly sales meetings which involved a 10 hour day on weekends. It is quite clear on all of the undisputed facts in this case that the employees were not buying and selling goods while travelling during these mandatory meetings. In fact these meetings either occurred during the employees' own personal time or detracted from time they would spend selling and earning commissions.

We are satisfied that *Rindero* would not have altered the Adjudicator's decisions in these cases. The decisions stand for different principles and there is no necessity for the Tribunal to interfere with the Decisions in these cases to ensure consistency with *Rindero*.

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Apart from reference to the *Rindero* decision, the submissions of counsel for Monarch were all made to the Adjudicator of first instance. It is not the role of the Tribunal on a request for reconsideration to substitute its opinion for that of the Adjudicator unless there is a clear and fundamental error in law. In these cases the Adjudicator made a reasoned and reasonable interpretation of section 34(1)(1) of the *Regulation* and, as the Tribunal has held in many previous decisions, the power to reconsider will be exercised with caution in order to ensure finality of decisions and the efficiency and fairness of the system.

ORDER

Pursuant to Section 116 of the *Act* we decline to vary or cancel the decisions BC EST # D041/98 and #D042/98.

**John M. Orr
Adjudicator
Employment Standards Tribunal**

**Geoffrey Crampton
Chair
Employment Standards Tribunal**

**Mark Thompson
Adjudicator
Employment Standards Tribunal**