

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 -

Jerome Henen and Shirley Henen
(" Henen " or " Employee")

- of a Decision issued by -

The Employment Standards Tribunal
(the "Tribunal")

ADJUDICATOR: Paul E. Love

FILE No: 2000/351

DATE OF DECISION: July 26, 2000

DECISION

OVERVIEW

This is an application for reconsideration, on written submissions from counsel, by Jerome Henen and Shirley Henen in relation to Tribunal Decision #D188/00 made May 4, 2000. The Decision cancelled a Determination dated December 6, 1999 wherein the Delegate found that a resident caretaker was entitled to a top up of wages, from the amount paid, to meet the minimum wage requirements of the Employment Standards Regulation. Further the Decision also cancelled the Determination which contained reimbursement of travel expenses incurred by Mr. Henen to attend. While Mr. Henen did raise an issue alleging an error of law in the interpretation of the contract, and an allegation of breach of natural justice, there was no error made by the Adjudicator in this matter, and the Decision was confirmed.

ISSUES TO BE DECIDED

Did the Tribunal err in finding that a rent credit was included within the Mr. Henen's wages?

Did the Tribunal err in finding that travel expenses were not wages within the meaning of the *Act*?

FACTS

Jerome and Shirley Henen (the "employees") were employed as resident caretakers by Middlegate Development. The position was part time, and remuneration was established pursuant to a written contract. The salient portion of the contract reads as follows:

The compensation will be \$1,070.00 without including a rent credit of \$350.00. This compensation of \$1,420.00 recognizes that they will work a minimum of 4 continuous hours and that they are on call during the remainder of each day. As this building is less than 60 units it is considered a part-time position and the minimum wage estimate is \$1,075.20. Any sum paid above the minimum wage is paid in order that they may compensate someone to be on call and to provide them with time off as required by statute and as their schedule permits. This payment would be deductible for income tax purposes...

The managers must occupy the managers 'suite #112 as designated by the firm and complete a rental agreement in the same manner as any other resident. Rent of \$575.00 will be paid by the managers in advance of the last day of the month and a security deposit of \$462.50 will be paid in advance prior to occupying the suite. The managers will pay for the same services as do all residents of the complex.

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Mr. & Mrs. Henen occupied a suite within the residential complex. The market rent for this suite was \$950.00 per month.

The Delegate found that the wages paid to Mr. Henen did not include a rent credit, and therefore he received less than the monthly minimum wage of \$1,075.20, as set out in the *Employment Standards Regulation* for the period November 1, 1997 to March 31, 1998 and \$1099.80 per month from April 1, 1998 to November 1998. The Delegate determined that Mr. Henen was entitled to wages in the amount of \$2,287.76, which the Delegate considered to be the difference between wages paid, and the minimum wage over the term of the employment relationship (November 1997 to May 1998).

The Delegate also reviewed the amounts paid by Mr. Henen for expenses incurred while attending residential tenancy arbitration hearings. The Delegate relied on s. 21(2) of the *Act* and held that these were the employer's business cost and the employer was required to reimburse the employee. The Adjudicator found that travel expenses did not constitute wages, and therefore were outside the jurisdiction of the Director to collect.

In this case, Mr. Henen argues that the Adjudicator erred in determining that rent was part of his total compensation. The employee further argues that as a matter of natural justice travel costs are recoverable. The submissions made by Mr. Henen were lengthy, and while I have reviewed them I have not set out in detail the submissions or the facts recited in this Decision. It is unnecessary to do so for the purpose of considering this application for reconsideration.

I have considered all the written submissions made by the parties.

ANALYSIS

In this reconsideration application, the burden rests with the applicant, Mr. Henen, to demonstrate an error which falls within the scope of a reconsideration application. Generally there is a heavy onus on the party seeking reconsideration to demonstrate:

- (a) procedural unfairness;
- (b) a fundamental error of law or fact;
- (c) some compelling new evidence that was not available at the initial appeal

Generally, there is a two-stage process in a reconsideration application. The first stage is whether or not the application falls within the scope for reconsideration, and the second stage concerns the merits of the application. The employer in its written submissions resists the application for reconsideration on the basis of both stages of the analysis.

Given that the applicant has raised an issue alleging a mistake in interpreting the contract, applying the statutory provisions, and the interpretation of "wages", it is applicable for me to consider the merits of the application. I note that consistent with the decisions of the Tribunal, the power to reconsider under s. 116 of the *Act*, is a power to be used sparingly, when proper

grounds, are established by the party seeking the reconsideration. It is not a fresh opportunity for me to consider again the merits of the decision. The only issues raised which merit further discussion are the issues which relate to minimum wage and rent, and reimbursement for expenses.

Minimum Wage/Rent

In interpreting the contract, the Adjudicator held that from a reading of the contract, there was no doubt that both parties knew that Mr. Henen's total compensation included the rent credit. While the contract is unhappily worded, the intent seems clear enough, that the total wage package included rent. The Adjudicator reviewed and relied upon the following adjudicative decisions of the Tribunal:

Re Sophie Investments, BCEST #D528/97; *Re British Columbia (Director of Employment Standards)* BC EST # D447/98; *Re Gateway West Management Corp.* BCEST #D356/97.

The Adjudicator held that this case fell within the principle set out in *Sophie Investments*, and other decisions of the Tribunal. The Adjudicator did not make a fundamental error of law in the interpretation of the contract, with regard to the inclusion of rent in income. Although it is not necessary on a reconsideration application for me to come to a conclusion as to whether the Adjudicator was correct in the interpretation of the contract, I have no hesitation in concluding that there was no fundamental error of law, and that the Adjudicator's decision was the correct interpretation of the contract.

Out of Pocket Expenses:

Further, the adjudicator did not err in applying the applicable principles in determining that out of pocket expenses incurred while attending a residential tenancy arbitration, were not wages. The Adjudicator's decision is consistent with the case law in this matter, as noted in the decisions referred to be the Adjudicator:

Re Boyko, BCEST #D124/96; *Re Vasiluk*, BCEST #D022/97.

ORDER

Pursuant to section 115 of the *Act*, I order that the Decision in this matter, dated May 4, 2000 be confirmed.

Paul E. Love
Adjudicator
Employment Standards Tribunal